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Jorge Cicero

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# International Law in Mexican Courts

Jorge Cicero\*

## ABSTRACT

*Recognizing the increasing importance of international law in Mexico, this Article addresses the actual and potential uses of international law in Mexican courts. The Article reviews the ways in which the Mexican system already ensures the judicial consideration of international undertakings, as well as areas of possible improvements. The Article first considers the role and status of international law in the Mexican legal order, including the domestic status of international treaties and agreements, as well as the interaction between national and international norms. Next, the Article focuses on ways to ensure the consideration of international legal questions by Mexico's high courts. Because Mexican courts have yet to develop a tradition of considering international standards of interpretation, the author proposes suggestions for establishing a jurisprudence in harmony with international undertakings. The Article then surveys the relationship between the Judiciary and the Executive in questions of international law by reviewing traditional as well as emerging international issues. The Article also considers standing to raise questions of international law before Mexican courts and suggests means of assisting Mexican judges in the application of international law. The Article concludes that Mexican law provides plentiful means for making international undertakings effective before domestic courts and tribunals of justice, but encourages further awareness and application of these means.*

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A Norma, Raúl Jesús y Jorge Andrés: diamante, manantial y luz; a Alba y Alejandra; a la memoria de mis abuelos Eulalia, Raúl e Isabel y de Adelina y Saturnino.

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## I. INTRODUCTION

In a global community where images, persons, goods, capital, services, ideas, and even crime flow swiftly, international law increasingly touches the national administration of justice. Strikingly, no matter how clearly different legal systems have incorporated treaties and other international sources, the domestic use of these international agreements is rarely realized in practice. Whether or not the national order explicitly embraces the domestic applicability of international norms, cultural factors tend to outweigh the letter of the law. Yet there is little doubt that the domestic law on a subject may significantly influence a legal community's attitudes toward international law.

In Mexico, at least three sets of circumstances shed light on why litigants and judges have yet to take full advantage of international law. First, the specific purpose of certain Mexican constitutional provisions is to deter the importation of intrusive agreements and less protective international standards. These provisions were adopted during a time of foreign intervention, when domestic law provided not only superior, but, with few exceptions, exclusive protection in matters of fundamental rights. There are no similar restraints expressly deterring constitutional amendments to withdraw or to restrict previously acquired freedoms. The assumption is that national minimum standards are always superior and that external threats to them should be the chief, if not the exclusive, constitutional concern.

Treaties do not achieve supreme rank in Mexico merely because of their ratification. The Mexican Constitution, unlike the U.S. Constitution, expressly cautions that the principle of supremacy applies only to treaties that conform to it.<sup>1</sup> Another clause in the Mexican Constitution expressly proscribes the conclusion of treaties restricting constitutional rights and

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1. Compare CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [hereinafter MEX. CONST.] art. 133, amended by D.O., Jan. 18, 1934 (according supreme status to "all treaties . . . which shall be made in accordance therewith by [the Constitution]"), with U.S. CONST. art. VI (according supreme status to "all Treaties made, or which shall be made, under the Authority of the United States").

freedoms.<sup>2</sup> This prohibition was introduced in the 1856 Constitutional Congress with the following consideration:

[E]xperience shows [that] treaties concluded and discussed with precipitation often produce serious alterations in the civil and political rights of citizens . . . . Great powers generally tend to influence the business of weaker countries; alliances, protectorates and interventions produce such results. Currently, one notes in the French Empire this trend and we all know that, in the last Congress of Paris, Louis Napoleon's Minister attempted to restrict the freedom of press enjoyed in Belgium. Because of a treaty, then, certain political rights or other liberties such as commerce, movement, etc., may be lost.<sup>3</sup>

Implied in these clauses is the constitutional sanction, perhaps even the constitutional status, of international treaties advancing fundamental rights and freedoms.<sup>4</sup> However, reading this implication into the Constitution requires an interpretive task because the Constitution's meaning is not obvious.<sup>5</sup> Given this framework, skepticism about the domestic uses of international instruments is not surprising. Typically, controversies about treaties focus on unconstitutional treaty-based behavior, rather than on constitutional covenants, treaties, and conventions.

2. See MEX. CONST. art. 15 ("The conclusion of treaties for the extradition of political prisoners, or for [the extradition] of common offenders that have had the condition of slaves in the country where they committed the offense; or of agreements or treaties as a result of which the guarantees and rights established by this Constitution for the citizen and men *are altered*, is unauthorized") (*emphasis added*). See also "Alcérreca Vda. de García del C., Dolores," 19 S.J.F. 142 (Supreme Court's reaffirmation that "the conclusion of treaties altering individual guarantees is unauthorized, for public order reasons").

3. See *Debates del Congreso Constituyente de 1856, reprinted in 3 DERECHOS DEL PUEBLO MEXICANO: MÉXICO A TRAVÉS DE SUS CONSTITUCIONES 769-70* (1967) [hereinafter *DERECHOS DEL PUEBLO MEXICANO*] (statement of Mr. Zarco).

4. As one scholar eloquently explains:

There is no room for doubt that [Article 15's] prohibition . . . use[s] the term "to alter," in the sense or connotation of "disturbing," "perturbing," or "distressing" . . . human rights, individual guarantees and fundamental freedoms. But the rights of men and the citizen can be the subject of changes, of alterations, always in a positive sense of expansive progress in the sphere of individual liberties, both by means of additions to . . . the Political Constitution, with its superior rank of Fundamental Law, and by means of . . . ordinary legislation.

By the same token, by means of international bodies of law, that is, by conventions and treaties, new human rights can be added, as the national Constitution . . . spells out, in its catalog of individual liberties, [only] basic and minimum principles or norms that shall always be a limit or frontier to the action of the State, limits this can decrease to expand the juridical statute of the human person.

. . . [F]or the validity of Mexico's accession to the UN Covenants on Human Rights, the text in force of [Article 133] is not an obstacle [either].

. . . [A]rticle 133's declaration that [the] Constitution, the laws that stem therefrom, *and all international treaties that are in accordance with*

Second, from a historical standpoint, the judicial application of customary international law in Mexico is infrequent and similarly related to external threats.<sup>6</sup> Several basic rules of contemporary international law now enjoy the status of constitutional principles governing Mexican foreign policy.<sup>7</sup> Even so, these principles are oriented toward the President.<sup>8</sup> The constitutional control of his foreign policy corresponds to the Senate, not the courts.<sup>9</sup>

Unlike standard domestic references to treaties and conventions, in the Mexican order there are few express references to "international law." Although such references appear in respect to territorial waters and airspace,<sup>10</sup> consular and diplomatic assistance to courts, protection of nationals abroad,<sup>11</sup>

*it . . . shall be the Supreme Law of all the Union is not to be interpreted in the sense that treaties must stem from, or have their express foundation in the Constitution, as is the case of the laws passed by the Congress . . . .*

For this reason and by *contrario sensu* application of constitutional [A]rticle 15's prohibition, the unfortunate 1934 addition to [A]rticle 133 of the words [treaties] 'that are in accordance with it (the Constitution)', must be read as if it said 'that are not against it.'

Antonio Martínez Báez, *Correlaciones entre la Constitución y los Pactos de las Naciones Unidas*, in *LOS TRATADOS SOBRE DERECHOS HUMANOS Y LA LEGISLACIÓN MEXICANA* 21, 25-27 (1986). For the sole example of expressly authorized treaties, see MEX. CONST. art. 18, amended by D.O., Feb. 4, 1977 (authorizing the conclusion of treaties on the execution of penal sentences abroad, provided the prisoners' consent to each transfer).

5. See Báez, *supra* note 4.

6. The case of Ferdinand Maximilian, the Hapsburg who attempted to establish a hereditary monarchy in Mexico, is worth recalling. Some years after the democratically enacted 1857 Constitution proclaimed the Republican form of government, Maximilian "accepted" the Crown of Mexico and Napoleon III sent an army of occupation. In 1867, a Mexican tribunal tried Maximilian and imposed capital punishment for crimes against the law of nations and other felonies. See *Causa de Maximiliano de Hapsburgo que se ha titulado Emperador de México y de sus llamados generales Miguel Miramón y Tomás Mejía sus cómplices en delitos contra la Independencia y la Seguridad de la Nación, el Orden y la Paz Pública, el Derecho de Gentes y las Garantías Individuales*, in FERNANDO DEL PASO, *NOTICIAS DEL IMPERIO* 569 (2d ed. 1989). See also *LEYES FUNDAMENTALES DE MEXICO 1808-1985*, at 606, 670 (Felipe Ramirez ed., 13th ed. 1985) (discussing the Mexican Constitution of 1857 and the Provisional Statute of the Mexican Empire).

7. See MEX. CONST. art. 89, § X, amended by D.O., May 11, 1988 (listing the following principles: self-determination, nonintervention, peaceful dispute settlement, proscription of the use or threat of force in international relations, juridical equality of States, international cooperation for development, the struggle for international peace and security).

8. See *id.*

9. See *id.* art. 76 & § I, amended by D.O., May 11, 1988.

10. See *id.* arts. 27, 42, § X, amended by D.O., May 11, 1988.

11. See *Ley Orgánica del Servicio Exterior Mexicano*, art. 2, § II, D.O., Jan. 4, 1994; "De la cooperación procesal internacional," C.F.P.C. art. 548.

and in statutes blocking foreign laws with extraterritorial reach,<sup>12</sup> there is little case law applicable to, let alone arising from, international sources other than treaties. In matters of international law, the bench and bar, for good reason, cling to the juridical certainty that rules recorded in treaties and statutes provide, rather than attempting to apply more nebulous "international law" concepts.

Finally, Mexican courts usually will not consider questions of international law not timely raised by the parties. International sources are not always precise, accessible, widely known, or even translated into Spanish. When domestic law leads in principle to the same result, the direct or indirect application of international law appears inconsequential. Furthermore, if international bodies are available, the interested parties may refrain from asserting the relevant agreement before national courts in order to promptly reach the international bodies.

Still, while some international sources and rules add little to national law, others are increasingly crucial to domestic adjudication. As for the prior exhaustion of domestic remedies, it is true that sometimes it admits of waivers and exceptions. But it is equally true that international jurisdictions cannot replace national courts; they often rely on national courts, where the cases may ultimately be tried.

Traditional case law consistently indicates that Mexican courts are prone to interpret, consider, and apply, as appropriate, duly concluded treaties and conventions. More importantly, the Mexican legal system is undergoing unprecedented developments that strikingly expand the avenues to give effect to international undertakings, if necessary, by judicial means.

This Article discusses the actual and potential uses of international law in Mexican courts, considering each topic suggested by the International Law Association (hereinafter ILA) Helsinki Conference.<sup>13</sup> While reviewing how the Mexican system already ensures judicial consideration of international undertakings, this Article also identifies several areas susceptible to possible refinements. Part II examines the current domestic status of international law in Mexico. Part III discusses the means of ensuring that Mexico's high courts hear questions of international law. In Part IV, the author examines both traditional and newly-emerging aspects of the relationship between the Executive and Judiciary regarding international law. The author explains in Part V the current concept of standing

12. See *Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional*, D.O., Oct. 23, 1996.

13. See *International Law in National Courts*, International Law Association, 67th Conf., Res. 20 (Aug. 12-17, 1996).

with respect to international law issues and proposes changes to the current rules. Part VI suggests means of assisting Mexican courts in the application of international law. Finally, in Part VII the author discusses the importance of educating Mexican judges about international law.

## II. THE ROLE AND RANK OF INTERNATIONAL LAW IN THE MEXICAN LEGAL ORDER

### A. *The Domestic Status of International Treaties and Agreements*

Unlike the legal systems of other Latin American nations,<sup>14</sup> Mexico's system does not require the domestic introduction of treaties by special legislation.<sup>15</sup> Instead, treaties concluded by the Executive and approved by the Senate achieve national status after their official domestic publication.<sup>16</sup> Mexican courts consistently equate treaties with legislative acts,<sup>17</sup> affirm their incorporation into national law,<sup>18</sup> and hold they are binding throughout the land.<sup>19</sup> For adjudication purposes, whether a treaty becomes self-executing once domestically in force is relevant, namely, to determining when private parties may seek judicial protection against it.<sup>20</sup> Refusal to give effect to treaties on

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14. See, e.g., VENEZ. CONST. art. 128 (all treaties and international conventions must be approved through passage of a special law).

15. See CARLOS ARELLANO GARCÍA, PRIMER CURSO DE DERECHO INTERNACIONAL PUBLICO 699 (1993).

16. See MEX. CONST. art. 76, § I; *id.* Ley sobre la Celebración de Tratados, D.O., Jan. 2, 1992, art. 4.

17. See Amparo en Revisión 8396/84, Pietro Antonio Arisis, unanimidad de votos, Ponente: F.H. Pavón Vasconcelos (May 14, 1986) (because they contain abstract and general norms, "international treaties are on the same level as legislative acts").

18. See Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito, Amparo en Revisión 256/81, C.H. Boehrling Sohn, unanimidad de votos, Ponente: G.D. Góngora Pimentel (July 9, 1981) ("[A]rticle 133 does not embrace the theory according to which international law is supreme over domestic law, but adopts the rule that international law is part of national law").

19. See "Peyres Vda. De Bell, Francisca," 12 S.J.F. 576 (1928); "Conde, Manuel E.," 104 S.J.F. 2243 (1950); "Hernández del Valle, Vinicio," 117 S.J.F. 987 (all holding that "the provisions contained in treaties concluded with foreign powers have the force of law for the country's inhabitants").

20. See Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos art. 73, § VI (stating that the writ of *amparo* lacks foundation "[a]gainst laws, treaties and regulations whose sole entry into force does not injure the plaintiff, and instead require a subsequent act of application to cause such injury") [hereinafter *Ley de Amparo*].



non-self-execution grounds<sup>21</sup> is not, however, a doctrine characteristic of Mexican courts.<sup>22</sup>

In Mexico, which is a federal republic composed of thirty-one states and the Federal District, the Constitution has a well-known supremacy clause according national rank to international treaties:

This Constitution, the laws of the Congress of the Union that stem therefrom, and all treaties that are in accordance with it, made or which shall be made by the President of the Republic, with approval of the Senate, shall be the Supreme Law throughout the Union. The judges of every State shall be bound by the said Constitution, laws, and treaties, any provisions to the contrary that may appear in the Constitutions or laws of the States notwithstanding.<sup>23</sup>

As judicially interpreted, the Constitution "does not preestablish the subject-matter . . . of treaties and conventions concluded by the Government of the Republic," provided they are in accordance with the Constitution.<sup>24</sup> Mexican judges are bound to give primacy to constitutional treaties over state laws, but they are also bound to give primacy to the Constitution over international treaties.<sup>25</sup>

So-called "inter-institutional" agreements between federal, state, or municipal agencies and foreign governmental organs or international organizations, although statutorily authorized, are not part of the supreme law.<sup>26</sup> Mexican law admits only the direct incorporation of "treaties;" the extent to which the Constitution authorizes "inter-institutional agreements" remains the subject of dispute.<sup>27</sup>

21. See generally Thomas Buergethal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 RECUEIL DES COURS 368 (1992).

22. Mexican law expressly contemplates the possibility of non-self-executing treaties requiring the conclusion of subsequent agreements for their performance. Like foreign policy principles, these provisions are directed toward the political branches of government, not toward the courts. See *Ley sobre la Celebración de Tratados*, art. 2, §§ I & II.

23. MEX. CONST. art. 133. See generally JORGE CARPISO, ESTUDIOS CONSTITUCIONALES 13, 33 (1983).

24. See *Amparo en Revisión 7798/47*, Vera José Antonio, unanimidad de cuatro votos (June 11, 1948); see also Baez, *supra* note 4.

25. See *Amparo en Revisión 7798/47*, Vera José Antonio, unanimidad de cuatro votos (June 11, 1948) ("The Supreme Court recognizes the primacy of the Constitution over treaties").

26. See *Ley sobre la Celebración de Tratados*, art. 2.

27. See MEX. CONST. art. 76, § I; *id.* art. 133; *Ley sobre la Celebración de Tratados* art. 2; CARLOS ARELLANO GARCÍA, TLC (TRATADO DE LIBRE COMERCIO)/NAFTA (NORTH AMERICAN FREE TRADE AGREEMENT): UNA VOZ CIUDADANA 197-226 (1994); GARCÍA, *supra* note 15, at 700-04.

As for the hierarchy between treaties and federal statutory law, Mexican courts generally maintain their equal status.<sup>28</sup> Yet, the last-in-time rule is alien to Mexican treaty practice, at least as it is interpreted under U.S. law.<sup>29</sup> In Mexican law, an antecedent rule remains in effect unless a subsequent one expressly repeals it or the two rules are incompatible.<sup>30</sup> Independently, this rule does not necessarily mean that subsequent federal statutes do not prevail over prior, incompatible treaties merely because Congress passed them later. When read together, different rules suggest that treaties will prevail over incompatible federal legislation.<sup>31</sup> Overall, the crucial factor is not which of the incompatible federal norms is later in time, but rather which is superior in terms of national public order.<sup>32</sup>

### B. *The Interaction Between National and International Norms*

In case of normative conflict, the traditional Mexican system would grant an injunction against the unconstitutional norm, without annulling it beyond the concrete cases brought to the courts.<sup>33</sup> Under the traditional system, Mexican courts would

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28. See Manuel Becerra Ramírez, *Los Poderes de la Federación Mexicana y las Relaciones Internacionales*, in *DERECHO CONSTITUCIONAL COMPARADO MÉXICO-ESTADOS UNIDOS* 947, 951 ("International treaties have the same hierarchy as federal laws").

29. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987).

30. See C.C.D.F. art. 9, D.O., Mar. 26, 1928.

31. See C.C.D.F. art. 11 ("Laws establishing exceptions to general rules are not applicable in any case not expressly specified in them"); C.C.D.F. art. 12 ("Mexican laws rule all persons within the Republic, as well as the acts and deeds done in her territory or jurisdiction and those submitted to such laws, unless these foresee the application of foreign law and without, moreover, prejudice of the provisions of those treaties and conventions to which Mexico is a party"); *Ley Federal de Procedimiento Administrativo*, art. 1, D.O., Aug. 4, 1994 (providing that federal legislation applies to administrative acts "without prejudice to the provisions of international treaties to which Mexico [is] a party").

32. See, e.g., C.C.D.F. art. 8 ("Acts executed against imperative or public-interest laws are null, unless the law commands the contrary"); *Ley sobre la Celebración de Tratados*, art. 9 (proscribing the domestic recognition of international judgments issued in the framework of treaties ratified by Mexico, "if the State's security, public order, or any other essential national interest is at stake"); *Alcérreca*, 19 S.J.F. 142.

33. See *Ley de Amparo*, art. 4 ("Only the party whom the law, international treaty, regulation or other challenged act injures can exercise the writ of *amparo* . . ."); *id.* art. 76 ("The judgments issued in *amparo* trials shall only encompass the private individuals or the private or official entities requesting them, and shall only protect them, where appropriate, in the special case of which the complaint arises, without making a general declaration about the law or act of which the complaint arises"). For information on the Mexican writ of *amparo*, see CARLOS ARELLANO GARCÍA, *EL JUICIO DE AMPARO* (1982).

give no effect to an unconstitutional treaty. Simultaneously, despite the treaty's supremacy, whether the treaty should remain in force was always decided within the political branches. The same was true if a statute contradicted supreme, constitutional treaties. In addition to determining the outcome of the normative contradiction, the role of the courts was to influence the outcome through their concrete case decisions.

The doctrine that the Judiciary should not intervene in the lawmaking process is no longer an absolute rule of Mexican law.<sup>34</sup> Since the Supreme Court of Mexico now has the power to completely invalidate unconstitutional norms,<sup>35</sup> the domestic role of international treaties merits particular attention.

The judicial invalidation of unconstitutional treaties represents an unprecedented check on the Executive and the Senate. Now supreme treaties comporting to the Constitution can completely override contrary, namely state legislation. The judicial branch also has increasing power to settle both the normative status of inter-institutional agreements<sup>36</sup> and the compatibility of state or municipal agreements with the federal treaty-making powers.<sup>37</sup>

The Judiciary is an increasingly vital actor in foreign affairs. Because of the powers attained by the judicial branch, the

34. On the advantages of and objections to the judicial power to invalidate general norms, see HECTOR FIX-ZAMUDIO, *LATINOAMERICA: CONSTITUCIÓN, PROCESO Y DERECHOS HUMANOS* 360-71 (1988).

35. See MEX. CONST. art. 105, amended by D.O., Dec. 31, 1994 and D.O., Aug. 22, 1996; Ernesto Zedillo, *Reforma al sistema judicial*, EXAMEN, Jan. 1995, at 18; Leonel Pereznielo Castro, *La reforma judicial*, EXAMEN, Jan. 1995, at 13.

36. Compare Ley sobre la Celebración de Tratados, art. 2, § II (defining "interinstitutional agreement" as "the agreement governed by public international law, concluded in writing between any agency or [Mexican] decentralized entity of the Federal, State, or Municipal public administration and one or several foreign governmental organs or international organizations, whatever its designation may be, whether or not it derives from a previously approved treaty") with Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, U.N. Doc. A/CONF. 39/27, § 1, ¶ a, D.O., Feb. 14, 1975 (defining "Treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"), and Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, art. 2(1)(a), 25 I.L.M. 543, 545-46 (1986), D.O., Jan. 11, 1988 (same definition, *mutatis mutandis*). See *infra* Parts IV & V.

37. See MEX. CONST. art. 117, § I (proscribing the conclusion of treaties between any individual Mexican state and foreign states); Juicio Ordinario Federal 17/46, Informe 1956, Pleno, at 32-34, reprinted in 7 DERECHOS DEL PUEBLO MEXICANO, *supra* note 3, at 976 (Supreme Court's ruling that its plenary has authority to hear controversies affecting the national interests, including cases where "one State concludes an alliance, treaty, or coalition with . . . a foreign power"); GARCÍA, *supra* note 15, at 700-04. See *infra* Parts IV & V.

principle of supremacy is increasingly prone to influence lawmaking and the conclusion of international treaties and agreements. Nonetheless, in the Mexican order it does not suffice to address the domestic applicability and role of international norms exclusively in terms of supremacy. Mexican law accords domestic effect to certain treaty-based international "judgments, arbitral awards, and jurisdictional resolutions."<sup>38</sup> In the Mexican federal system, private international law treaties often involve not only issues of public policy and normative hierarchy, but also issues of forum selection.<sup>39</sup>

Human rights treaties embody evolving standards for the judicial application and interpretation of constitutional freedoms.<sup>40</sup> International treaties and conventions can shape new constitutional principles, as is occurring now in the framework of Mexico's nationality reform.<sup>41</sup>

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38. See *Ley sobre la Celebración de Tratados*, arts. 8 & 11 (guidelines on and effects of treaty-based dispute settlement between the Mexican government or Mexican nationals, on the one hand, and foreign governments, foreigners, or international organizations, on the other). Compare with Act No. 288 of 1996, D.O., Jul. 5, 1996 (Colom.) (regulating the domestic effects of money decisions of the Inter-American Human Rights Commission and the Human Rights Committee of the U.N. Covenant on Civil and Political Rights). On the position of Mexico in respect to international human rights bodies and tribunals, see JESÚS RODRÍGUEZ Y RODRÍGUEZ, COMISION NACIONAL DE DERECHOS HUMANOS (hereinafter C.N.D.H.) *LOS SISTEMAS INTERNACIONALES DE PROTECCIÓN DE LOS DERECHOS HUMANOS* (1996); Jorge Cicero, Thesis, *México y el Protocolo Facultativo del Pacto Internacional de Derechos Civiles y Políticos* (1989) (on file with the International Law Department of the U.N.A.M. Law School).

39. See, e.g., Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, arts. 4 & 5, 42 O.A.S.T.S., D.O., Apr. 27, 1978 (leaving the determination of which is the "competent authority" regarding recognition and execution of awards to the laws of the State where recognition or execution is requested, and establishing the public policy exception); Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, arts. 2 & 6, 51 O.A.S.T.S., D.O., Aug. 20, Nov. 30, 1987.

40. See, e.g., Jorge Cicero, *The Alien Tort Statute of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by the United States*, 23 COLUM. HUM. RTS. L. REV. 315, 351-52 (1992).

41. See *Proyecto de Decreto que Reforma los Artículos 30, 32 y 37 de la Constitución Política, Dictamen de las Comisiones Unidas de Puntos Constitucionales, de Gobernación, Primera Sección, de Asuntos Migratorios, de Asuntos Fronterizos Zona Norte y Zona Sur y Estudios Legislativos* [Draft Decree Amending Articles 30, 32 and 37 of the Political Constitution, Opinion of the Joint Commission on Constitutional Issues, Governmental Affairs, First Section, Migration Affairs, Border Affairs North and South Zones, and Legislative Studies], Primera Sección, Nov. 21, 1996 (introducing the principle that "[t]he law shall regulate the exercise of the rights Mexican legislation grants to Mexicans that possess other nationalities and shall establish norms to prevent dual nationality conflicts," after considering the provisions of treaties on dual nationality and political rights).

As summarized by Alberto Székely, the harmonization and coexistence of international treaties with the Mexican order into which they are incorporated includes the following possibilities:

1) That the provisions on the same subject-matter, both in the domestic order and in the text of the international instrument, are essentially identical or harmonious. 2) That the domestic provisions go beyond those of the instrument, in the sense not of contradicting it, but of fulfilling it in excess. 3) That the domestic order only partially foresees the norms of the international text, without contradicting it in the regulated portion. 4) That the domestic order does not foresee at all the international norms stipulated in the treaty. 5) That between the provisions on the same subject-matter . . . there are discrepancies, in the sense one may not be fulfilled without contradicting the other.

Instances three and four open three possibilities: (1) that the international text binds the State to legislate on the subject-matter before acceptance; (2) that it allows the State to legislate after the acceptance; or (3) that the same text covers the gap in the domestic order upon the text's incorporation into the domestic order.<sup>42</sup>

In Mexico's monist system, one could hardly limit the interactions between treaties and domestic laws to instances of normative conflict. Representing inherently related dimensions of a single constitutional order, the presumption is not that national and international norms in force in the Republic contradict each other. The presumption is, instead, that one supplements the other.

### III. ENSURING MEXICO'S HIGH COURTS' CONSIDERATION OF INTERNATIONAL LEGAL QUESTIONS

#### A. *The Local Supreme Tribunals*

In addition to the role of specialized courts in Mexico, each constituent unit's supreme tribunal of justice has authority to consider and apply international treaties where appropriate. As the text of the Constitution makes clear, one purpose of the supremacy clause is precisely to ensure the fulfillment of international undertakings by courts and tribunals throughout the Mexican Republic.<sup>43</sup>

As already noted, the Constitution of Mexico now establishes a novel set of remedies specifically designed to settle supremacy

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42. See Alberto Székely, *México y los Instrumentos de las Naciones Unidas sobre Derechos Humanos*, in *LA PROTECCIÓN INTERNACIONAL DE LOS DERECHOS DEL HOMBRE, BALANCE Y PERSPECTIVAS* 209, 210-11 (1983).

43. See MEX. CONST. art. 133; *supra* text accompanying note 23.

disputes. Here, suffice it to recall one opinion that the supremacy clause authorizes "every judge in the Republic" to decide "whether the laws governing the subject-matter of the case are in accordance with the Constitution, if such issue is at stake, for to accept the contrary would be to impose upon the judges a duty without providing them the means [that are] essential to carry it out."<sup>44</sup>

This reasoning holds for supremacy as it applies to international treaties, and the Constitution of Mexico ensures limited local jurisdiction over treaty-related controversies in the following clause:

Federal tribunals shall have cognizance of . . . all civil and criminal controversies about the fulfilment and application of federal laws or of international treaties concluded by the Mexican State. *If such controversies affect only the interests of private parties, the regular judges and tribunals of the States and the Federal District may also have cognizance, at the choice of the plaintiff.* The judgments can be appealed before the immediate superior of the judge originally cognizant of the matter.<sup>45</sup>

Legislative history reveals the clause was conceived for the judicial consideration of "individual rights deriving from treaties."<sup>46</sup> Its framers expected the clause to provide grounds for international claims "only in case of denial of justice."<sup>47</sup> Its adoption shows concern about foreign intervention on behalf of foreign nationals and seeks to prevent it by encouraging the exercise of domestic remedies.<sup>48</sup>

Related legislation clarifies that the constitutional reference to "civil controversies" encompasses those that are not "criminal" and not exclusively those that arise between private parties.<sup>49</sup>

44. See 8 DERECHOS DEL PUEBLO MEXICANO, *supra* note 3, at 942.

45. MEX. CONST. art. 104, § I (emphasis added). Cf. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"), and 28 U.S.C. § 1331 (1996) (district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

46. See *Debates de Constituyente de 1856*, reprinted in 7 DERECHOS DEL PUEBLO MEXICANO, *supra* note 3, at 953 (statement of Mr. Arriaga).

47. See *id.* at 949 (statement of Mr. Guzmán).

48. For a discussion of similar concerns leading to the federalization of foreign affairs, alienage jurisdiction, and foreign tort claims in the United States, see Cicero, *supra* note 40, at 328-36.

49. See Ley Orgánica del Poder Judicial de la Federación, arts. 50, § I(a), D.O., May 26, 1995 (jurisdiction of federal courts on criminal matters over crimes foreseen in federal laws and treaties); *id.* art. 52, § I (jurisdiction of federal courts on administrative matters over federal questions arising out of the legality of administrative acts or procedures); *id.* art. 53, § I (reproducing Article 104, § I); *id.* art. 55, § I (jurisdiction of federal courts on labor matters over federal questions arising out of the legality of acts or procedures of labor authorities).

Still, the clause is jurisdictional; it suggests that, as a rule, the plaintiff should bring the treaty controversy within a civil remedy or other ordinary right of action.<sup>50</sup> After all, the Constitution places the controversy not under devices specifically conceived for constitutional review, but within the regular jurisdiction of federal courts.<sup>51</sup>

The subsequent addition of limited concurrent jurisdiction prevents overloads in the federal judicial system.<sup>52</sup> In the constituent units, each regular supreme tribunal normally reviews trial judgments.<sup>53</sup> By expressly providing appeals to superior courts, the concurrent jurisdiction clause further ensures the consideration of treaty controversies by high tribunals throughout the Mexican Republic.<sup>54</sup>

Constitutionally, the operation of concurrent jurisdiction does not depend upon the existence of harmonious local laws.<sup>55</sup> Lacking harmonious rules in a federal unit, the Constitution of Mexico—as supreme national law—suffices for the exercise of concurrent jurisdiction.<sup>56</sup> Uniform concurrent jurisdiction rules in each federal unit could further encourage the consideration of treaties by local courts and supreme tribunals.<sup>57</sup>

50. See, e.g., C.P.C.D.F. arts. 2-34 (types and general rules of civil actions); C.C.D.F. arts. 1910-34 (civil remedies for damages arising of illicit acts, moral damage, liability of public officials and of the State as such).

51. See Héctor Fix-Zamudio, *Artículo 104, Comentario*, in CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, COMENTADA 436, 442 (1992).

52. See *id.* at 438.

53. See, e.g., N.L. CONST. art. 100, § I (Constitution of the State of Nuevo Leon).

54. The United Mexican States comprise the following territorial units: Aguascalientes, Baja California, Baja California Sur, Campeche, Coahuila, Colima, Chiapas, Chihuahua, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, México, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatán, Zacatecas, the Federal District. See MEX. CONST. arts. 43-48.

55. See *Jurisdicción Concurrente (Es Competente el Juez elegido por el actor)*, Comp. 50/54, Informe 1954, Pleno at 144, reprinted in 7 DERECHOS DEL PUEBLO MEXICANO, *supra* note 3, at 975.

56. See *id.* ("according to [A]rticle 133 of the Political Constitution, this constitutes the Supreme Law of all the Union and, for the same reason, its content cannot be undermined by laws of lesser hierarchy because it integrates a superlegality prevailing over the federal and ordinary laws, [and] allow[s] the plaintiff to choose the judge [under constitutional Article 104's concurring jurisdiction]").

57. For useful models and background, see CONSTITUCIÓN POLÍTICA DEL ESTADO LIBRE Y SOBERANO DE MÉXICO (Constitution of the State of Mexico) art. 88 ("The exercise of the Judiciary is vested upon [the] Superior Tribunal of Justice, and trial and lesser-amount courts that shall take cognizance of and shall resolve . . . concurrent jurisdiction and local criminal, civil and family controversies, as well as [controversies] on the international treaties foreseen in the Federal

Concurrent jurisdiction, often used in commercial matters, is particularly suitable for the local consideration of treaties on private international law. Mexico is party, for instance, to the 1994 Convention on the Law Applicable to International Contracts (hereinafter Convention).<sup>58</sup> Lacking contractual choice of law and forum, concurrent jurisdiction allows local tribunals to settle international commercial disputes between private parties by applying the rules established in the Convention.

Other cases initially fall within local supreme tribunals not because of concurrent jurisdiction, but because of a treaty's subject matter. Mexico is party, for example, to multilateral treaties relating to family law,<sup>59</sup> which is local in Mexico's federal system.<sup>60</sup> Moreover, resort to local courts makes particular sense for the service of process and in disputes between parties residing in border areas.<sup>61</sup>

## B. Federal Courts

### 1. Jurisdiction and Authority

In the Mexican constitutional system, controversies about treaties fall within the exclusive domain of the federal judiciary if they concern interests beyond "private parties."<sup>62</sup> Whether federal courts have concurrent or exclusive jurisdiction depends on the circumstances of each case.

Mexican case law traditionally deems that "the punctual fulfilment of international treaties is a concern of the Society and the State."<sup>63</sup> Cases in which a private party invoking a treaty seeks civil remedies against another private party do not

Constitution"). *See generally* Ley Orgánica de Poder Judicial Federal, D.O., May 26, 1995.

58. *See* Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, arts. 25-27, 78 O.A.S.T.S., 33 I.L.M. 732 (1994).

59. *See, e.g.*, Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, 62 O.A.S.T.S., D.O., May 26, 1988.

60. *Compare* MEX. CONST. art. 124 ("The powers that are not expressly granted to federal officials by this Constitution, are deemed to be reserved by the States"), with U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

61. *See, e.g.*, Inter-American Convention on Letters Rogatory, Jan. 30, 1975, art. 7, 43 O.A.S.T.S., D.O., Apr. 25, 1978 ("Courts in border areas of the party states may directly execute the letters rogatory contemplated in this Convention and such letters shall not require legalization").

62. *See* MEX. CONST. art. 104, § I. *See also supra* text accompanying note 45.

63. *See* "Gordon, Ben," 6 S.J.F. 43 (5a época 1920).



necessarily concern public interests. However, treaty-based challenges to public acts, controversies about the governmental fulfilment of treaties, and attempts to block the domestic performance of a treaty, present a different situation.<sup>64</sup>

Similar to courts in other federal States, the high federal courts in Mexico have final authority in the domestic interpretation of treaties.<sup>65</sup> The relevant constitutional clause provides:

The law shall indicate under which terms the jurisprudence established by the tribunals of the Federal Judicial Power on the interpretation of the Constitution, federal or local laws and regulations, and international treaties concluded by the Mexican State, is mandatory, also how it may be interrupted or modified.<sup>66</sup>

Formerly, Mexican law paralleled the constitutional language about "the interpretation of the Constitution, federal or local laws, and international treaties."<sup>67</sup> Federal legislation, however, no longer reproduces this language; rather, it now focuses on how the higher courts establish jurisprudence, taking for granted their constitutional authority to interpret treaties and other general norms.<sup>68</sup>

Although this development distracts attention from the judicial authority to interpret treaties, another overlooked fact is much more important: in the establishment of jurisprudence on the subject, Mexican courts have yet to develop a tradition of considering international standards of interpretation. It is a familiar comment that Mexico's supremacy clause and the Vienna Convention on the Law of Treaties reflect different approaches concerning the hierarchy of national and international law.<sup>69</sup> Yet,

64. For traditional criteria about whether a federal controversy affects national interests and is suitable for hearing by the Plenary Tribunal of the Supreme Court, see Juicio Ord. Fed. 17/46, Informe 1956, Pleno at 32-34, reprinted in 7 DERECHOS DEL PUEBLO MEXICANO, *supra* note 3, at 976.

65. For information regarding emerging interactions between an international tribunal's interpretation of an instrument as a matter of international law and the judicial application, as a matter of domestic law, of these international decisions, see THOMAS BUERGENTHAL, INTERNATIONAL TRIBUNALS AND NATIONAL COURTS: THE INTERNATIONALIZATION OF DOMESTIC ADJUDICATION (1994).

66. MEX. CONST. art. 94 (emphasis added).

67. See Ley de Amparo, arts. 192-93 (former text), reprinted in MIGUEL ACOSTA ROMERO & GENARO DAVID GÓNGORA PIMENTEL, LEY DE AMPARO: LEGISLACION, JURISPRUDENCIA, DOCTRINA 884-87 (2d ed., 1985).

68. See *id.* (amended text).

69. See Székely, *supra* note 42, at 211-12 ("[T]here is no doubt that, in the domestic Mexican order, treaties are subordinated to the Constitution," nor is there any doubt "that the Vienna Convention proclaims the supremacy, at the international level, of international law over domestic law," except for the vague situation foreseen in article 46); see also Vienna Convention on the Law of Treaties, *supra* note 36, art. 27 (stipulating that a State "may not invoke the

it would be misleading and inaccurate to conclude that the Vienna Convention and other international interpretive rules have a limited role before Mexican courts in light of constitutional supremacy.

In criminal matters, the Constitution of Mexico disallows the retroactive application of the law and its extensive interpretation to the detriment of the defendant.<sup>70</sup> In non-criminal cases, judgments must follow "the letter or the juridical interpretation of the law."<sup>71</sup> Only lacking such interpretations, must they follow "the general principles of law."<sup>72</sup>

Thus, in the establishment of jurisprudence, nothing precludes the consideration of treaties for the benefit of prisoners<sup>73</sup> or for developing progressive judicial criteria to prevent irreparable damage to persons.<sup>74</sup> More generally, the Vienna Convention, which is part of Mexican law, embodies generally recognized standards for the "juridical interpretation" of international agreements.<sup>75</sup>

To further develop the legislation governing federal jurisprudence on treaties, and to encourage the establishment of

provisions of its internal law as justification for its failure to perform a treaty"), *id.* art. 46 (invalidity of treaties because of "manifest" violations of internal law regarding the competence to conclude treaties).

70. See MEX. CONST. art. 14; Horacio Lombardo, *Interpretación Jurídica*, in 5 DICCIONARIO JURÍDICO MEXICANO 178-79 (1984).

71. MEX. CONST. art. 14.

72. *Id.*

73. See, e.g., American Convention on Human Rights, Nov. 22, 1969, art. 9, 36 O.A.S.T.S., D.O., May 7, 1981 (*entered into force* July 18, 1978) ("If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom"); *id.* art. 29 ("No provision of this Convention shall be interpreted as: a. permitting any party state, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right recognized by virtue of the laws of any party state or by virtue of another convention to which one of the said states is a party").

74. See, e.g., MEX. CONST. art. 22 (freedom from torture); Ley Federal para Prevenir y Sancionar la Tortura, art. 6, D.O., May 27, 1986 (obligation to immediately denounce acts of torture); Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 67 O.A.S.T.S., D.O., Sept. 11, 1987, arts. 1 & 6 (undertaking of the party states to "take effective measures to prevent and punish torture within their jurisdiction"); Ley de Amparo, arts. 123 & 137 (providing for habeas corpus decrees in urgent cases, to prevent torture, solitary confinement, and arbitrary detention).

75. On the use of the Vienna Convention by the Argentine Supreme Court to give domestic effect to international undertakings, see BUERGENTHAL, *supra* note 65, at 12 (discussing *Ekmekdjian v. Sofovich*, Judgment of December 1, 1988, which gave judicial effect to the internationally recognized right of reply and departed from previous precedent holding the equal rank of treaties and federal statutes); Buergenthal, *supra* note 21, at 358-59.

jurisprudence in harmony with international undertakings, the following or similar proposals merit consideration:

- In applying and interpreting treaties concluded by the Mexican State, the Judiciary shall consider the interpretive rules established by the treaty in question or by other applicable conventions, if the provisions of the treaty are unclear. The Judiciary may consider any supplementary sources that it deems appropriate.
- In applying and interpreting constitutional precepts, legislation, and other general norms whose subject is the matter of treaties concluded by the Mexican State, the Judiciary shall endeavor to consider the applicable treaties that it deems appropriate.

These alternatives would enhance awareness about internationally-recognized standards of interpretation, without restricting judicial discretion or advocating the unnecessary use of supplementary means.<sup>76</sup> They would also focus attention on the possibility of using international instruments to interpret domestic laws.

## 2. Ensuring Treaty Questions Reach the High Courts

Federal questions about international treaties and agreements may now reach the Supreme Court of Mexico through the new invalidation powers, which are the subject of other sections of this Article.<sup>77</sup> Yet, to fully realize their repercussions and scope, it is essential to discuss how treaty questions reach the high federal courts in ordinary and *amparo*<sup>78</sup> litigation.

### a. The Supreme Court's Powers and Exclusive Jurisdiction

In ordinary federal litigation, circuit unitary tribunals review the trial judgments of labor, administrative, civil, and criminal federal courts.<sup>79</sup> If the federal government is a party, the Chambers of the Supreme Court have the power to hear appeals relating to federal interests and questions of supremacy.<sup>80</sup> The interpretation and fulfilment of treaties, within controversies involving civil remedies or other ordinary actions, would likely meet this standard.

76. See Vienna Convention on the Law of Treaties, *supra* note 36, arts. 31 & 32.

77. See *infra* Parts IV & V.

78. See *infra* Part III.B.2.b.

79. See Ley Orgánica del Poder Judicial, art. 29, § II.

80. See MEX. CONST. art. 105, § III; Ley Orgánica del Poder Judicial, art. 21, § I.

As for the Plenary of the Mexican Supreme Court, it is long-standing precedent that in ordinary litigation it has the power to hear federal questions affecting national interests.<sup>81</sup> Like analogous, exclusive *amparo* jurisdiction, this includes federal laws or acts encroaching on a constituent unit's jurisdiction, and local laws or acts encroaching on the federal government's jurisdiction.<sup>82</sup>

These powers and jurisdiction denote the ability to hear and resolve controversies involving not only agreements concluded by state or municipal authorities,<sup>83</sup> but also the "federal clauses" that some treaties stipulate.<sup>84</sup> In Mexico, as in the United States, the constituent units retain all powers that the Constitution does not expressly grant to the national government.<sup>85</sup> At the same time, federal clauses endowed with normative supremacy may entail immediate undertakings on domestic matters within each constituent unit's jurisdiction.<sup>86</sup>

81. See Juicio Ord. Fed. 17/46, Informe 1956, Pleno at 32-34, *reprinted in* 7 DERECHOS DEL PUEBLO MEXICANO, *supra* note 3, at 976.

82. See *id.*; ROMERO & PIMENTEL, *supra* note 67, at 32-33 (discussing Plenary's exclusive jurisdiction should such issues arise in *amparo* litigation); see also MEX. CONST. art. 103, §§ II & III; Ley de Amparo, art. 1, §§ II & III.

83. See *supra* note 36 and accompanying text.

84. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, n.4 (1987).

85. See MEX. CONST. art. 124; U.S. CONST. amend. X.

86. For example, the American Convention on Human Rights provides as follows:

1. Where a party state is constituted as a federal state, the national government of such party state shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

American Convention on Human Rights, *supra* note 73, art. 28, ¶¶ 1 & 2. Compare with International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 50, G.A. Res. 2200 (XXI), GAOR, Supp. No. 16, at 52, D.O., May 20, 1981 (*entered into force* Mar. 23, 1976) ("The provisions of the present Covenant shall extend to all parts of federal States without limitations or exceptions"), and Convention Relating to the Status of Refugees 189 U.N.T.S. 137 (*entered into force* Apr. 22, 1954), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 64, 79 (Ian Brownlie, ed., 3d. ed., 1992) (undertaking of federal governments to bring articles falling within the jurisdiction of constituent units "with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons.").

It is hard to sustain the claim that federal clauses centralize in one governmental branch or in the national government matters that are subjects of the respective treaties and of state law. Although Mexico's constituent units have expressly delegated the treaty-making powers to the national government,<sup>87</sup> the supremacy of treaties concluded by the Mexican State is a matter separate from the constitutional distribution of powers to carry them out. The judicial branch may directly apply treaties but cannot pass the legislation they may require. Crimes whose punishment is found in state law do not necessarily fall within the original jurisdiction of federal courts, regardless of whether supreme treaties touch the same subject.

The problem is not so much the scope of the treaty-making powers; rather, it is that federal clauses may require affirmative measures whose adoption initially falls to the constituent units.<sup>88</sup> If a unit refrains from carrying out the treaty, and the national powers do not take suitable action, the federal state as a whole may be held responsible.<sup>89</sup> Few questions of international law so clearly fall within the Supreme Court of Mexico's original jurisdiction and inherent powers as the domestic effects of these federal clauses.

#### b. *Amparo* Litigation and Jurisprudence

The purpose of the writ of *amparo* is to protect individuals who request the writ against acts of authority or general norms that violate individual constitutional guarantees.<sup>90</sup> Relief usually consists of restitution and injunctions; but in cases of governmental omission the relief may be specific performance.<sup>91</sup> Alternate forms of relief are now permissible in certain circumstances.<sup>92</sup>

Five uninterrupted, consistent *amparo* rulings by the Supreme Court's Plenary, its Chambers, or collegiate circuit tribunals generate a higher form of case law.<sup>93</sup> Resolutions settling contradictory precedent have the same effect.<sup>94</sup> The

87. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. d (1987).

88. See, e.g., American Convention on Human Rights, *supra* note 73, art. 28, ¶ 2.

89. See, e.g., Convention on the Rights and Duties of States, Dec. 26, 1933, art. 2, 37 O.A.S.T.S., D.O., Apr. 21, 1936 (affirming that the federal state constitutes "a sole person" under international law).

90. See MEX. CONST. arts. 103 & 107; Ley de Amparo, art. 1.

91. See Ley de Amparo, art. 80.

92. See MEX. CONST. art. 107, § XVI, amended by D.O., Dec. 31, 1994.

93. See Ley de Amparo, art. 192.

94. See *id.*

Plenary resolves contradictions between the Chambers, and it is generally for the Chambers to resolve contradictions between collegiate circuit tribunals.<sup>95</sup> The Plenary's case law and that of its Chambers bind every court in the Republic.<sup>96</sup> The case law of collegiate tribunals binds lower federal courts and courts generally.<sup>97</sup>

The extent to which these long-standing rules will endure is unclear. Structural changes in the composition and organization of the federal judiciary seek to transform the Supreme Court exclusively into a constitutional tribunal.<sup>98</sup> To that effect, one proposal calls for the establishment of another high tribunal with the exclusive purpose of unifying the *amparo* case law of collegiate tribunals.<sup>99</sup>

As the law currently stands, there are several ways of ensuring the consideration of treaties in *amparo* litigation and jurisprudence.<sup>100</sup> Mexican courts espouse that "the writ of *amparo* is admissible against the improper application of a treaty."<sup>101</sup> Thus, *amparo* has been granted to determine that "appropriate means" to enforce a United States-Mexico convention on stolen vehicles should be interpreted as "no other than judicial means."<sup>102</sup> By resorting to alternate means, without affording due process, the authority was "not only infringing the Constitution,

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95. See *Ley Orgánica del Poder Judicial*, art. 10, § VIII; *id.* art. 21, § VIII.

96. See *Ley de Amparo*, art. 192.

97. See *id.* art. 193.

98. See José Luis Soberanes Fernández, *Nueva Justicia Constitucional en México*, CRÓNICA LEGISLATIVA, Apr.-May 1996, at 13, 23. The previous composition of the Mexican Supreme Court was 21 "numerary" and a maximum of five "supernumerary" (i.e., alternate) Justices. Its previous organization was the plenary, four regular chambers, and one auxiliary chamber. Currently, 11 Justices compose Mexico's highest Court. Besides the Plenary Tribunal, only two Chambers function now: Civil and Criminal Matters; and Administrative and Labor Matters. See MEX. CONST. art. 96, amended by D.O., Dec. 31, 1994; "Acuerdo Número 1/1995 del Tribunal Pleno de la Suprema Corte de Justicia de la Nación, Relativo a la Especialización de las Salas de la Suprema Corte de Justicia de la Nación y a la Adscripción de los Señores Ministros," D.O., Feb. 13, 1995; "Acuerdo Número 2/1995 del Tribunal Pleno de la Suprema Corte de Justicia de la Nación, Relativo a la Distribución de Asuntos Entre las Salas y los Señores Ministros," D.O., Feb. 13, 1995; compare with *Ley Orgánica del Poder Judicial de la Federación*, D.O., Jan. 5, 1988, repealed by *Ley Orgánica del Poder Judicial*, arts. 15-28.

99. See Soberanes, *supra* note 98, at 19.

100. In the transition toward the new institutions, compatible legislation in force applies. See "Decreto Mediante el cual se Reforman los Artículos 21, 55, 76, 79, 89, 93-108, 110, 111, 116, 122 y 123 de la Constitución Política de los Estados Unidos Mexicanos," D.O., Dec. 31, 1994.

101. *Amparo en Revisión 8123/63*, Manuel Braña L., cinco votos, Ponente: Inárritu (Aug. 13, 1965).

102. See *Vera v. Procuraduría General de la República*, *Amparo en Revisión 7298/47*, 96 S.J.F. 1639 (1948).

but the Convention itself, which has the rank of constitutional law."<sup>103</sup>

The protective radius of constitutional due process and ensuring legality extends *amparo* protection to various "rights."<sup>104</sup> This is true for treaty-based rights that do not technically correspond to a constitutional guarantee.<sup>105</sup> Similarly, human rights treaties give evolving, progressive scope to constitutional legality and due process commands suitable for *amparo* jurisprudence and protection. Carlos Arellano García explains how the writ of *amparo* operates for purposes of guaranteeing legality:

a) It is an individual guarantee of the citizen that the public authority must comport its behavior to the laws authorizing it to act. The principle that the State only can do that which it is legally allowed to gets constitutional rank and the status of individual right.

b) Since the State's authorities must respect individual guarantees, among them, they respect the guarantee of legality establishing the strict observance of that which the laws provide.

c) So, regarding the State's authority, the behavior of the State's authorities is limited not only by the constitutionality of their acts but also by the legality of their conduct.

d) Since there is a means for the control of the constitutionality of the acts of the State's authorities, and since the legality is a constitutional guarantee, the means of control becomes a means for controlling the legality of their behavior.

In the Mexican order, the writ of *amparo* . . . is actionable against acts of authority that violate individual guarantees. In turn, articles 14 and 16 of the Constitution establish . . . the guarantee of legality. Therefore, by invoking constitutional articles 14 and 16, the writ of *amparo* controls not only the constitutionality in the behavior of the State's authority, but also the legality in the behavior of the same State's authorities.<sup>106</sup>

Given the monist system Mexico follows, human rights treaties in force in the Republic are part of the laws that specify the limits of the State's behavior. The proscription against depriving any person of her rights without "trial" (*i.e.*, a hearing) and "essential procedural formalities" (*i.e.*, due or minimum guarantees) illustrates overlapping constitutional-international

103. *Id.* But see *supra* text accompanying note 28.

104. See MEX. CONST. art. 14 ("No one shall be deprived of his life, liberty, property, possessions or rights without trial before previously established tribunals, in which essential procedural formalities are met, and in conformity with previously established laws"); see also MEX. CONST. art. 16 (guaranteeing that every act of authority be legally grounded and reasoned).

105. For information on the correlation between constitutionally and internationally recognized human rights in Mexico, see JESUS RODRIGUEZ Y RODRIGUEZ, ESTUDIOS SOBRE DERECHOS HUMANOS: ASPECTOS NACIONALES E INTERNACIONALES 41-94 (1990).

106. GARCÍA, *supra* note 33, at 266-70.

due process.<sup>107</sup> Even so, in *amparo* litigation, the usual way of making treaty-based human rights effective before the courts is by relying exclusively on corresponding constitutional guarantees.

### c. Prospective Avenues

In different matters, Mexican law allows judges to rectify technical errors or omissions in the complaint (*suplencia de la deficiencia de la queja*).<sup>108</sup> In *amparo* litigation, judicial rectification typically operates in cases involving unconstitutional norms, manifest deprivations of due process, or the vulnerable and the disadvantaged: prisoners, minors, and parties to labor and agrarian matters.<sup>109</sup> Rectification of technicalities, though not designed to relieve every procedural requirement, leaves considerable room for the application of treaty norms that relate to the due administration of justice.

The National Human Rights Commission's Regulations define human rights as "those recognized in the Constitution and those recognized in covenants, treaties and conventions" ratified by Mexico.<sup>110</sup> To advance the application of treaties by high tribunals and courts generally, whether the parties invoke them or not, the inclusion of analogous provisions in the Mexican Constitution is worthy of consideration.<sup>111</sup> Besides modeling additional constitutional guarantees after human rights treaties,

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107. Compare MEX. CONST. art. 14 (right not to be deprived of any right without trial), with International Covenant on Civil and Political Rights, *supra* note 86, art. 14 (right to a fair and public hearing and minimum guarantees).

108. See, e.g., C.P.C.D.F. art. 46, D.O., Sept. 21, 1932 (rectification of technicalities in favor of parties without counsel, judicial duty to appoint counsel). On the incorporation of this principle to the new invalidation powers of the Supreme Court, see *infra* text accompanying notes 183-85.

109. See Ley de Amparo art. 76; INSTITUTO DE ESPECIALIZACIÓN JUDICIAL DE LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, MANUAL DEL JUICIO DE AMPARO 37-40 (1988).

110. See Reglamento Interno de la Comisión Nacional de Derechos Humanos, art. 6, D.O., Nov. 12, 1992; Ley de la Comisión Nacional de Derechos Humanos, art. 1, D.O., June 29, 1992.

111. See, e.g., COLOM. CONST. arts. 93 ("The rights and duties enshrined in this Charter, shall be interpreted in conformity with the international treaties on human rights ratified by Colombia"); *id.* art. 94 ("The enunciation of rights and guarantees included in the Constitution and in the international agreements in force[,] shall not be understood as denying others that, being inherent in the human person, do not expressly appear in them"); see also SPAN. CONST. art. 10(2) ("The norms on fundamental rights and freedoms recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on the same matters ratified by Spain"); PORT. CONST. art. 16(2) ("The constitutional and legal precepts on fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of Human Rights").



consideration should also be given to expressly granting constitutional rank to selected international instruments.<sup>112</sup>

#### IV. THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE EXECUTIVE IN INTERNATIONAL LEGAL QUESTIONS

Echoing the U.S. Constitution, which authorizes federal jurisdiction over controversies about treaties, maritime law cases, cases concerning consular and diplomatic agents, and extraditions, the Constitution of Mexico assigns the federal judiciary a significant role in foreign affairs.<sup>113</sup> This role is also evident in the Mexican judicial courts' exclusive jurisdiction over all Mexican governmental acts within and outside of the national territory.<sup>114</sup> Nevertheless, unlike U.S. courts, Mexican courts have not developed a "political question" doctrine deferring to the executive or legislative branches on questions of international law.<sup>115</sup>

Despite practical and conceptual overlaps, it is possible to group the traditional Judiciary-Executive relationships on questions of international law arising before Mexican courts essentially into four categories: (1) the Executive as plaintiff or defendant; (2) the Executive as representative of public interests before the Judiciary; (3) the Executive as assistant of the Judiciary; and (4) judicial opinions to the Executive. In addition

112. See ARGEN. CONST. art. 75, § 22 (giving treaties superiority over laws and selected human rights instruments a supreme status in the constitutional hierarchy); Héctor Fix-Zamudio, *El Derecho Internacional de los Derechos Humanos en las Constituciones Latinoamericanas y en la Corte Interamericana de Derechos Humanos*, in *THE MODERN WORLD OF HUMAN RIGHTS, ESSAYS IN HONOR OF THOMAS BUERGENTHAL* 159, 161-73 (Antônio Cançado Trindade, ed. 1996).

113. Compare MEX. CONST. art. 104 ("Federal tribunals shall have cognizance of: all civil and criminal controversies about . . . international treaties concluded by the Mexican State . . . ; all controversies about maritime law . . . ; cases concerning members of the Consular and Diplomatic Corps), and MEX. CONST. art. 119, amended by D.O., Sept. 3, 1993 ("The extraditions requested by foreign States shall be substantiated by the Federal Executive, with the intervention of the judicial authority in the terms of [the] Constitution, the International Treaties signed in this respect, and the regulatory laws"), with U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . arising under . . . Treaties made, or which shall be made, under [U.S.] authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction; . . . To Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original Jurisdiction").

114. See C.F.P.C. art. 568.

115. See generally Edward Gordon, *American Courts, International Law and "Political Questions" Which Touch Foreign Relations*, 14 INT'L LAW. 297 (1980).

to these traditional categories, there are several emerging developments which warrant discussion.

### A. *The Traditional Spectrum*

#### 1. The Executive as Plaintiff or Defendant

In criminal matters, the Offices of the Attorneys General of the Republic, of Military Justice, of each state and of the Federal District act as plaintiffs. These organs, which technically fall within the executive branch, primarily raise before the courts questions of international law that may require the punishment of crimes. One example is whether treaty provisions directly apply when a treaty in force in Mexico forbids the crime and the Penal Code does not.<sup>116</sup> Another example is the assertion of Mexican jurisdiction to punish crimes committed or originated abroad in circumstances specified by the Penal Code.<sup>117</sup>

In contrast, in *amparo* litigation defendants include executive authorities. Contempt in *amparo* decrees may result in the responsible authority's removal and conviction.<sup>118</sup> This stands, of course, for injunctions against laws or acts contradicting supreme treaties, and for injunctions against the improper enforcement of treaties.

#### 2. The Executive as Representative of Public Interests

Penal actions aside, Mexican law frequently bestows on organs of the Executive the duty to represent public, national, or social interests before the courts. The Republic's Attorney General has the mandate to intervene, among others, in unconstitutionality actions, and also has powers that include requesting the Supreme Court to hear questions of federal interest and supremacy.<sup>119</sup>

In addition to plaintiffs, governmental defendants, and interested third parties, federal attorneys intervene in *amparo* trials to represent the social interests in the litigation.<sup>120</sup> As the social representative in litigation, the Executive must safeguard

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116. See C.P.D.F., art. 6, D.O., Aug. 14, 1931.

117. See *id.* arts. 2-5.

118. See MEX. CONST. art. 107, § XVI, *as amended*; *Ley de Amparo*, arts. 204-10.

119. See MEX. CONST. art. 102, § A; *Ley Orgánica de la Procuraduría General de la República*, art. 4, D.O., May 10, 1996 [hereinafter *Ley Orgánica de la P.G.R.*].

120. See *Ley de Amparo*, art. 5.

the principle of legality, the proper administration of justice, and the respect of human rights.<sup>121</sup> In this role, the Executive may raise questions of international law to the extent they relate to ensuring the preceding interests.

Some cases, however, immediately entail the responsibility to raise questions of international law. Regarding federal jurisdiction over controversies involving consular and diplomatic agents, it is the Mexican Supreme Court's long-standing view that

[a]ccording to [S]ection VI of [A]rticle 104 of the Constitution ["Federal tribunals shall have cognizance . . . Of cases concerning members of the Consular and Diplomatic Corps"], it is for federal tribunals to take cognizance of cases concerning the members of the diplomatic and consular corps and since that provision does not distinguish between the members of the Mexican consular and diplomatic corps abroad, and those of foreign governments in the country, this legal provision must be deemed to encompass the former and the latter; and even if the acts executed by such individuals have a private character, the federal authorities must have cognizance of them because given their consular or diplomatic status they may affect international relations.<sup>122</sup>

Not surprisingly, the Attorney General of the Republic is expressly mandated to intervene in controversies involving diplomats and consuls.<sup>123</sup> In federal legislation, the mandate specifically refers to whether there is immunity in criminal cases.<sup>124</sup> Although statutory law apparently circumscribes the Attorney General's role in controversies involving consuls and diplomats acting precisely as such,<sup>125</sup> the Supreme Court's precedent directly interprets the Constitution. The federal judiciary cannot waive its jurisdiction beyond official acts, nor is it necessarily bound to follow the Executive's view on immunity under treaties or international law.

121. See *Ley Orgánica de la P.G.R.*, art. 2.

122. See "*Diplomáticos y Cónsules*," Vol. VII at 654, reprinted in 7 *DERECHOS DEL PUEBLO MEXICANO*, *supra* note 3, at 977-78.

123. See *Ley Orgánica de la P.G.R.*, art. 7, § IV.

124. See *id.*; see also *Ley Orgánica del Poder Judicial*, art. 50, § I(c) (jurisdiction of federal trial courts over crimes "committed abroad by diplomatic agents, official staff of the legations of the Republic and Mexican consuls"); *id.* § I(d) (jurisdiction of federal courts over crimes "committed in foreign embassies and legations"); [Vienna] Convention on Consular Relations, Apr. 24, 1963, arts. 40-45, D.O., Dec. 19, 1968 (adopted by Mexico Sept. 11, 1968); [Vienna] Convention on Diplomatic Relations, Apr. 18, 1961, arts. 29-32, D.O., Sept. 14, 1965 (adopted by Mexico Aug. 3, 1965).

125. See *Ley Orgánica de la P.G.R.*, art. 7, § IV.

### 3. The Executive as Assistant of the Judiciary

The belief that the Executive should primarily assist the Judiciary in international litigation is one deeply rooted in Mexican legal culture. Direct resort to constables, solicitors, or *huissiers*, which are more general judicial methods for the performance of judicial proceedings abroad, are uncommon in Mexican practice.

For judicial proceedings abroad, recourse to the Mexican Foreign Service is the standard method.<sup>126</sup> Before Mexican courts, and on behalf of them, the Ministry of Foreign Affairs or the Office of the Republic's Attorney General acts as the central or coordinating authority.<sup>127</sup> Again, questions of international law fall within this capacity, to the extent they directly relate to the functions of central authorities as such.

Occasionally, the registrars of superior tribunals function as central authorities, both in common and civil law venues, and one inter-American trend is to allow the designation of specific-unit authorities in federal States.<sup>128</sup> Although not technically inconceivable, the designation of local supreme tribunals as central authorities sounds remote and foreign to the Mexican tradition.

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126. See *Ley del Servicio Exterior Mexicano*, art. 44, § IV; C.F.P.C., arts. 548 & 551.

127. See, e.g., Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, May 24, 1984, art. 7, 24 I.L.M. 459, 472; Inter-American Treaties: Signatures, Ratifications, and Deposits with Explanatory Notes, 9 O.A.S.T.S. Rev. 1993 at B-51 (declaration of Mexico within article 7 [designation of Ministry of Foreign Affairs as Central Authority]); Treaty on Cooperation Between the U.S.A. and the United Mexican States for Mutual Legal Assistance, Dec. 9, 1987, U.S.-Mex., art. 2, 27 I.L.M. 443; D.O., Aug. 7, 1991 (designating the Attorney General of the Republic's Office as Coordinating Authority).

128. See Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, art. 5, OEA/Ser.K/XXI.5, CIDIP-V/doc.36/94 rev. 5, 79 O.A.S.T.S., 33 I.L.M. 721 (1994) ("A federal State, or a State in which several legal systems apply, or a State with autonomous territorial units may designate more than one Central Authority, specifying the legal or territorial area covered by each of them"); HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 52-110 (2d ed. 1992) (indicating the States parties that have designated judicial authorities as central authorities are the following: Barbados [designation of Registrar of the Supreme Court], Canada [designation of federal, provincial and territorial central authorities], Germany [designation of individual central authorities for each constituent unit], Italy [designation of the Registry of the Court of Appeal in Rome], Malawi [Registrar of the High Court], Seychelles [Registrar of the Supreme Court], U.K. [designation of central authority and of registrars and courts as "other authorities" for specific territorial units]).

To strengthen the cooperation between the executive and judicial branches in international legal assistance, the designation of local agencies as specific-unit central authorities seems more suitable. Within Mexico's federal organization, these alternatives deserve particular consideration regarding treaties on judicial assistance in civil or family matters, the performance of which heavily depends on state laws and tribunals.

#### 4. Judicial Opinions to the Executive

In Mexican extradition law, the distribution of power between the Judiciary and the Executive presents strikingly unique features. While federal trial judges intervene in extraditions requested by foreign states, the Executive initially decides the case, and constitutional control shifts to higher courts. The Ministry of Foreign Affairs considers whether the extradition request should be admitted,<sup>129</sup> while federal district judges consider detentions, evidence, hearings, defenses, and bail.<sup>130</sup> The Office of the Republic's Attorney General must appear before the judge.<sup>131</sup>

Collegiate circuit tribunals have jurisdiction over writs of *amparo* against the Executive's resolutions granting extradition.<sup>132</sup> Because the proscription of treaties for the extradition of political prisoners is a constitutional guarantee,<sup>133</sup> the issue of whether it bars granting concrete requests is suitable for *amparo* review.

However, district judges give judicial opinions to the Ministry of Foreign Affairs concerning the merits of the request itself, either under applicable treaties or, in their absence, under the Extradition Act.<sup>134</sup> The outcome of each opinion—in other words the resolution as to whether to grant the extradition—is the responsibility of the Executive, not of the trial judge.<sup>135</sup>

129. See *Ley de Extradición Internacional*, art. 20, D.O., Dec. 29, 1975.

130. See *id.* arts. 21-27.

131. See *id.* arts. 21, 25.

132. See *Ley Orgánica del Poder Judicial*, art. 37, § IV.

133. See MEX. CONST. art. 15.

134. See *Ley de Extradición Internacional*, arts. 28-33. For information on the extradition procedure, see INSTITUTO DE ESPECIALIZACIÓN JUDICIAL DE LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, *supra* note 109, at 333-63.

135. For information on this issue, see *Acuerdo del Tribunal Pleno de la Suprema Corte de Justicia de la Nación*, Exp. 3/96, Promovente: Presidente de la República 141-42 (Apr. 23, 1996) (Supreme Court's investigation, carried out at the request of the President, about facts constituting serious violations of constitutional guarantees). For information on the constitutional foundations of and issues of standing in the investigation, see *infra* text accompanying notes 197-204, 210-11.

In international extraditions, foreign relations concerns initially weigh the balance toward the Executive, with the constitutional review of high courts establishing the final equilibrium between both branches. Legal cooperation and international undertakings receive, in short, as much consideration as public policy and the respect of fundamental rights allow.

### B. *Emerging Issues*

Several developments surprisingly depart from the traditional relationship between Mexico's Judicial and Executive branches in international legal questions: the proliferation of alternate dispute settlement means, free trade-related due process undertakings, the distribution of power under blocking statutes, and the implications of the new Supreme Court's powers in respect to denunciations and reservations.

#### 1. Alternate Means

Quasi-judicial procedures and other alternate means are increasingly available to settle treaty-related disputes and to give effect to international undertakings in Mexico. Conciliation,<sup>136</sup> precautionary orders,<sup>137</sup> ombudsmen's recommendations,<sup>138</sup> administrative inquiries,<sup>139</sup> the extrajudicial payment of damages,<sup>140</sup> and the administrative invalidation or nonexecution of public acts<sup>141</sup> are noteworthy in this regard.

Although the Mexican judicial system has been remarkably strengthened in recent years, one prominent way that international human rights law has achieved concrete domestic results is through recommendations from outside the judiciary. Mexico's National Human Rights Commission constantly relies on international standards, whether embodied in conventions or not,

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136. See, e.g., *Ley de la C.N.D.H.*, art. 5(VI).

137. See, e.g., *Ley Federal de Procedimiento Administrativo*, arts. 81, 82; *Reglamento de la C.N.D.H.*, art. 99.

138. See, e.g., *Ley de la C.N.D.H.*, arts. 22-26. For example, the Agrarian Affairs Federal Attorney and the Environmental Protection Federal Attorney, Mexico now has an ombudsmen network consisting of 32 public human rights commissions: one with national reach and one in every constituent unit. See *MEX. CONST.*, amended by D.O., Jan. 28, 1992, art. 102(B).

139. See *Ley Federal de Responsabilidades de los Servidores Públicos*, arts. 46-78, D.O., Dec. 31, 1982.

140. See, e.g., C. Rodríguez Moreno, *Reparación del Daño por Parte del Estado por Violaciones a Derechos Humanos*, Oct. 1994, *Gaceta*, at 11-14.

141. See *Ley Federal de Procedimiento Administrativo*, art. 6.

in its recommendations to organs of the Executive and other agencies.<sup>142</sup>

That these recommendations are not binding is less important than the fact that authorities habitually accept and comply with most of them.<sup>143</sup> But the Mexican ombudsmen have no powers to intervene in jurisdictional matters.<sup>144</sup> They do not substitute for the Judiciary's constitutional control of governmental compliance with human rights treaties, nor should the Judiciary surrender such control to other organs.

## 2. The Ancillary Labor and Environmental Agreements

North American free trade has highlighted secondary issues that pertain to the distribution of power between the Judiciary and the Executive. Ancillary provisions of the North American Free Trade Agreement (hereinafter NAFTA) specify due process standards in the sphere of judicial, administrative, and quasi-judicial litigation in labor and environmental matters<sup>145</sup> and

142. See, e.g., C.N.D.H. Recomendación 8/96, Feb. 2, 1996, *Case of LARC & JCDF*, Feb. 1996, *Gaceta*, at 29, 37 (1996) (considering, in light of the U.N. Standard Minimum Rules for the Treatment of Prisoners and the U.N. Principles for the Protection of All Detained Persons, that temporary isolation may be deemed constitutional "only if it is imposed as a punishment with strict observance of the guarantees of legality—that both the infraction and the intensity and duration of the punishment be foreseen in the [Readaptation Center's] Regulations—and of proportionality—that the period of the punishment corresponds to the seriousness of the offense"); C.N.D.H. Recomendación 259/93, Dec. 22, 1993, *Case of the Social Readaptation Center of Tampico, Tamaulipas*, *Gaceta*, at 162, 169 (finding overcrowding, lack of medical and criminological classification, and lack of segregation of accused from convicted persons in violation of the same U.N. Rules and Principles); C.N.D.H. Recomendación 137/95, Nov. 14, 1995, Nov. 1995, *Gaceta* at 229, 245 (finding acts of torture, as defined in the U.N. and Inter-American Conventions on the subject); C.N.D.H. Recomendación 205/93, Oct. 13, 1993, *Case of the mentally-ill and the incompetent held in the Social Readaptation Centers of the State of Colima*, Dec. 1993, *Gaceta* at 62, 74 (finding violations of the U.N. Minimum Rules for Treatment of Prisoners, Declaration on the Rights of the Mentally Disabled and Principles for the Protection of Detained Persons).

143. See, e.g., C.N.D.H., ANNUAL REPORT 336-37 (1993) (221 recommendations accepted, with evidence of full compliance; 297 recommendations accepted, with evidence of partial compliance; nine recommendations not accepted; six recommendation accepted, within the period to submit evidence; two recommendations accepted, with unsatisfactory compliance; 18 recommendations "on time to be answered"; three recommendations accepted, "without evidence of compliance").

144. See MEX. CONST., as amended, art 102(B).

145. See North American Agreement on Labor Cooperation, Sept. 13, 1993, Can.-Mex.-U.S., arts. 4 & 5, D.O., Dec. 21, 1993; North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., arts. 6 & 7, D.O., Dec. 21, 1993. For a U.S. view on the subject, see Stephen Zamora, *The*

provide for the decision and review of such cases by impartial, independent tribunals.<sup>146</sup>

Their designation notwithstanding, the ancillary agreements are not inter-institutional agreements without national status in the Mexican order.<sup>147</sup> Still, they do not seek direct domestic application, but rather the development of measures to enforce national norms and standards.<sup>148</sup> The question thus follows: how can the Executive encourage performance of ancillary agreements by labor and other tribunals while assuring due respect for judicial independence?

In Mexico, available options include giving effect to the ancillary agreements through both national laws and human rights instruments. Unlike U.S. courts, Mexican courts are not barred by reservations, understandings, or declarations (hereinafter RUDs) from directly applying treaties on civil and political rights as self-executing law.<sup>149</sup> If necessary, the competent executive agencies may seek the performance of the due process undertakings by raising overlapping international treaties before the courts.<sup>150</sup>

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*Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POLY INT'L BUS. 391 (1993).

146. See, e.g., North American Agreement on Labor Cooperation, *supra* note 145, art. 5(4).

147. See *supra* text accompanying notes 26-27.

148. See, e.g., North American Agreement on Labor Cooperation, *supra* note 145, arts. 2 & 3.

149. For information on the U.S. "non-self-executing" declaration to the Covenant on Civil and Political Rights, see, e.g., David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77, 79 (1993).

150. Compare, e.g., North American Agreement on Labor Cooperation, *supra* note 145, art. 5 (undertaking to ensure due process, including public hearings, right to defense, reasonable time frameworks, right to appeal, impartial and independent review, effective remedies, and legal assistance), with Covenant on Civil and Political Rights, *supra* note 86, art. 2(3) (basic undertakings, including effective remedies before "judicial, administrative or legislative authorities, or [before] any other competent authorities"), and *id.* art. 14(1) (right of every person, "[i]n the determination . . . of his rights and obligations in a suit at law . . . to a fair trial and public hearing by a competent, independent and impartial tribunal established by the law"), and American Convention on Human Rights, *supra* note 73, art. 8, ¶ 1 (every person's right "to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law . . . for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature") (emphasis added), and *id.* art. 25, ¶ 1 (right of everyone "to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention."). See also Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion OC-11/90, Inter-Am. C.H.R. 11 (Ser. A),



The means a State chooses to carry out international agreements on the national level is essentially a domestic law issue. Without prejudice of other measures, this method seems consistent with judicial independence, with Mexico's monist system, and with the purposes of the ancillary and other agreements.

### 3. The Executive's Advisory Role Under Blocking Statutes

Another significant development is the Law Protecting Trade and Investment,<sup>151</sup> (hereinafter LPTI) which was enacted to block the Helms-Burton Act.<sup>152</sup> The law gives the Executive the role of advising the interested business community. The LPTI authorizes the Ministry of Foreign Affairs and the Ministry of Trade "to issue general criteria for the interpretation of this Law."<sup>153</sup> Similarly, it directs both ministries "to advise affected individuals and corporations."<sup>154</sup>

Coupled with the Executive's interpretive authority, advice to the interested parties prospectively encompasses questions of international law that might arise before Mexican courts within the blocking statute.<sup>155</sup> Therefore, the LPTI represents an original model for Executive-Judiciary relations in questions of international law touching vital national interests. As a matter of judicial independence, the resulting question is whether the courts should defer to the Executive in these circumstances.

### 4. The Judiciary, Denunciations, and Reservations

At present, it is an open question as to how the Executive should proceed if, in the exercise of its new powers, the Judiciary invalidates a treaty in the Mexican legal order. If the Supreme

24-28 (1990) (discussing the right to legal representation within the right to a fair hearing both in criminal and in civil, labor and other matters).

151. *Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional*, D.O., Oct. 23, 1996 [hereinafter *Ley de Protección al Comercio y la Inversión*].

152. Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021 (1996).

153. *See Ley de Protección al Comercio y la Inversión*, art. 8.

154. *See id.* art. 7.

155. The LPTI commands Mexican courts to deny recognition and enforcement of judgments, judicial orders, and arbitral awards resulting from foreign laws containing objectives specified in the law. Mexican courts could enforce foreign monetary judgments and awards against parties who gained economic benefits from foreign judgments and awards resulting from the same foreign laws. Parties connected to Mexico and condemned to damages pursuant to such foreign laws would get a right of action in Mexican courts. *See Ley de Protección al Comercio y la Inversión*, arts. 1 & 4-6.

Court of Mexico only strikes down specific provisions of a treaty as unconstitutional, international alternatives include proposing suitable amendments to it.<sup>156</sup> In contrast, if the Supreme Court totally invalidates the treaty, denunciation or withdrawal should immediately follow.<sup>157</sup>

As far as separation of powers is concerned, one potential problem is that Mexican law contemplates no specific procedure for the denunciation of treaties.<sup>158</sup> Because the Senate has the exclusive power to approve ratification, acceptance, or adherence,<sup>159</sup> constitutional controversies might arise over whether this implies the exclusive power to approve denunciation or withdrawal. In comparative law, solutions include express constitutional provisions governing the denunciation of treaties.<sup>160</sup>

Also, while understandings are not standard Mexican practice, Mexican reservations and declarations (hereinafter REDs) to international treaties now seem more prone to the Supreme Court's constitutional review. That REDs fall within the Executive's and the Senate's domain clearly follows from the treaty-making powers of both organs.<sup>161</sup> Yet, the review of REDs seems inherent in the subject matter of unconstitutionality actions, which resolve "the possible contradiction between a general norm and [the] Constitution."<sup>162</sup>

"Reservation" means "a unilateral statement, however . . . named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty . . . [that] purport[s] to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."<sup>163</sup> Domestically, treaties

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156. See Vienna Convention on the Law of Treaties, *supra* note 36, arts. 39-41.

157. See *id.* art. 56.

158. See *Ley sobre la Celebración de Tratados*, arts. 1-5.

159. See MEX. CONST. art. 76, § I; *Ley sobre la Celebración de Tratados*, arts. 4 & 5.

160. See ARGEN. CONST. art. 75, § 22 (establishing the legislative power "to approve and reject treaties," requiring a two-thirds approval "of the total of members of each Chamber" for the Executive's denunciation of human rights treaties); *id.* § 23 (requiring approval by "an absolute majority of the total of members of each Chamber" for the denunciation of economic integration treaties).

161. See, e.g., José López Portillo, *Exposición del Poder Ejecutivo de la Unión sobre los Pactos y Convenciones Internacionales que Promueven la Protección de los Derechos Humanos*, in *LOS TRATADOS SOBRE DERECHOS HUMANOS Y LA LEGISLACIÓN MEXICANA*, *supra* note 4, at 79-94 (Executive's submission of seven instruments and the proposed REDs for Senate approval).

162. See MEX. CONST. art. 105, § II, *as amended*.

163. Vienna Convention on the Law of Treaties, *supra* note 36, art. 2, § 1, ¶ d. Mexican law defines "reservation" as "[t]he declaration formulated at the time of signing, ratifying or acceding to a treaty, with the purpose of excluding or

concluded by Mexico integrate reservations and declarations having the same result. Once published with the treaty they modify, REDs become, in effect, "general norms" in force in the Republic.<sup>164</sup> REDs in possible contradiction with the Constitution may fall, then, within the subject matter of claims of unconstitutionality.

## V. STANDING TO RAISE QUESTIONS OF INTERNATIONAL LAW BEFORE MEXICAN COURTS

### A. *The Law and Precedent*

With few exceptions, Mexican law grants no *actio popularis*;<sup>165</sup> nor does it contemplate, in general, specific standing to raise questions of international law before the courts and tribunals of justice. Rather, the norms of standing common to each domestic action apply. As a rule, only directly injured parties, parties having the contrary interest, and their representatives have standing.<sup>166</sup>

Criminal matters aside, several situations present peculiar features concerning treaty-related questions: standing in the writ of *amparo*, standing in claims of unconstitutionality and constitutional controversies, and the distinction between the right of petition and constitutional standing.

#### 1. *Amparo* Standing

Highly developed in matters of standing, the Mexican law of *amparo* still regards treaties as more likely to encroach upon constitutional guarantees than to foster their observance and enjoyment. Despite this traditional approach, under certain circumstances the interested parties may benefit from *amparo* standing to assert rights under international treaties.

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modifying the juridical effects of certain provisions of the treaty in its application to the United Mexican States." Mexican law does not establish, however, any particular procedure for approving or withdrawing reservations. See *Ley sobre la Celebración de Tratados*, art. 2, § VII; JESUS RODRÍGUEZ Y RODRÍGUEZ, *LAS RESERVAS FORMULADAS POR MÉXICO A INSTRUMENTOS INTERNACIONALES SOBRE DERECHOS HUMANOS* 29 (1996).

164. See *supra* text accompanying note 16.

165. One exception confirming the rule is the impeachment procedure. See *Ley Federal de Responsabilidades de los Servidores Públicos*, art. 12.

166. See, e.g., C.P.C.D.F., art. 1.

First, only parties or their representatives directly injured by a treaty, law, or act have standing to request *amparo* injunctions.<sup>167</sup> Implied in this rule is the standing to seek protection against laws or acts contradicting treaties if the laws or acts simultaneously injure an individual's constitutional guarantees.<sup>168</sup> Mexican law does not accord *amparo* standing on the sole ground that a law or act may contradict supreme treaties.<sup>169</sup> However, the affected parties have *amparo* standing if they show domestic laws or acts contradicting a supreme treaty injure due process and legality or other constitutional guarantees.<sup>170</sup>

Second, plaintiffs seeking protection against a norm or treaty must show a concrete application injuring them or that the norm's entry into force immediately injures their interests.<sup>171</sup> Absent imminent threat to personal security, there is no immediate *amparo* standing against laws that allow, but do not compel, public acts that potentially contradict treaties.

Unless the laws do not require regulations or other successive measures for their execution, the case for immediate *amparo* standing is hard to build. In contrast, *amparo* standing is assured when the law instantly imposes legal obligations in possible contradiction with treaties (*e.g.*, compulsory professional association or new requirements affecting the exercise of treaty-based freedoms).

Third, district attorneys have standing to challenge *amparo* rulings injuring interests of the State as such.<sup>172</sup> Injunctions against treaties, their enforcement, and treaty-based acts naturally present issues of public interest.

Finally, the Republic's Attorney General, like the parties and judges in each case, has standing to request the high courts to

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167. See Ley de Amparo, art. 4.

168. Despite occasional comment to the contrary, there is general agreement that the contradiction of treaties *per se* does not grant standing to exercise the writ of *amparo*. See, *e.g.*, Báez, *supra* note 4, at 27-28.

169. See, *e.g.*, ROMERO & PIMENTEL, *supra* note 67, at 33 ("The writ of *amparo* was established . . . not to protect the Constitution as a whole, but to protect the individual guarantees . . . . Had the constitutional framers intended to grant the standing to request *amparo* for the protection of any violation of the Constitution, even if it did not result in an injury to the individual's interest, they would have clearly established so, but they did not . . . [The framers] did not intend to give the Federal Judiciary absolute powers to oppose any [u]nconstitutional provisions through the writ of *amparo*;) instead they intended to establish this writ only for the protection and enjoyment of individual guarantees.").

170. See *supra* notes 104-07 and accompanying text.

171. See ROMERO & PIMENTEL, *supra* note 67, at 72-73, 411-12; see also Ley de Amparo, art. 73, §§ V-VI.

172. See, *e.g.*, ROMERO & PIMENTEL, *supra* note 67, at 75.

resolve contradictory *amparo* rulings.<sup>173</sup> This includes contradictory rulings about the constitutionality, application, or interpretation of treaties.

## 2. Claims of Unconstitutionality

With at least eight affirmative votes from its eleven justices, the Supreme Court of Mexico has the power to invalidate norms contradicting the Constitution.<sup>174</sup> Since *acciones de inconstitucionalidad* (hereinafter claims of unconstitutionality) focus heavily on dissenting legislative minorities, the standing to exercise them is narrow.

Standing to bring claims of unconstitutionality of "international treaties concluded by the Mexican State" is reserved to thirty-three percent of the Senate's members and to the Republic's Attorney General.<sup>175</sup> The same percentage of senators and the Attorney General have standing to claim the unconstitutionality of federal laws and of laws of the Federal District.<sup>176</sup> Additionally, the Attorney General, appointed with legislative approval, has standing to exercise actions against laws of the Mexican states.<sup>177</sup>

Thirty-three percent of national representatives has standing to challenge federal or Federal-District laws.<sup>178</sup> The same percentage of state or Federal-District representatives has standing to challenge laws enacted in their own jurisdictions.<sup>179</sup> Political parties have standing in constitutional challenges in electoral cases.<sup>180</sup>

The reason senators, and not representatives, have standing against treaties is that the treaties' approval is decided by the Senate, not by both Chambers of Congress.<sup>181</sup> As for the analogous standing of the Attorney General, though technically within the Executive branch, here he represents the public interests and society as a whole.<sup>182</sup> In constitutional challenges and constitutional controversies, the President acts through

173. See *Ley de Amparo*, arts. 197 & 197(A).

174. See MEX. CONST. art. 105, § II, *as amended*.

175. See *id.* art. 105, §§ II(b) & II(c).

176. See *id.*

177. See *id.* art. 105, § II(c).

178. See *id.* art. 105, § II(a).

179. See *id.* art. 105, §§ II(d) & II(e).

180. See *id.* art. 105, § II(f) (specifying that the actions challenging constitutionality represent the only way to request the invalidation of local and federal electoral norms).

181. See *id.* art. 76, § I.

182. See *supra* text accompanying notes 119-21.

cabinet members or through the Judicial Advisor to the Federal Government, not through the Attorney General.<sup>183</sup>

*Ratione materiae*, there is hardly any doubt that the Supreme Court can invalidate general norms that contradict the constitutional supremacy clause and, therefore, the treaties incorporated by it. The regulatory legislation makes it clear that constitutional challenges and constitutional controversies leave room for affirming the violation of any "constitutional precept" and for any "invalid [unconstitutionality] reasoning."<sup>184</sup> In claims of unconstitutionality, the Supreme Court is bound "to correct any errors appearing in the citation of . . . legal precepts" and to "rectify [the] reasoning."<sup>185</sup> Ultimately, the Court has express authority to "support [the] declaration of unconstitutionality in any constitutional precept, whether invoked or not in the initial brief."<sup>186</sup>

*Ratione personae*, the question follows as to who has standing to claim the unconstitutionality of federal or local laws contradicting treaties within the constitutional supremacy clause. Legislative minorities presumably have standing regarding laws enacted in their own spheres. But because the Attorney General has standing against federal and local laws generally, the Constitution seems to give him broader powers to assert the supremacy of treaties.

### 3. Constitutional Controversies

Different branches within the three levels of government (federal, state, and municipal) have standing to request the Supreme Court to settle constitutional controversies arising between the branches.<sup>187</sup> As it happens in constitutional challenges, in constitutional controversies the judicial invalidation of norms requires eight affirmative votes.<sup>188</sup>

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183. See *Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos*, arts. 11 & 63, D.O., May 11, 1995.

184. See *id.* art. 22, §§ 5 & 6; *id.* art. 61, §§ 4 & 5.

185. See *id.* art. 71.

186. See *id.* For the rules regarding rectification of technicalities that apply in constitutional controversies, see *id.* arts. 39 & 40. For background on this higher form of rectification of technicalities, see *supra* notes 108-09 and accompanying text.

187. See MEX. CONST. art. 105, § I, *as amended*. Unlike actions challenging constitutionality, constitutional controversies were established but not regulated, except for taxation controversies, before the 1994 amendments. See Soberanes, *supra* note 98, at 27-29.

188. See MEX. CONST. art. 105, § I, *as amended*.

Controversies between "two branches of the same State, about the constitutionality of their acts or general norms" are cognizable.<sup>189</sup> Besides treaty primacy in concrete cases, local supreme tribunals or governors now may seek the invalidation of norms enacted by their own state's Congress that possibly contradict constitutional treaties.

The Supreme Court also is able to resolve constitutional controversies between "[t]he Federation and one State or the Federal District,"<sup>190</sup> and between "[t]he Federation and one Municipality."<sup>191</sup> Controversies about the constitutionality of international agreements concluded by state or municipal agencies may fall within these grants.<sup>192</sup> Although the Supreme Court apparently has no power to invalidate such agreements,<sup>193</sup> the issue is not crucial as a matter of domestic law. After all, unlike treaties, the Mexican legal order does not incorporate inter-institutional agreements.

Moreover, if state or municipal agreements encroaching on the federal domain simultaneously encroach upon constitutional guarantees, the affected individuals have *amparo* standing against the agreements.<sup>194</sup> The same is true of federal agreements encroaching on the local spheres of government.<sup>195</sup> This is not because inter-institutional agreements have domestic normative status. Rather, should the execution of such agreements produce injuries to an individual's constitutional guarantees, the courts can adjudicate them as acts of authority.<sup>196</sup>

#### 4. Standing and Right of Petition

Mexico's highest court has the power to designate justices, magistrates, judges, or special commissioners for the exclusive purpose of investigating "facts constituting the serious violation of an individual guarantee."<sup>197</sup> Obvious as the connections to human rights treaties are, the Supreme Court has been emphatic that this power is different in scope and purpose from the writ of *amparo*.<sup>198</sup> In one exceptionally rare inquiry, the Court spelled out the applicable criteria, including "a state of alarm extending

189. See *id.* art. 105, § I(h).

190. See *id.* art. 105, § I(a).

191. See *id.* art. 105, § I(b).

192. See *supra* text accompanying notes 26-27, 36-37.

193. See MEX. CONST. art. 105, § I, *as amended*.

194. See *id.* art. 103, § III; Ley de Amparo, art. 1, § III.

195. See MEX. CONST. art. 103, § II; Ley de Amparo, art. 1, § II.

196. For judicial criteria about who has authority and what is an act of authority for *amparo* purposes, see ROMERO & PIMENTEL, *supra* note 67, at 4-32.

197. See MEX. CONST. art. 97.

198. See *Acuerdo del Tribunal Pleno*, Exp. 3/96, *supra* note 135, at 36-45.

into time," "generalized violations . . . in a place, State, or region," and the inability "to control them, in a reasonable time."<sup>199</sup>

In these situations, the Supreme Court has the power to act on its own initiative.<sup>200</sup> But only the Federal Executive, each chamber of the national Congress, and state governors have constitutional standing to request the Court to do so.<sup>201</sup>

Private parties may urge the exercise of this power on the ground that human rights treaties are at stake. Unlike the writ of *amparo*, in which private parties have standing, such requests fall within the constitutional right of petition.<sup>202</sup> Under Mexican law, the right of petition essentially commands the addressed authority to answer promptly in writing respectful, peaceful, written requests.<sup>203</sup> Beyond that, Mexican jurisprudence affirms that the right of petition alone does not command the authority to give a reply granting the request.<sup>204</sup>

### B. Possible Adjustments

According to José Luis Soberanes Fernández, "the most controverted feature of [constitutional challenges] is the restricted number of persons with standing to bring [them]."<sup>205</sup> In the words of Soberanes, the Attorney General's standing to challenge treaties "is somewhat awkward because international treaties are concluded by the President . . . who is the hierarchical superior of the Attorney, hence one can hardly understand how the subordinate challenges the acts of his superior."<sup>206</sup>

In claims of unconstitutionality and in constitutional controversies, amendments making express the implied standing to raise the incompatibility of domestic norms with supreme treaties seem unlikely today. These actions and controversies represent exceptional developments in progress. Whether their potential will be fully realized in practice remains to be seen. Eventually, however, some possible adjustments will merit deliberation: whether to grant individuals, bar associations, and other private parties standing to raise constitutional challenges;<sup>207</sup> whether to grant Mexico's National Human Rights

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199. See *id.* at 40-43.

200. See MEX. CONST. art. 97.

201. See *id.*

202. See CARPIZO, *supra* note 23, at 210.

203. See MEX. CONST. art. 8.

204. See RODRÍGUEZ Y RODRÍGUEZ, *supra* note 105, at 61.

205. See Soberanes, *supra* note 98, at 27.

206. See *id.*

207. See FIX-ZAMUDIO, *supra* note 34, at 351 (noting the Colombian and Venezuelan "popular challenges to constitutionality" grant such standing to individuals).



Commission standing to raise the possible contradiction between general norms and international treaties;<sup>208</sup> and whether specific organs other than the plaintiff, the defendant, and the Attorney General should participate in raising contradictions between treaties and the Constitution, and between laws and treaties.<sup>209</sup>

The Mexican Supreme Court's power to investigate serious human rights violations could become the subject of regulatory legislation.<sup>210</sup> Today, absent such regulatory norms, the effects of the Court's findings are deemed as influential, but not as binding.<sup>211</sup> Eventually, regulatory legislation could specify whether and to what extent the findings should bind other government organs and branches. It could also specify the Court's power to consider human rights treaties in its inquiries and to hear evidence on this subject. Ideally, the National Human Rights Commission should have constitutional standing before the Court.

For individuals and other private parties, the writ of *amparo* remains, nevertheless, the paramount remedy in the Mexican constitutional system. It seems worthwhile to make express their implied *amparo* standing against norms or acts that violate supreme human rights treaties. While not every internationally-recognized human right is susceptible to adjudication, many are. Moreover, while many internationally recognized human rights that are susceptible to adjudication parallel the Mexican constitutional guarantees, this is not always the case. The matter warrants careful study.

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208. See Ley de la C.N.D.H., art. 6, § VIII (Commission's power to propose actions for "better protection of human rights"); *id.* § XIII (Commission's power to propose actions "advancing the fulfillment within the national territory of treaties, conventions and agreements signed and ratified by Mexico in the human rights field").

209. See, e.g., Ley Orgánica de la Administración Pública Federal, art. 28(1), D.O., Dec. 29, 1976, amended by D.O., Dec. 28, 1994 (intervention of Ministry of Foreign Affairs "in all sorts of treaties, agreements and conventions," by advising and coordinating federal agencies in this regard); Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución, art. 10 (giving the status of "interested third parties" in constitutional controversies to certain entities, powers, or organs that, "without having the character of plaintiffs or defendants, could be affected by the judgment").

210. See CARPZO, *supra* note 23, at 199-217.

211. See *id.* at 213-16.

## VI. ENSURING ASSISTANCE TO MEXICAN COURTS IN THE APPLICATION OF INTERNATIONAL LAW

Because duly-concluded treaties are part of Mexican law, their existence, content, and incorporation are not subject to proof before Mexican courts. Once a treaty gains domestic force, only the treaty's interpretation or applicability to the matter before the court is susceptible to controversy, provided the treaty conforms to the Constitution.

In contrast, like foreign norms, usage or custom that generates law is subject to dispute by the interested parties.<sup>212</sup> Occasionally the courts have held that "[t]he law is subject to proof when it consists of the jurisprudence of tribunals" and that the burden of proof corresponds to the party "that asserts it and invokes it."<sup>213</sup> Parties invoking international sources other than treaties should adequately document them, for the domestic effects of such sources are particularly prone to dispute.

Amicus curiae briefs are foreign to Mexican law and practice. Despite their utility in international legal questions, apprehensions of politicizing the judicial process might hinder their eventual introduction into the Mexican judicial system. Other ways of assisting Mexican courts in the application of international law include dissemination, rules of evidence, and domestic codification.

### A. Dissemination

The foremost way of assisting national judges in the application of international law is by making the sources of international law directly available to them. Public agencies, international organizations, and academic institutions all continue to engage in this process.

As in other countries, there is an official, annual collection of treaties and agreements in Mexico.<sup>214</sup> The Ministry of Foreign Affairs publishes an annual index including the date of domestic publication, status of ratifications, reservations and declarations, objections, and inter-institutional agreements.<sup>215</sup> Ideally, all Mexican tribunals should have immediate access to the texts and updated index. Also, the Ministry of Foreign Affairs provides

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212. See C.F.P.C. art. 86.

213. 109 S.J.F. at 286 (5a época).

214. TRATADOS RATIFICADOS Y CONVENIOS EJECUTIVOS CELEBRADOS POR MEXICO (for treaties before 1992); TRATADOS CELEBRADOS POR MEXICO (for treaties after 1992).

215. MÉXICO: RELACIÓN DE TRATADOS EN VIGOR.

public information services about the status of treaties. Every federal court and local tribunal should be aware of these services.

In the Organization of American States (hereinafter OAS), one Resolution of the General Assembly instructs the Permanent Council,

through its Working Group on Enhancement of the Administration of Justice . . . and in conjunction with the Inter-American Juridical Committee, to take the necessary steps to increase awareness and disseminate information in the member states concerning the international rules of law emanating from the inter-American system and, in particular, from the instruments for which the OAS General Secretariat is depositary.<sup>216</sup>

In addition to the works in progress to further disseminate inter-American judicial sources by electronic means, specialized seminars are available at the request of interested Member States.<sup>217</sup> As for inter-American human rights case law, repertories are either in progress<sup>218</sup> or already available.<sup>219</sup> Similar plans for the dissemination of U.N.-sponsored law could significantly assist national judges in the application of international law.<sup>220</sup>

### B. Rules of Evidence

In civil matters, Mexican courts apply foreign law as judges in the country of origin would, but the parties can dispute the existence and content of that law.<sup>221</sup> Consequently, Mexican judges have broad authority to order or admit such proof as they deem necessary to establish the text, force, sense, and scope of

216. See *Enhancement of the Administration of Justice in the Americas*, OAS GAOR, AG/RES. 1325 (XXV-0/95), June 9, 1995, "Resolves" para. 2.

217. See *Support for the Administration of Justice in the Americas*, OAS GAOR, AG/RES. 1326 (XXV-0/95), June 9, 1995.

218. See CENTRO DE DERECHOS HUMANOS Y DERECHO INTERNACIONAL HUMANITARIO, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, PROYECTO PARA LA CREACIÓN DE UN REPERTORIO DE JURISPRUDENCIA DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS. BORRADOR PRELIMINAR. JURISPRUDENCIA CONTENCIOSA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 1980-1995 (1997).

219. See M.E. VENTURA ROBLES ET AL., SISTEMATIZACION DE LA JURISPRUDENCIA CONTENCIOSA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1981-1991 (1996).

220. For information on the promotion of related U.N. law and U.N. programs in the field of criminal justice, see, e.g., *United Nations Standards and Norms in Crime Prevention and Criminal Justice*, U.N. ESCOR, 45th plen. mtg., Res. 1996/16 (1996); *Administration of Juvenile Justice*, U.N. ESCOR, 45th plen. mtg., Res. 1996/13 (1996); *International Cooperation and Assistance in the Management of the Criminal Justice System*, U.N. ESCOR, 45th plen. mtg., Res. 1996/11 (1996).

221. See C.F.P.C., art. 86.

foreign law.<sup>222</sup> Means of assistance include special Foreign Service reports.<sup>223</sup>

Analogous rules might be useful regarding the existence, sense, force, and scope of rules of international law other than treaties in force in Mexico. Analogous rules might be equally useful to show how foreign courts, multilateral organs, or international tribunals have applied and interpreted the treaty before the court. Thomas Buergenthal states one critical angle of the issue in the following terms:

Today it is much more likely than in the past for the decisions of national courts to be quite regularly subject to the scrutiny of international tribunals. And while it is true that these tribunals do not ordinarily have jurisdiction to set aside or annul the decisions of national courts, they may result in a finding that the national courts erred in their interpretation of the state's international obligations and that, therefore, the state must find a way to rectify the situation. Decisions of international tribunals receive increasing public attention, moreover, particularly in cases involving human rights issues. The national legal and political establishment (judges, lawyers, legislators and officials of the executive branch) are thus becoming more sensitized to the notion that national law and national courts no longer have the last word in determining various issues arising in domestic litigation. With this realization comes the recognition (sooner in some countries than others) that lawyers and judges need to take decisions of international tribunals into account in the domestic adjudicative processes.<sup>224</sup>

Notwithstanding this suggestion, the Judicial branch is not and should not be bound to necessarily take any executive organ's views or reports on such sources as its own. The Constitution gives final authority to the federal judiciary in this regard. Nor, unlike cases involving foreign law, are Mexican courts bound to apply treaties and international law as foreign tribunals or international bodies would. These bodies and tribunals may provide authoritative interpretations of treaties as a matter of international law; however, they are not authorized to interpret treaties within the framework of domestic law.<sup>225</sup>

Functional as it is to provide the courts with such information, the interpretation of international norms as a matter of Mexican law falls within the exclusive expertise and domain of national courts. In Mexico, rules on the gathering and

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222. *See id.*

223. *See id.*

224. BUERGENTHAL, *supra* note 65, at 2.

225. *See, e.g.,* Certain Attributes of the Inter-American Commission on Human Rights (arts. 41, 42, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93, Inter-Am. C.H.R. 13 (Ser. A), ¶ 57(1) (July 15, 1993).

consideration of such sources as persuasive evidence seem more likely to gain gradual acceptance and, therefore, are more adequate to assist the courts.

### C. Codification

Like the constitutional principles governing the President's foreign policy, the framing of different Mexican statutes closely follows international law. In applying these statutes, Mexican courts need not determine to which rules open references to "international law" would allude. For judicial purposes, the statute parallels or gives meaningful domestic content to international norms and standards, thus preventing the problems of determination and proof.

The LPTI follows this approach.<sup>226</sup> So do, to a different extent, the Federal Code of Civil Procedure's "International Procedural Cooperation" Chapter<sup>227</sup> and the Extradition Act,<sup>228</sup> deferring to pertinent treaties and conventions where possible.<sup>229</sup>

226. Article 1 of the LPTI proscribes individuals and private or public corporations "within national territory, whose acts take place or wholly or partially produce effects in that territory, or those subject to Mexican laws, [from performing] acts affecting trade or investment, when such acts result of the extraterritorial effects of foreign laws." *Ley de Protección al Comercio y la Inversión*, art. 1.

By foreign laws with extraterritorial effects, Article 2 of the LPTI refers to those with any of the following purposes: (a) "to impose an economic blockade or even limit investment toward a country to provoke the change of its form of government"; (b) "to allow claims of payment to private parties because of expropriations performed in the country to which the blockade is applied"; and (c) "to restrict the entrance into the country enacting the law as one mean to achieve the preceding objectives." *Id.* art. 2.

*Compare, e.g., with* OAS Charter, OEA/Ser.A/2, 1-F O.A.S.T.S., *amended by* the Protocols of Buenos Aires, Feb. 27, 1967, *and by* the Protocol of Cartagena de Indias, Dec. 5, 1985, art. 15 ("The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants"), *and id.* art. 19 ("No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind"), *and id.* art. 35 ("Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties."); *see also* Opinion of the Inter-American Juridical Committee on Resolution AG/Doc.3375/96, Freedom of Trade in the Hemisphere, OEA/Ser.G, CP/doc.2803/96 (Aug. 27, 1996) [hereinafter Opinion of the Inter-American Juridical Committee on Freedom of Trade in the Hemisphere]; OEA/Ser.G, CP/doc. 2859/97 at 39, 45 (Feb. 13, 1997) (concluding in "significant areas . . . the bases and potential application of the [Helms-Burton Act] are not in conformity with international law").

227. *See* C.F.P.C., arts. 543-77. *Compare, e.g., id.*, art. 551 ("[International] letters rogatory may be transmitted to the requested organ by the interested parties, by judicial channel, through consular officials or diplomatic agents, or by the competent authority of the requested or requesting State, as the case may

These statutes were specifically conceived to operate in harmony with international standards and undertakings, providing substantial legislative guidance to the courts. Eventually, the experience gained through their frameworks could provide a useful background for a uniform code or manual on procedural rules governing the judicial application of international law.

## VII. THE EDUCATION OF MEXICAN JUDGES IN INTERNATIONAL LAW

The establishment of Councils of the Federal Bench, the purpose of which includes developing the judicial profession, is one basic ingredient of Mexico's administration of justice reform.<sup>230</sup> One branch of the Council of the Federal Bench is an institute required to instruct and update judges in matters related

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be"), and *id.* art. 552 ("foreign letters rogatory transmitted through official channels shall not require legalization."), with Inter-American Convention on Letters Rogatory, *supra* note 61, art. 4 (essentially same text as Article 551), and *id.* art. 6 ("Whenever letters rogatory are transmitted through consular or diplomatic channels or through the Central Authority, legalization shall not be required").

228. See Ley de Extradición, arts. 8-14. Compare, e.g., *id.*, art. 10, § V (requiring, for extradition purposes, assurances of the requesting State "that, if the crime imputed to the requested person is punishable in its legislation with capital punishment or any of the punishments constitutional article 22 refers to ['mutilation, marking, flagellations, beatings, torture of any kind . . . and any other unusual and extreme punishments'], only prison shall be imposed"), with Inter-American Convention on Extradition, Feb. 25, 1981, 60 O.A.S.T.S., art. 9 (requiring the same assurances under the same circumstances, adding the possibility of assurances that, should capital punishment be imposed, it will not be executed), and United States-Mexico Extradition Treaty, May 4, 1978, U.S.-Mex., T.I.A.S. No. 9656, art. 8 (requiring the same assurances regarding the imposition or execution of capital punishment). For a discussion of capital punishment, extradition and international human rights law, see also Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

229. See, e.g., C.F.P.C., art. 543 (general rules); *id.* art. 549 (international letters rogatory); *id.* art. 560 (gathering of evidence abroad by consular or diplomatic agents); Ley de Extradición, art. 3 (extraditions requested by the Mexican government); *id.* art. 12 (preference to extraditions requested to Mexico under international treaties, in case of simultaneous requests); *id.* art. 25 (admissibility of defenses on treaty-based grounds).

230. See MEX. CONST. arts. 100, amended by D.O., Dec. 31, 1994; *id.* § 122(A), Base Cuarta § II, amended by D.O., Aug. 22, 1996; Ley Orgánica del Poder Judicial arts. 68-84; Acuerdo Número 1/1995 del Pleno del Consejo de la Judicatura Federal, D.O., Feb. 20, 1995. For comparative background on this subject, see generally HECTOR FIX-ZAMUDIO, LOS PROBLEMAS CONTEMPORÁNEOS DEL PODER JUDICIAL 30-40 (1986).

to their functions.<sup>231</sup> Beneficiaries also include representatives of the different levels of the bench and public counsel.<sup>232</sup>

Naturally, the Councils of the Federal Bench present exceptional opportunities for judge-oriented international law programs. In this and other regards, the Institute of the Federal Bench is available to assist interested local judiciaries and may seek the support of Mexican universities.<sup>233</sup>

A parallel development is the unprecedented international attention to national judicial systems and the domestic administration of justice. One regional commitment is advancing the equal and effective access to justice. This commitment was reflected in the First Summit of the Americas held in Miami in 1994.<sup>234</sup> Today nearly every OAS organ has either mandates, services, or suggestions in respect to the administration of justice and related subjects.<sup>235</sup>

National instructors represent one ideal way for educating the officers of interested organizations about different legal and judicial systems. Similarly, the instruction and updating of national judges in international law are areas of possible convergence, with due respect for judicial independence and non-intervention.

Just as states are sovereign to organize their courts, it is exclusively for each Council of the Federal Bench to develop its

231. See *Ley Orgánica del Poder Judicial*, arts. 92-7.

232. See *id.*, arts. 90 & 95.

233. See *id.*, art. 92.

234. See *Summit of the Americas: Declaration of Principles and Plan of Action*, Dec. 11, 1994, 34 I.L.M. 808 (1995).

235. See *Enhancement of the Administration of Justice in the Americas*, *supra* note 216; *Support for the Administration of Justice in the Americas*, *supra* note 217 (promotional activities with participation of the General Secretariat, Permanent Council, Inter-American Juridical Committee); *Improvement of the Administration of Justice in the Americas, Protection and Guarantees for Judges and Lawyers in the Exercise of their Functions*, CJI/RES.II.19/94 (Aug. 25, 1994) (Inter-American Juridical Committee's recommendations to the Permanent Council about dissemination of U.N. Principles of judicial independence and problems that could threaten it); *General Policy Framework and Priorities: Partnership for Development*, AG/RES. 1, OAS GAOR (XX-E/94) § III.b (Feb. 18, 1994) (General Assembly's determination of priorities of the new Inter-American Council for Integral Development, including "strengthening of public and judicial administration").

See also American Convention on Human Rights, *supra* note 73, art. 41, ¶ e (Inter-American Human Rights Commission's advisory services); *id.* art. 64 (Inter-American Human Rights Court's consultative services); *A New Vision of the OAS, Working Paper of the General Secretariat for the Permanent Council* 14 (1995) (Secretary General's suggestion of "advisory services for revamping judicial and legal systems to improve the effectiveness of existing institutions of justice, depending on the interests of the individual States"); Office of the OAS Secretary General, *The Law in a New Inter-American Order*, OEA/Ser.G, CP/doc.2744/96, §§ 3.1, 3.6, 4.1-2 (2d ed. 1996) (related Secretary General's suggestions).

instructional programs according to its own priorities. Interested Councils are nonetheless free to request, through appropriate channels, such support as they deem appropriate. For example, inter-American materials of interest for national judicial programs include:

- Inter-American conventions on private international law, extradition, corruption, judicial assistance, and execution of penal sentences abroad;<sup>236</sup>
- Inter-American human rights instruments, reports, judgements, and opinions;<sup>237</sup>
- Inter-American documents on judicial independence and protection and guarantees for judges and lawyers in the exercise of their functions;<sup>238</sup> and
- Inter-American reports and opinions on free trade, coercive measures, and commercial dispute-settlement.<sup>239</sup>

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236. See, e.g., Inter-American Convention Against Corruption, OAS GOAR, Mar. 29, 1996, OEA/Ser.K/XXXIV.1, CICOR/doc.14/96 rev.2; Inter-American Convention for the Execution of Penal Sentences Abroad, OAS GAOR, June 9, 1993, AG/RES. 1205 (XXIII-0/93); Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, O.A.S.T.S. 56, D.O., Apr. 28, 1983; Inter-American Convention on Extradition, *supra* note 228; Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, *supra* note 127; Inter-American Convention to Prevent and Punish Torture, *supra* note 74, arts. 11-15 (extradition norms); Inter-American Convention on Letters Rogatory, *supra* note 61; Inter-American Convention on the Law Applicable to International Contracts, *supra* note 58; Inter-American Convention on International Commercial Arbitration, *supra* note 39; Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, *supra* note 39. For an official catalog of OAS-sponsored treaties, see, e.g., 9 O.A.S.T.S. Rev. 1993, *supra* note 127.

237. See, e.g., BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/II.92, doc. 31 rev. 3 [Updated to May 1996]; 1968 INTER. AM. Y.B. HUM. RTS.; 1969-70 INTER. AM. Y.B. HUM. RTS.; 1985 INTER. AM. Y.B. HUM. RTS.; 1992 INTER. AM. Y.B. HUM. RTS.; ROBLES ET AL., *supra* note 219.

238. See, e.g., J.T. Fried, *Report on Improvement of the Administration of Justice in the Americas: Protection and Guarantees for Judges and Lawyers in the Exercise of their Functions*, annex to CJI/RES.II.19/94; Inter-Am. C.H.R., *Measures Necessary to Enhance the Autonomy, Independence and Integrity of the Members of the Judicial Branch*, 1992 INTER-AM. Y.B. HUM. RTS. 990, reprinted in CJI RES.II.19/94, *id.* at 105; see also Basic Principles on the Independence of the Judiciary, adopted by the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug.-Sep. 1985, reprinted in CJI RES.II.19/94, *id.*, at 95.

239. See, e.g., "Juridical Dimension of Integration and International Trade," CJI/RES.I-1/95 (Mar. 15, 1995), OEA/Ser.G, CF/doc.2711/96 (Feb. 27, 1996), at 15-17; J.L. Siqueiros, *La Solución de Controversias en el Marco del TNLC o NAFTA*, CJI/SO.I/doc.2/94 (Dec. 21, 1994); J.L. Siqueiros, *Régimen de Solución de Controversias en la Asociación Latinoamericana de Integración (ALADI)*, CJI/SO.II/doc.21/94 (Aug. 2, 1994); Opinion of the Inter-American Juridical Committee on Freedom of Trade in the Hemisphere, *supra* note 226; *Dictamen del Comité Jurídico Interamericano sobre "Medidas Coercitivas de Carácter Económico,"*



Moreover, different court systems could benefit from treaty series selected according to the specific functions of the court systems. Family judges have an interest in treaties on children's rights, conflicts of adoption laws, traffic of minors, alimony, and violence against women.<sup>240</sup> Double imposition agreements relate to the functions of taxation tribunals,<sup>241</sup> as do the International Labor Organization conventions to those of labor tribunals.<sup>242</sup> Depending on the requirements of each interested court system, another area suitable for national or international cooperation is selecting and making accessible specific subject-matter sources for judges.

It is through national law that international law attains concrete judicial meaning. Instructional cooperation seems equally essential regarding comparative experiences on the judicial consideration of international law.

### VIII. CONCLUSION

Mexico's contributions to contemporary international law include, to recall two paramount examples, the prompt and effective remedy that human rights instruments gleaned from the Mexican writ of *amparo*<sup>243</sup> and Mexico's support of the first

CJI/RES.I-04/1987, reprinted in COMITÉ JURÍDICO INTERAMERICANO, INFORMES Y RECOMENDACIONES 1987, Vol. XIX, at 6 (1988).

240. See, e.g., Inter-American Convention on Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 (1994); Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/44/25, reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 86, at 182; Inter-American Convention on Support Obligations, July 15, 1989, 71 O.A.S.T.S.; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 14, 1988, art. 16, 28 I.L.M. 156 (1989) ("Rights of Children"); Convention on International Traffic in Minors, *supra* note 128; Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, *supra* note 59.

241. See, e.g., Agreement for the Avoidance of Double Taxation, Nov. 7, 1992, Mex.-Swed., D.O., Feb. 10, 1993; Agreement for the Avoidance of Double Taxation, Nov. 7, 1991, Mex.-Fr., D.O., Mar. 16, 1993; Agreement for the Avoidance of Double Taxation on the Operation of Vessels, Oct. 18, 1984, Mex.-Neth., 1434 U.N.T.S. 24308, D.O., Aug. 21, 1986.

242. For reprints of selected International Labor Organization instruments, see, e.g., BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 86, at 243-316.

243. See American Convention on Human Rights, *supra* note 73, art. 25 ("Judicial protection"); *American Declaration of the Rights and Duties of Man*, adopted by the Ninth International Conference of American States, Bogota, 1948, OEA/Ser.L.V/II.92, doc. 31, rev. 3, art. XVIII (May 3, 1996) ("Right to a fair trial"); Germán Fernández del Castillo, *La Declaración Americana de Derechos y Deberes del Hombre*, in MÉXICO EN LA IX CONFERENCIA INTERNACIONAL AMERICANA 133, 149-50 (1948); Conferencia Especializada Interamericana sobre Derechos

populated nuclear weapons-free zone in the world.<sup>244</sup> More importantly, in Mexico the struggle for international peace—inseparable from justice, respect for international obligations, and the rule of law<sup>245</sup>—enjoys constitutional rank.<sup>246</sup>

If used to its full advantage, current Mexican law provides plentiful means for making international undertakings effective before domestic courts and tribunals of justice. The harmonization between national and international law will surely continue, consistent with Mexico's foreign policy tradition and with its administration of justice reform.

Continuing programs to increase awareness about the domestic incorporation and uses of international law should include not only judges and judicial officers, but also district attorneys, legislators, and the Mexican bar. The role of state courts, interpretive standards, and the integration of constitutional and treaty-based rights are suitable for progressive refinements. The same is true for the standing to raise, and provide evidence of, international law claims before Mexican courts.

National systems that do not expressly accord constitutional rank at least to selected international instruments now run behind in comparative incorporation trends.<sup>247</sup> As far as granting treaties the same status as federal laws, it is essential not to lose sight of one original purpose of constitutional supremacy: to ensure domestic compliance with international undertakings within the limits of fundamental rights, the rule of law, and national public policy. Contemporary international law, namely international human rights law, incrementally fosters these same values.

Long-standing case law shows that, unless manifest transgressions of the constitutional order appear, Mexican courts and tribunals are able to carry out international treaties and that

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Humanos, San José, Costa Rica 7-22 de Noviembre de 1969, Actas y Documentos, OEA/Ser.K/XVI/1.2, at 261-63 (1979).

244. See Organismo para la Proscripción de las Armas Nucleares en la América Latina y el Caribe, *El Tratado de Tlatelolco (1967-1987)* 19 (1987).

245. See U.N. CHARTER preamble; Universal Declaration of Human Rights, U.N. GAOR, 3d Sess., 183d mtg., G.A. Res. 217.

246. See MEX. CONST. art. 89, § X; *supra* text accompanying notes 7-9.

247. See Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, in *ESSAYS IN HONOR OF LOUIS HENKIN 2* (1997); accord Fix-Zamudio, *supra* note 112; Carlos M. Ayala Corao, *La Jerarquía de los Tratados de Derechos Humanos*, in *THE INTER-AMERICAN SYSTEM FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS 14* (Seminar, Dec. 2-4, 1996).

Mexican judges do not confront a "non-self-executing" policy deterring the direct application of treaties in force in the land.<sup>248</sup>

These facts, though, do not obscure the advantages of making express the implied constitutional status of treaties advancing human rights and fundamental freedoms: progressive judicial protection, more juridical certainty, and the prevention of constitutional and international disputes. Another vital result would consist of the reaffirmation that minimum rights are subject to successive expansion, but not to regression or withdrawal.

Because the American Human Rights Convention and the U.N. covenants establish international jurisdictions, their integral constitutionalization could involve complex judicial and political problems.<sup>249</sup> With few exceptions, similar obstacles do not surface regarding the possible constitutionalization of the Convention's and the covenants' parts on rights and basic State obligations.<sup>250</sup>

The American and Universal Declarations on the subject do not establish international mechanisms and set forth in equal plane first- and second-generation rights.<sup>251</sup> Lacking the specificity of treaties, yet endowed with an evolving normative content, they are less prone to conflict with the domestic order, but suitable to gradually influence it.<sup>252</sup> To command constitutional interpretation in their light could indirectly achieve

248. On the constitutionality of U.S. RUDs with such purposes, see Buergenthal, *supra* note 247, at 11-14.

249. See American Convention on Human Rights, *supra* note 73, pt. II ("Means of Protection") ch. VII (Inter-American Commission on Human Rights); *id.* ch. VIII (Inter-American Court of Human Rights); International Covenant on Civil and Political Rights, *supra* note 86, pt. IV (Human Rights Committee); see also Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., 1496th mtg. (1966). Mexico has not yet recognized the compulsory jurisdiction of the Inter-American Human Rights Court, and is not yet party to the U.N. Optional Protocol. See *supra* note 38.

250. See American Convention on Human Rights, *supra* note 73, pt. I ("State Obligations and Rights Protected"); International Covenant on Civil and Political Rights, *supra* note 86, pts. I-III; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., 1496th mtg. (1966). For a discussion of whether Mexican REDs to these instruments should be withdrawn because of supervening or other circumstances, see RODRÍGUEZ Y RODRÍGUEZ, *supra* note 163, at 54-81.

251. See American Declaration of Rights and Duties of Man, arts. I-XXVIII; Universal Declaration of Human Rights, *supra* note 245.

252. On the normative status of these instruments, see, e.g., Thomas Buergenthal, *La Relación Conceptual y Normativa Entre la Declaración Americana y la Convención Americana sobre Derechos Humanos*, 111 REVISTA IIDH 114 (1989); PEDRO NIKKEN, *LA PROTECCION INTERNACIONAL DE LOS DERECHOS HUMANOS: SU DESARROLLO PROGRESIVO* 284-308 (1987).

analogous results as achieved by granting constitutional rank to human rights treaties.<sup>253</sup>

Emerging case law strongly suggests that the Mexican judiciary might be receptive to this interpretive approach. In a landmark 1997 opinion, the Supreme Court of Mexico affirmed that a state law proscribing more than one labor union in each local governmental agency violates the Constitution.<sup>254</sup> Although the Supreme Court relied on ILO Convention 87, it did not directly apply the principle of the supremacy of treaties over state laws.<sup>255</sup> Instead, the Court invoked the Convention as evidence

that the spirit underlying [A]rticle 123 . . . has been to proclaim the freedom of labor association in a fully universal sense, grounded in the individual association right of each worker and recognizing a collective right once the union gets existence and reality of its own, principle that . . . is respected in the aforementioned Convention.<sup>256</sup>

In consonance with the ILO Convention, the Supreme Court found that the constitutional freedom of labor association encompasses: "1) [a] positive aspect, which leads to the attribution of the worker to join a union that has been already established or to establish new unions; 2) [a] negative aspect, which implies the possibility of not joining any union at all; and] 3) [t]he liberty to secede or to withdraw from the association."<sup>257</sup> By using the Convention as an interpretive aid, the Court treated it as enjoying constitutional rank without expressly declaring so.

In any event, supreme normative hierarchy does not necessarily entail exclusive, centralized federal jurisdiction over every matter that becomes the subject of treaties. Without prejudice to the executive, legislative, or judicial powers of the national government, treaties on different subject-matters increasingly entail, on the contrary, positive measures within each constituent unit. Far from having disruptive effects, interpretive provisions as described above could invigorate the

253. See SPAN. CONST. art. 10(2); PORT. CONST. art. 16(2).

254. See "Sindicación Unica. El Artículo 76 de la Ley para los Servidores Públicos del Estado de Jalisco y sus Municipios, Viola la Libertad Sindical Consagrada en el Artículo 123 Constitucional, Apartado 'B,' Fracción X," 5 S.J.F. 117-18 (9a época 1997).

255. See Freedom of Association and Protection of the Right to Organize Convention, July 9, 1948, D.O., Oct. 10, 1950; Amparo en Revisión 337/94, Sindicato de Trabajadores del Personal Académico de la Universidad de Guadalajara, 21 Mayo 1996, 5 S.J.F. 145-48 (9a época 1997).

256. See *id.* at 147-48; MEX. CONST. art. 123, § B(X) ("[Public] workers shall have the right of association for the defense of their common interests").

257. See Tesis 1/1997, *supra* note 254; Amparo en Revisión 337/94, *supra* note 255, at 148; Freedom of Association and Protection of the Right to Organize Convention, *supra* note 255, art. 2.

judicial consideration of international undertakings throughout the Republic, in harmony with the Mexican federal system.