



## TRANSITIONAL JUSTICE, HUMAN RIGHTS AND THE RESTORATION OF CREDIBILITY: RECONSTRUCTING MEXICO'S SOCIAL FABRIC

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*ABSTRACT. Mexico is entering a phase of transitional justice. This can be observed in the numerous reforms and measures that are being taken to adapt the legal system to international standards, particularly those related to human rights and criminal justice. Some examples show an increased tendency to adhere to and enforce the rule of law and human rights; to recognize the official truth of authorized misconduct that took place in the past; to punish perpetrators, and above all, to ensure victims' rights to truth and reparation. If these tendencies continue, it could potentially lead to the restoration of public trust in the authorities and pave the way for reconciliation between society and the State. While many experiences of traditional transitional justice have taken place in post-authoritarian contexts, the convergence of the main elements used in those traditional cases lead us to suggest that these models could also apply to societies in transition, not from a particular form of government to another, but from a developing democracy into a law-abiding society. In this sense, a bottom-up approach that aims at attaining truth, reform and change will be necessary to break a cycle of impunity and develop social and government institutions that respect and enforce the rule of law and human rights.*

**KEY WORDS:** *Transitional justice, human rights, international law, victims' rights, rule of law.*

**RESUMEN.** México está comenzando a atravesar por una fase de facto de justicia transicional. Un matiz de ello puede observarse en las numerosas reformas y medidas que están siendo tomadas para adaptar el marco legal, y en particular aquellas áreas relativas a los derechos humanos y a la justicia penal, a los estándares internacionales. Algunos ejemplos en las esferas del sistema judicial y de las instituciones públicas de derechos humanos muestran una tendencia ascendente a adherirse e implementar el Estado de derecho y los derechos humanos; a reconocer una verdad oficial respecto a conductas inapropiadas, autorizadas

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*por el gobierno, que tuvieron lugar en el pasado; a castigar a los infractores de la ley y, sobre todo, a garantizar los derechos de las víctimas a la verdad y a la reparación del daño. La continuidad de estas tendencias podría conducir al restablecimiento de la confianza pública en las autoridades, y mostrar el camino hacia la reconciliación de la sociedad con el Estado. Mientras muchas de las experiencias tradicionales de justicia transicional han tenido lugar en contextos pos-autoritarios, la convergencia de los principales elementos que han sido utilizados en esos casos tradicionales nos llevan a considerar la idea de que dichos esquemas también podrían ser aplicables a sociedades en transición, no de una forma de gobierno a otro, sino de una democracia en desarrollo hacia una sociedad respetuosa de la ley. En este sentido, un enfoque que busque alcanzar la verdad, reformas y cambios será necesario para romper el ciclo de impunidad y desarrollar instituciones sociales y oficiales que respeten y garanticen la prevalencia del Estado de derecho y los derechos humanos.*

PALABRAS CLAVE: *Justicia transicional, derechos humanos, derecho internacional, derechos de las víctimas, Estado de derecho.*

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#### I. INTRODUCTION

Recent Mexican history, and in particular during the 2006-2012 presidential term of Felipe Calderón Hinojosa, could give the impression that the country—despite its relatively good economic condition—is either a failed State or about to become one.<sup>1</sup> There is a situation in which authorities and official institutions have been immersed in corruption scandals, rampant impunity

<sup>1</sup> Fletcher, Weinstein and Rowen argue that an effective government has three basic functions to perform: ensuring basic security (both against external and internal threats); meeting the basic needs of its citizens; and maintaining legitimacy (which requires that governmental structures are transparent, accessible and accountable). In the case of Mexico, there seem to be serious deficits in the effectiveness of its government, which would qualify it as a “weak”

has become widespread around the country and violence has escalated over the past seven years as a result of the “war on drugs” undertaken by President Calderón. This has led to a public outcry of disbelief in the system and even more recently to the formation of vigilante groups in some states.

There have also been an important number of cases in which human rights abuses against detainees—who have been captured in shootouts with the police, the Army or the Navy and who are probably involved in drug-related or other criminal activities—have led them to be set free. This in turn has led the population to question the role of human rights in the country. Claims have been filed on behalf of the victims of the war on drugs, asserting that many civilians have died because of the military anti-drug strategy mandated by the President and that even innocent people have been murdered by the authorities as a result of “being mistaken” for criminals.

Although it is still early to issue a verdict on Calderón’s presidential term<sup>2</sup>—the “truth” on the results of his military strategy is still coming out—<sup>3</sup> this situation leads us to believe that it is necessary to implement a different strategy that could very well adopt the ideals and prospects of transitional justice, and ultimately embrace the standards of international human rights law to

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State. Laurel E. Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 197 (2009).

<sup>2</sup> In late 2011, a petition was filed before the International Criminal Court by a group of activists who demanded that the Prosecutor open an investigation of top Mexican officials, including President Felipe Calderón, as well as drug lords like Joaquín Guzmán Loera, known as “El Chapo.” However, as of the time of writing, no information has been released on whether the Prosecutor intends to pursue this case. Sara Webb and Manuel Rueda, *Mexican Group Asks ICC to Probe President, Officials*, REUTERS, November 25, 2011, available at <http://www.reuters.com/article/2011/11/26/us-mexico-icc-idUSTRE7AO0TA20111126> (last accessed February 19, 2013).

<sup>3</sup> For example, under the new President, Enrique Peña Nieto, the Ministry of the Interior acknowledged that, figures showed the death of at least 70,000 people, the forced or involuntary disappearance of 25,000 and mass forced displacements during his predecessor’s term. William Booth, *Mexico’s Crime Wave Has Left about 25,000 Missing*, *Government Documents Show*, WASH. POST, November 30, 2012, available at [http://articles.washingtonpost.com/2012-11-29/world/35584943\\_1\\_mexico-city-mexican-government-human-rights](http://articles.washingtonpost.com/2012-11-29/world/35584943_1_mexico-city-mexican-government-human-rights) (accessed February 19, 2013); BBC, ‘Mexico Enacts Law to Compensate Victims of Crime’, BBC, January 10, 2013, available at <http://www.bbc.co.uk/news/world-latin-america-20968899> (accessed February 19, 2013). Human Rights Watch also issued a report in which it documented the disappearance of 250 persons, 149 of which were enforced by state agents. Human Rights Watch considered this situation a national phenomenon; HUMAN RIGHTS WATCH, MEXICO’S DISAPPEARED: THE ENDURING COST OF A CRISIS IGNORED (2013). On the other hand, Amnesty International quoted official governmental statistics, highlighting the disappearance of 26,121 persons and the homicide of approximately 65,000, according to the National System of Public Security; see Amnesty International, *Confronting a Nightmare: Disappearances in Mexico*, June 2013. For a clearer picture on the issue of displacement and the role transitional justice can play in addressing it, see Roger Duthie, *Transitional Justice and Displacement*, 5 INT’L J. TRANSITIONAL JUSTICE 241 (2011).

the fullest extent. The proposal of using a transitional justice approach, as well as its justification, lies in the fact that this set of paradigms intrinsically links justice and politics from a perspective of redress; that is, the need to legally sanction and award reparation for former wrongs effected by a political elite, with the aim of helping rebuild a torn or fractured society and restore stability and civic trust in a political system and State institutions.

As Teitel explains it, transitional justice balances the ideals of justice and the realities of politics with the aim of effecting a radical transformation of the foundations of society, including its principles.<sup>4</sup> This transformation can therefore become a starting point that allows a given State to fully embrace the rule of law as its benchmark and pair it with social stability and the construction of a new social contract.<sup>5</sup> Thus, the idea of adopting the foundational principles that have worked in other transitional justice scenarios in the Mexican context<sup>6</sup> and having international human rights law as the guiding force behind the reform of the relationship between the State and the population that goes beyond mere rhetoric<sup>7</sup> can be useful to mend the situation that has led Mexico to socio-political fracture.

As identified by the UN Special Rapporteur on the promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, transitional justice is a strategy aimed at guaranteeing respect for and protection of human rights in the aftermath of widespread or serious violations. Transitional justice has four specific goals: providing recognition to victims, fostering trust both horizontally—among citizens—and vertically—in State institutions—, contributing to social reconciliation and strengthening the rule of law.<sup>8</sup> If these ele-

<sup>4</sup> RUTI TEITEL, TRANSITIONAL JUSTICE 213 (2000) [“Transitional Justice... is a pragmatic balancing of ideal justice with political realism that instantiates a symbolic rule of law capable of constructing liberalising change. [Its] paradigmatic rule-of-law principles are intimately related to these periods’ quintessential and defining feature, namely the grounding within society of a normative shift in the principles underlying and legitimating the exercise of state power.”].

<sup>5</sup> “Transitional justice communicates to the citizenry the ‘trustworthiness’ of the state; it exhibits improvements in state morality and thereby works to restore confidence in political institutions.” Stephen Winter, *Towards a Unified Theory of Transitional Justice*, 7 INT’L J. TRANSITIONAL JUSTICE 224, 233 (2013).

<sup>6</sup> We refer specifically to truth-seeking, justice initiatives, reparation and guarantees of non-recurrence that lead to social reconciliation and cohesion, and collectively strive to strengthen the rule of law.

<sup>7</sup> Teitel argues, for example, that the use of international human rights law may be an element that helps in the reconciliation of internal reform within a specific and defined normative framework, and given its status, it constitutes a set of ideals that transcends legal and political perspectives. TEITEL, *supra* note 4, at 222.

<sup>8</sup> U. N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, pars. 15, 21, UN Doc. A/HRC/21/46 (August 9, 2012). For a more detailed account of the development of transitional justice over the last three decades and some of the current challenges it faces, see Pablo de Greiff, *Some Thoughts on the Development and Present State of Transitional Justice*, 5 J. HUM. RTS. 98 (2011).

ments serve as a checklist, the need to achieve these mediate and final goals becomes evident. Furthermore, it points toward an ongoing or post-conflict situation that would benefit from a transitional justice perspective, one which could thrive in light of recent examples of application of said paradigms that have taken place in judicial and human rights spheres. Thus, the need to fulfill the goals of transitional justice to foster the socio-political reconstruction of the country, tied in with some ongoing attempts to employ some of the elements at different levels in other transitional contexts, leads us to believe that at this point Mexico may be entering a *de facto* situation of transitional justice.<sup>9</sup>

This note contains six sections: After this introduction, section II focuses on analyzing the need for a transitional process of justice and politics in Mexico as a direct consequence of the government's confrontational policy against drug cartels. This sheds light on the structural inadequacies and deficiencies of Mexico's prosecutorial, legal and prison systems, which has in turn led to a more widespread distrust of State institutions. Thus, it is argued that a legal and political transformation is required to restore public trust in its institutions, which could greatly benefit from the paradigms of transitional justice and the foundations of international human rights law.

Section III turns to analyze the role national human rights institutions could play in developing a victim-oriented approach in the proposed transitional process. Given their standing and attributions, such institutions could aid in the domestic dissemination and implementation of the international human rights standards that Mexico has ratified. In this sense, applying international provisions related to reparation due to victims of human rights violations could help in rebuilding public trust in the State, in addition to moving forward in the development of a more cohesive legal system based on the rule of law and the consistent application of international human rights standards. Moreover, the effective implementation and enforcement of some of the basic human rights standards, like the right to due process of law, are needed to help the mentioned socio-political transformation come true and the transformative civic process to start. In this sense, the consistent enforcement of these rights might be an important step in restoring civic trust in the State machinery, and ultimately in strengthening the rule of law.

Section IV serves to illustrate an important recent example that details the transcendence of victims' rights. In the Human Rights Commission of the State of Nuevo León recommendation regarding *Casino Royale*, several ele-

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<sup>9</sup> As stated in the first report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to the UN Human Rights Council, the measures normally used in traditional transitional justice contexts have progressively been applied to "...post-conflict contexts and even to settings in which conflict is ongoing or to those in which there has been no transition to speak of." U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, par. 16, UN Doc. A/HRC/21/46 (August 9, 2012).

ments that are normally present in transitional contexts appear and showcase how a victim-centered approach might bring important benefits to the establishment and the enhancement of a culture centered on the rule of law. At the same time, it shows how public human rights institutions can participate in a context of political and legal transition based on international human rights law.

Finally, another example appears in section V. The *Florence Cassez* judgment issued by the Mexican Supreme Court of Justice shows that a judicial transition is taking place in the country, one that aims at re-establishing the rule of law from the bottom based on the respect of the rights inherent to due process. In this sense, this case is a good example of how the actions of different institutions can lead to further developing a legal culture based on the rule of law, which may in turn help re-establish a connection between the people and the government leading to the reconstruction of the social fabric and the restoration of credibility in the State.<sup>10</sup>

Section VI offers some concluding remarks. This article strives to identify and discuss the elements that could indicate that Mexico is going—even if irregularly—through a *de facto* phase of transitional justice, as well as the effects and guidance international human rights law has had and potentially could have for the country while it tries to start anew in its quest to become a consolidated democracy in which human rights and the rule of law can be effectively enforced.<sup>11</sup>

## II. MEXICO AND THE NEED FOR A TRANSITIONAL PROCESS OF JUSTICE AND POLITICS

In 2000, Mexico started navigating through a transitional period in which after 70 years, a government belonging to the opposition, the PAN (National Action Party) was democratically elected. This change in government renewed hope in the people of Mexico, who saw the PRI (Institutional Revolutionary Party) as a bureaucratic, corrupt organization that had led Mexico

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<sup>10</sup> While these two cases have been selected due to the important impact they have had on the current legal and political context, it must be noted that they are under no circumstance the only examples of international human rights law enforcement that indicate a decisive split from the previous legal system and culture. Besides, other cases might show different results. Thus, the cases referred to here are to be considered as significant legal benchmarks that help illustrate the constitutional changes after the 2011 constitutional reforms that incorporated international human rights into the Mexican legal framework.

<sup>11</sup> For an interesting contextual example of the challenges and difficulties in establishing the rule of law and the legitimacy of the State in Mexico, as well as the need to focus on strengthening civil society as a countermeasure to fight corruption and “unrule of law,” see Stephen D. Morris, *Mexico’s Political Culture: The Unrule of Law and Corruption as a Form of Resistance*, 3 (2) MEXICAN L. REV. 327 (2011).

to several economic crises, electoral frauds, periods of mass human rights violations (particularly enforced disappearances, extrajudicial killings and oppression in the 1970s and 1980s)<sup>12</sup> and a loss of faith and credibility in official institutions.

Even though the 1990s brought several important changes in terms of economy (with the entry into force of the North American Free Trade Agreement), transparency (through the creation of an Electoral Institute to oversee electoral processes in the country and guarantee the validity of elections, as well as a human rights system headed by a National Human Rights Commission and 32 state commissions), supranational legal monitoring (by accepting to be placed under the jurisdiction of the Inter-American Court of Human Rights in 1998) and institutional reform —such as the one concerning the Supreme Court of Justice that transformed the court structure and accorded the Court most of its current powers—, it was not until the PRI lost the presidential elections that there was hope for a new process to begin. In the eyes of the general public, this would be the process that would set the foundations for a new democracy in which economic development, rule of law and the respect for human rights would be the norm and not the exception.

Thirteen years later, important advances have been made, such as the 2011 human rights reform<sup>13</sup> or the 2008 criminal law reform —which has not been implemented but in a few states of the country, that aimed to instate an accusatorial regime based on oral processes instead of the traditional written trials. Despite the progress made, different perspectives have emerged: the “war on drugs” undertaken by former President Calderón exposed several deficiencies in the prosecutorial, judicial and prison systems in Mexico.

For example, it is widely known that in prosecutions of detainees in relation to drug-related activities, few detentions ultimately end up in convictions.<sup>14</sup> This is mainly because suspects often experience abuse from the police

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<sup>12</sup> GISELA VON WOBESER, HISTORIA DE MÉXICO 249-277 (2010).

<sup>13</sup> This reform granted constitutional status to the human rights treaties ratified by the State while also instituting a diffuse conventionality control that allows any judge to invalidate a law in a specific case if said law contravenes a human rights treaty. Among other important modifications, the reform also imposed the duty to strive to protect human rights on every authority, making the application of the *pro homine* principle a standard throughout the country. Nevertheless, the Supreme Court decided to set forth a constitutional limit on the domestic enforcement of international human rights law, which would materialize if an international norm or standard contravenes the Constitution. While the publication of this precedent is still pending, the Court has reached its conclusion on this matter. Contradicción de Tesis 293/2011, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, Septiembre de 2013, Páginas 3-30 (Mex.). For a more precise insight into the new diffuse conventionality control, see Alfredo Narváez Medécigo, *Enforcement of Fundamental Rights by Lower Courts: Towards a Coherent System of Constitutional Review in Mexico*, 6 (1) MEXICAN L. REV. 3 (2013).

<sup>14</sup> “The obligation to respect, ensure respect for, and to enforce international human rights and humanitarian law includes a State’s duty to prevent violations, investigate violations, pun-

or army forces at the time of arrest or initial detention—including arbitrary arrest, illegal detention, torture and enforced disappearance. This situation opens a window of opportunity for detainees to demand constitutional protection of their human rights through the judicial remedy of *amparo*.<sup>15</sup> This situation has had obvious effects on the public's perception of the role human rights play, with little regard to the illegality and impunity with which the State's security forces carry out their operations, usually and systematically<sup>16</sup> committing human rights abuses.<sup>17</sup> An example will be presented and explained in detail in the chapter referring to the *Florence Cassez* case.

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ish violators, provide victims with equal and effective access to justice and provide for or facilitate reparation to victims.” M. Cherif Bassiouni, *International Recognition of Victim's Rights*, 6 HUM. RTS. L. REV. 203, 204 (2006).

<sup>15</sup> The judicial remedy of *amparo* is a constitutional mechanism that was created in 1847, for the purpose of protecting the individual—whether a natural or a legal person—from acts of authorities that could pose a risk to his legal sphere (to himself or his properties *lato sensu*). An *amparo* can perform the functions of several other legal instruments, such as *habeas corpus*, the control of constitutionality of the laws or the recourse to cassation—especially in cases in which judges allegedly and incorrectly apply and interpret the law without taking into account fundamental rights protected by the Constitution. There are two types of *amparo*: the *direct amparo*, which can be used as a last resort against definitive judicial or administrative decisions that infringe the person's human rights, against violations of due process or violations arising from interpretations made in the resolution; and the *indirect amparo*, which is used to challenge the constitutionality of any act by an authority that is final and that could cause irreparable damage to the plaintiff *other than* judicial or administrative resolutions that put an end to the trial. The *amparo* trial can be decided in three ways: granting, denial or dismissal, the latter generally for a lack of subject matter. As to the effects of its resolutions if granted, there are two types of *amparo*: a *full amparo* (*amparo liso y llano*, in Spanish), which implies that federal judiciary protects the citizen's right and invalidates the effects of the decision or judgment that would have caused a human rights infringement; and the *amparo for effects*, in which the federal judiciary orders that the procedures begin anew without the inclusion of the elements that led to the filing of the *amparo*. For an interpretation of the institution of *amparo* from a common law perspective, see RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO. A STUDY OF THE AMPARO SUIT (1971). See also Eduardo Ferrer Mac-Gregor & Rubén Sánchez Gil, *Amparo y proceso acusatorio en México*, in EDUARDO FERRER MAC-GREGOR & ALBERTO SAÍD RAMÍREZ, JUICIOS ORALES. LA REFORMA JUDICIAL EN IBEROAMÉRICA 427-468 (2013), for a study of the new complexities and challenges of the new *amparo* trial.

<sup>16</sup> For example, Human Rights Watch has observed that “[d]uring [Calderón's] tenure, soldiers and police officers systematically tortured civilians to extract confessions in the fight against cartels, and they committed widespread executions. Almost none of these abusive soldiers and police have been punished. Of the roughly 5,000 investigations that military prosecutors opened into alleged abuses from... December 2006, through April 2012, only 38 soldiers have been sentenced.” José Miguel Vivanco, *Nothing to Celebrate in Mexico*, THE WASH. POST, January 24, 2013, [http://www.washingtonpost.com/opinions/jose-vivanco-mexicos-human-rights-failures/2013/01/24/cf40db22-6413-11e2-9e1b-07db1d2ccd5b\\_story.html](http://www.washingtonpost.com/opinions/jose-vivanco-mexicos-human-rights-failures/2013/01/24/cf40db22-6413-11e2-9e1b-07db1d2ccd5b_story.html) (accessed 20 February 2013).

<sup>17</sup> The Secretary-General of the United Nations recognized this problem in a report to the Security Council on the rule of law and transitional justice in conflict and post-conflict societ-

Several issues have become more perceptible over the past years regarding the judicial system, such as a lack of preparation and knowledge from judges on how to effectively implement the human rights reform—and therefore, take into account the implications and State obligations deriving from the international treaties the country has ratified—or, the few actions taken, for example, in the field of torture prevention, which is a form of abuse that detainees commonly experience. Even though Mexico has signed the Istanbul Protocol and has ratified the corresponding international conventions concerning torture, such protocols and instruments are rarely used when allegations of torture are brought up in a judicial procedure, let alone at the start of a proper investigation into such allegations, thus perpetuating impunity. Another important pattern throughout the judiciary is the admission of flawed evidence, like confessions obtained through torture—prohibited not just by international human rights law and international criminal law, but also by numerous Inter-American Court of Human Rights judgments and the Mexican Constitution—, which obviously allow suspected felons to regain their freedom through the *amparo*.<sup>18</sup>

The prison system does not elude the institutional flaws that seem to be present in many other institutions. Instead of serving their purpose as social rehabilitation centers, prisons are at the mercy of drug cartels and other criminal groups, which have in most cases eroded the rule of law. A clear example of this was a massacre that took place on February 20, 2012 at the Apodaca Social Rehabilitation Center in Nuevo León where a group of convicts massacred 44 inmates from a rival drug cartel and a group of 37 convicts escaped.<sup>19</sup> This case was notorious because of the prison security's involvement in and acquiescence of the massacre and escape of the prisoners, as well as for lax prosecution against those involved in the massacre, including the prison warden at the time of the tragedy.<sup>20</sup>

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ies, where he stated that “...helping war-torn societies re-establish the rule of law and some to terms with large-scale past abuses... requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security.” The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, par. 3, delivered to the Security Council, UN Doc. S/2004/616 (August 23, 2004).

<sup>18</sup> These situations have been documented and addressed by the UN Committee against Torture, which in its latest concluding observations on Mexico issued several recommendations regarding arbitrary detention, confessions obtained under duress, impunity and the application of the Istanbul Protocol, among others. U.N. Committee against Torture, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Mexico*, pars. 10, 15-17, UN Doc. CAT/C/MEX/CO/5-6 (December 11, 2012).

<sup>19</sup> CBS News, “Official: Guards aided Zetas prison break,” [http://www.cbsnews.com/8301-202\\_162-57381449/official-guards-aided-zetas-prison-break/](http://www.cbsnews.com/8301-202_162-57381449/official-guards-aided-zetas-prison-break/) (accessed 20 February 2013).

<sup>20</sup> “Corruption, police misconduct, and poor prison conditions attest to weak state struc-

These situations, and many more, point to significant structural problems Mexico has to overcome in order to effectively make the transition to a peaceful environment conducive to development and civic evolution. As noted in literature on transitional justice, this sort of structural problems clearly show a State in which there is a need to implement a working system that can guarantee the establishment of the rule of law, so as to overcome current deficits and abuses, as well as re-build institutions even if it has not experienced an internal conflict *per se*—like those suffered under authoritarian regimes in Latin America, Europe or Asia, in which the State apparatus was used precisely to incur human rights abuses.<sup>21</sup>

The implementation of a transitional process should therefore be focused not just on the prosecutorial, judicial and prison systems that are partly in charge of preserving a social climate of justice, but also on the politics of the government in turn.<sup>22</sup> Many of these problems have been identified as the final episodes of a chain of events that started with inappropriate socio-economic policies designed as short-term remedies, low salaries and a macroeconomic stability that somehow did not end up improving the microeconomic finances of the general population, especially of those living in conditions of extreme poverty.<sup>23</sup> According to Pablo de Greiff in his capacity as UN Expert, these issues are the result of social conflicts that are usually marked by severe economic scarcity, which pose diverse challenges to the effectiveness of governmental policies designed to address socio-economic deficits.<sup>24</sup> In the

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tures to administer law fairly.” See Laurel E. Fletcher et al., *supra* note 1, at 191.

<sup>21</sup> “...an honest attempt to reestablish the force of basic rights and norms grounds efforts to coexist peacefully and, in the long run, promotes the legitimacy and stability of a regime. In other words, *transitional justice measures provide reasons for citizens to trust one another and the institutions under which they live...*” Juan E. Méndez, *Editorial Note*, 3 INT'L J. TRANSITIONAL JUSTICE 157, 160 (2009) (Emphasis added). There is a need to move away from the conceptual definition of what transitional justice is in order to apply its standards based on the situations on the ground, and particularly on the needs of the population and society as a whole, in order to reconstruct the social fabric and thus build trust in institutions and restore peace under a regime based on the rule of law, human rights and justice.

<sup>22</sup> “...peacebuilding and transitional justice involve promotion of socioeconomic and political justice, as well as of legal justice, which combats a culture of impunity and sets up structures to ensure ongoing respect for human rights and the rule of law.” Wendy Lambourne, *Transitional Justice and Peacebuilding after Mass Violence*, 3 INT'L J. TRANSITIONAL JUSTICE 28, 34 (2009). For a comparative approach of how peace-making, peace-keeping and peace-building have been used as strategies in different countries after internal conflict and for an argument on the need to uphold human rights and the rule of law during such efforts to prevent and avoid further conflict, see B. G. Ramcharan, *Human Rights and Conflict Resolution*, 4 HUM. RTS. L. REV. 1 (2004).

<sup>23</sup> Though they are important in this context, socio-economic factors will not be studied in this article as they go beyond the object of the main topic and could potentially lead to discussions related to policy in areas other than justice, rule of law, truth and human rights.

<sup>24</sup> U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, par. 16, UN Doc. A/HRC/21/46 (August 9, 2012).

Mexican case, this situation made joining organized crime an interesting and attractive possibility for young people, who would normally earn more money in this environment than what a normal salary would pay, while having a better chance of not being caught or facing a criminal trial.

Mexico is not specifically ‘emerging from conflict’ for it has been in this situation since at least 2005. However, since the 1990s Mexico seems to have occupied itself in undertaking the economic and financial reforms needed to achieve the goals of obtaining international recognition and attracting foreign investment, while taking much slower steps in implementing the justice, prosecution and human rights standards<sup>25</sup> that should go along with economic development, and would comply with recommendations from international organizations and with its obligations under international law in general.

Any attempt to solve the problem that is currently crippling the country has to go through a transition period and effect a change in both the judicial and political operators in order to rebuild social institutions and thus re-establish a link with the population based on credibility and trust in the government,<sup>26</sup> while also attacking the problems created by social injustice, corruption and weak law enforcement.<sup>27</sup> The existence of a representative democracy leads us to believe that whatever transformation the country must undergo, it is a process that should start from the bottom-up, that is, getting the population to actively participate with institutions, in an attempt to locally implement the international human rights and criminal law standards that the international community expects from a consolidated democracy.<sup>28</sup>

Thus, to rebuild public trust in the authorities and the social fabric in the country, the government must take steps to ensure the implementation of the

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See also Fletcher et al., *supra* note 1, at 218. [“Attention to the underlying socioeconomic disparities and inequalities in the country, in conjunction with structural change in the way that the country is governed, may be the most important first steps in developing an appropriate response to perpetrators of violence.”]

<sup>25</sup> For Turner, the imposition of internationally recognized standards of rule of law is the basis for obtaining stability and consolidating any State into a liberal democracy. Catherine Turner, *Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law*, 2 INT’L J. TRANSITIONAL JUSTICE 126, 127 (2008).

<sup>26</sup> Winter, *supra* note 5, at 232. [“Transitional justice works... by creating the institutional conditions for civic trust and civil recognition. Since civic trust and civic recognition are necessary conditions of reconciled and democratic politics, transitional justice’s promotion of these mediate goals supports the ultimate aims.”]

<sup>27</sup> As stated by Arias Marín, transitional justice processes can be complemented with a particular focus on retribution, without disregarding the need to establish and recognize the responsibilities of the wrongdoers. Alan Arias Marín, *Justicia transicional y derechos humanos. La relevancia de las víctimas*, 13 DERECHOS HUMANOS MÉXICO. REVISTA DEL CENTRO NACIONAL DE DERECHOS HUMANOS 13, 23 (2010).

<sup>28</sup> “Arguably, it is the local engagement with rights that will lead to the emergence of an embedded human rights culture, not the existence in law of contested international standards.” Turner, *supra* note 25, at 133.

constitutional reforms on human rights and the criminal justice system, as a starting point to guarantee the continuity of its transitional process. Given the importance of enforcing human rights through structural, social and economic policies in a democratic society, any transition must start with respect for the most basic substantive and procedural rights, particularly due process of law, to generate coherence that the population can relate to and rely on. The success of a transitional process will depend on the effectiveness of the law and its being respected by authorities and the population, which would in turn contribute to the process of social transformation. As Teitel argues, since the defining feature of a transition is its normative shift, “legal practices bridge a persistent struggle between two points: adherence to established convention and radical transformation.”<sup>29</sup> In this regard, the respect and enforcement of substantive and procedural rights throughout the prosecutorial, judicial and prison systems would become the catalysts on which the credibility on the State would be based, and which would allow the population and the authorities to establish a new rapport based on the respect for the law.<sup>30</sup>

This role can and should be assumed by the State as a unit, that is, in a transversal manner that involves the active engagement of the Executive, Legislative and Judicial branches. However, certain institutions could enhance the government’s effort and play an active role in the promotion of human rights, justice, peace-building and social stability, in a way that would help the transitional process. In this sense, the role of national human rights institutions in any transitional process is paramount, given their specific appropriateness and technical knowledge in dealing with human rights issues. In the case of the National Commission of Human Rights, some comments will be shared in the next section as to how it could become a leading actor and improve its participation in the transitional process that the country is going through.

### III. THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN DEVELOPING A VICTIM-ORIENTED APPROACH

National Human Rights Institutions (NHRIs) have been recognized and charged with the task of working *inter alia* as intermediaries in the implementation of international human rights standards in national law and jurisdictions.<sup>31</sup> In the case of Mexico, the *Comisión Nacional de los Derechos Humanos* (CNDH) was established in 1992 after the inclusion of Article 102-B in the

<sup>29</sup> TEITEL, *supra* note 4, at 215.

<sup>30</sup> “Legal processes offer established means of changing public reasoning in the political order, for they are themselves predicated on authoritative representations of public knowledge. Transitional legal processes thus contribute to the public epistemological and interpretative changes contributing to the perception of transformation.” *Id.* at 223.

<sup>31</sup> For a more detailed insight on the role of NHRIs under international law, see Richard

Constitution. This constitutional provision stipulates the protection of human rights is entrusted to the CNDH and to 32 state commissions, which are responsible for issuing non-binding recommendations to State agents and filing complaints before the corresponding judicial or administrative authorities for the human rights abuses committed by a given State agent or public official, in addition to challenging the constitutionality of a law considered as violating the human rights standards protected by the Mexican Constitution and international human rights treaties before the Supreme Court of Justice.<sup>32</sup> Recent reforms to the roles of the CNDH and state commissions<sup>33</sup> include a provision that whenever a public official does not accept or enforce a recommendation, this negative response can be made public and the official could be called to appear before the local or national Congress to explain the motives for not complying with said recommendation. This represents an effort to increase accountability of all public officials in terms of their performance regarding the respect of human rights.

Considering Mexico's legal tradition as a "positivist" system, as reflected by Human Rights Watch in its assessment Of the country's human rights system,<sup>34</sup> it is important to mention that the legislation that regulates the functions and organization of the CNDH does not address or even refer to the standing and rights that victims of human rights violations should be entitled to whenever party to any investigation carried out by the national *ombudsman*.

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Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 HUM. RTS. L. REV. 1 (2010).

<sup>32</sup> This last provision regarding international law has only been in force since June 10, 2011, with the publication of what is known as the "Human Rights Reform." Decreto por el que se modifica la denominación del capítulo I del título primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos [Decree to modify the title of the Chapter I and to reform various articles of the Constitution of the United Mexican States], Diario Oficial de la Federación [D.O.], 10 de Junio de 2011 (Mex.) [Hereinafter Human Rights Reform of June 10, 2011].

<sup>33</sup> Human Rights Reform of June 10, 2011.

<sup>34</sup> HUMAN RIGHTS WATCH, MEXICO'S NATIONAL HUMAN RIGHTS COMMISSION: A CRITICAL ASSESSMENT 1, 60 (2008), where it clearly demonstrated that the CNDH had interpreted its mandate with many limitations, considering that it could only investigate violations of human rights that were protected by either statutory law or the Constitution, but not those included in international human rights treaties for they did not form part of the Mexican system. Thus, the 'principle of legality' under which the Commission can only do what is expressly mandated or authorized by law would be violated if it extended its functions. It must be mentioned, however, that in a Court Opinion issued in 1999 the Supreme Court of Justice declared that international treaties have priority over national laws as long as they do not contravene the Constitution (TRATADOS INTERNACIONALES. SE UBICAN JERÁQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN UN SEGUNDO PLANO RESPECTO DE LA CONSTITUCIÓN FEDERAL. Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, Vol. X, November 1999, Tesis P. LXXVII/99, page 46 (Mex.)); along the same line, article 133 of the Constitution states that international treaties that have been ratified by the State are a part of the Mexican legal system. See also Carver, *supra* note 31 at 15.

Considering this situation, it is certainly alarming to perceive that the lack of a victim-oriented approach in its legal framework could potentially undermine not only the role of the CNDH in the persecution of human rights violations—turning the commission into a merely administrative procedure that only would seek to point out the violations committed by the authorities—, but it could also lead to the denial of the human rights-based compensation to which victims are entitled, particularly in cases of gruesome violations like the ones described in the opening paragraph of this article.

In the same sense, the CNDH usually limits its recommendations to suggesting that government officials receive human rights education and that the corresponding administrative or criminal legal actions are taken against officials who are found to have violated human rights directly or in collaboration with others. Regretfully, CNDH recommendations usually do not address victims' rights or advise the authority on the measures that could be taken to provide appropriate reparation, given the context and seriousness of the human rights violation. The recent enactment of the General Law of Victims<sup>35</sup>—which civil society has celebrated as a triumph—responds to society's demands to address the serious human rights violations that have come with the “war on drugs”, and could be a step in the appropriate direction towards granting human rights violation victims appropriate standing in the legal system.

The aims of this law are to guarantee that victims have the right to protection, truth, justice, reparation, due diligence and non-repetition of the illegal acts or omissions by the authorities, as well as to deter human rights violations by sanctioning the Mexican State not just legally but also financially, and generally to give victims a sort of compensation for the abuses suffered. However, with the creation of a national organism in charge of enforcing the law, it seems unlikely that the CNDH will adopt a different stance in issuing its recommendations since the only main actions that the law attributes to it are the dissemination of victim's rights throughout the country (article 118-VI on the powers of the Federal Government) and to act in conjunction with state commissions in order to provide efficient service in enforcing victims' rights (article 173). Important criticism has arisen, particularly regarding the vagueness of the law (for example, it considers two types of victims: victims of crime and victims of human rights violations, but it does not define the difference between them) and that in its current state, the law cannot be applied effectively. In general terms, a more precise series of actions is required of the CNDH to act as the human rights champion it is supposed to be.

Given their status as the safe keepers of human rights within national systems, NHRIs do not only have the obligation to act in their quasi-judicial authority, but also to apply and implement the standards recognized under

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<sup>35</sup> Ley General de Víctimas [LGV] [General Act Victims], *as amended* 3 de Mayo de 2013, Diario Oficial de la Federación [D.O.], 9 de Enero de 2013 (Mex).

international law. Despite the fact that their jurisdiction is strictly over matters regarding human rights, the intersection of this field with international criminal law and transitional justice, along with the principle of interdependence of human rights —some of which are also contained in treaties regulating international criminal law, such as the Rome Statute— should support the principle of reparation and the standing of the victims. This is one of the pillars of international human rights law to which the field of transitional justice closely relates.

The use of these international standards can help both define the content of the rights they are supposed to protect under international law standards, customs and case law, and to extend the protection of these rights as conceived under national law according to the practices employed by its international counterparts. In this sense, it is remarkably important that NHRIs emulate the examples set forth by regional human rights systems —and particularly that of the Inter-American System of Human Rights— regarding the reparations victims are entitled to, to create a cohesive standard that can be applied internationally.

When a human rights violation occurs, sometimes the only thing that can help the victims cope with their pain is the reparation awarded to them<sup>36</sup> —considering that in many cases, regardless of the reparation, victims' grief and suffering cannot be assuaged.<sup>37</sup> In some cases, as repeatedly upheld by the Inter-American Court of Human Rights, this reparation serves to honor the memory of those affected by State activities or omissions, as well as a reminder that human dignity should always drive and limit the actions undertaken by States, in order to prevent future abuses.<sup>38</sup>

International human rights law, international criminal law and transitional justice are linked by the intrinsic aim to prevent and deter human rights violations, each in its own particular way. However, an underlying but very important aspect that all of them take into consideration is that the victims, those who are marginalized or under a greater risk of being subject to a violation of their human rights, not only deserve but have the right to be protected. Moreover, when injured, victims should be able to exercise the right to have access to remedies, reparation and compensation. With this in mind, it is crucial that NHRIs —like the CNDH in Mexico— take the necessary steps to realign

<sup>36</sup> “Reparations have come to occupy a special place in transitional processes, at least in part because they are a transitional justice measure that arguably has the greatest potential to make an immediate difference to the life of victims.” The Secretary-General, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, par. 43, delivered to the General Assembly, UN Doc. A/67/368 (September 13, 2012).

<sup>37</sup> “...although justice will never be attained in any thoroughly satisfactory sense, the act of seeking it should demonstrate to the wronged and the aggrieved that there is always room to consider their claims within the framework of a democratic polity.” A. James McAdams, *Transitional Justice: The Issue That Won’t Go Away*, 5 INT’L J. TRANSITIONAL JUSTICE 304, 312 (2011).

<sup>38</sup> Radilla Pacheco v. Mexico, Inter-Am. Ct. H. R. (ser. C) No. 209 (Nov. 23, 2009).

their attention from the *goal* of attributing responsibility to public officials to a more comprehensive and victim-oriented approach that aims at helping in the reparation and coping *process* that victims usually need, for it is a fact that the victims of human rights violations are themselves the *process* and *goal* of every human rights system. It is through the process of victim protection and the reparation of their injuries that the goal of re-establishing the rule of law and the respect for human rights is more likely to be achieved.<sup>39</sup>

#### IV. CASINO ROYALE: APPLYING THE PRINCIPLES OF TRANSITIONAL JUSTICE

Despite the aforementioned critique of the CNDH, we must also recognize an emerging trend in the human rights system in Mexico—as well as in the Judiciary—that consists of trying to comply with its international obligations and have a more complete role in the protection of human rights, particularly for the victims of human rights abuses. A prominent example will be discussed in the next paragraphs, showing a specific case in which this human rights approach can incorporate some of the principles of transitional justice in order to try to better protect or compensate the victims.

On August 25, 2011, Mexico made the headlines all over the world with an organized crime attack against a casino in the northeastern city of Monterrey. In an unprecedented type of violence, a commando set the Casino Royale ablaze for not paying a “protection fee” demanded by a drug cartel, killing 52 people in the process, most of whom died of smoke inhalation since they were unable to escape the building. Expert analysis later revealed that some of the emergency exits were in fact blocked and that safety measures had not been implemented despite having obtained the corresponding permits from the Civil Protection Office, the agency in charge of ensuring that safety measures are strictly followed. The Human Rights Commission of the State of Nuevo León (CEDH-NL) started an investigation to determine if and what human rights violations had also occurred in the tragedy.

An analysis of Recommendation 103/2012 shows a detailed analysis and use of the jurisprudence of international organizations and tribunals, such as the Inter-American Court of Human Rights, as well as through direct reference to and the application of international human rights standards. The Commission arrived at the conclusion that several human rights violations had taken place (particularly regarding the rights to life, personal integrity and working conditions), all of which were associated with the State’s duty to protect its citizens from human rights abuses, including from those at the hands of non-State actors.

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<sup>39</sup> “...peacebuilding requires a transformation in relationships between people, in addition to the ending of violence and construction of the conditions for peace.” Lambourne, *supra* note 22, at 35.

In particular, the Commission determined that a lack of actual monitoring by the Civil Protection Office (the agency in charge of issuing operating permits based on passing approval on the security measures at the premises), the Ministry of Urban Development and the Environment of Monterrey (the body in charge of authorizing the business's operation if the premises comply with the required fire prevention measures) and the General Office of Labor Inspection of the state Ministry of Labor (the body in charge of inspecting that appropriate working conditions and safety measures have been met, including safety training for employees). In other words, the lack of due diligence by the authorities caused a breach in their duty to prevent human rights abuses, as it is directly linked to their positive obligation to protect.<sup>40</sup>

An important characteristic of the *Casino Royale* case is that even though it was specifically centered on the authorities' responsibilities in the lack of due diligence that led to the death of 52 people and the ensuing human rights violations, it also had a particular focus on the rights of the victims,<sup>41</sup> even distinguishing between primary and secondary victims. For example, it stated that there was a human rights violation of the people who lost their lives and those who were injured, as well as of their families,<sup>42</sup> who were the indirect victims of the human rights violation, in compliance with the jurisprudence set forth by the Inter-American Court of Human Rights in its *Pacheco Teruel* judgment.<sup>43</sup>

In the same sense, the *Casino Royale* resolution stated that the CEDH-NL took into account the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>44</sup> (the *Van Boven Principles*) to issue its recommendation on the different forms of State reparation to be awarded to the victims. Therefore, the Commission deemed it prudent to award economic reparation for lost earnings and the subsequent damage (particularly funerary costs and medical and psychological expenses), rehabilitation measures (including medical, psychological or psychiatric treatment), satisfaction (as defined in the *van Boven Principles*,

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<sup>40</sup> Comisión Estatal de Derechos Humanos de Nuevo León, *Recomendación 103/2012*, Exp. CEDH/242/2011 (December 31, 2012) [Hereinafter Recomendación Casino Royale], regarding the specific conditions that led to the human rights violations.

<sup>41</sup> For a description of what rights are understood explicitly as victims' rights (namely the rights to equal and effective access to justice; the right to adequate, effective and prompt reparation for the harm suffered, and the right to truth and their specific characteristics), *cfr.* Cherif Bassiouni, *supra* note 14, at 260-276.

<sup>42</sup> Recomendación Casino Royale, *supra* note 40, at 193.

<sup>43</sup> *Pacheco Teruel v. Honduras*, Inter-Am. Ct. H. R. (ser. C) No. 241, at para. 74 (Apr. 27, 2012). In this case, the Court considered that the family of the deceased would be a secondary victim to the human rights violation.

<sup>44</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, UN Res. A/RES/60/147 (March 21, 2006).

including the verification of the facts and issuing a public apology, starting the criminal and administrative procedures against the public officials and other non-State actors whose acts or omissions contributed to the human rights violation, and the construction of a monument in memory of the deceased and those injured in the fire) and guarantees of non-repetition.<sup>45</sup> This recommendation especially focused on alleviating some of the victims' suffering, which would be accomplished through the recognition of public truth and bringing those directly and indirectly responsible to justice.<sup>46</sup>

Considering that this particular human rights violation was the result of a combination of factors, including omissions in due diligence on behalf of the authorities, a lack of corporate responsibility to respect by the casino operator and a violent attack from organized crime, several elements that are usually included in transitional justice contexts were analyzed. For example, the *Casino Royale* recommendation made explicit reference to the "right to truth that the victims of human rights abuses and their families have to know what happened," and that the "investigation and determination of historical truth constitute another measure to combat impunity, which in its own fosters the chronic repetition of human rights violations."<sup>47</sup>

Making reference to Inter-American Court of Human Rights (in particular to *Campo Algodonero*)<sup>48</sup> and the American Convention of Human Rights case law, the CEDH-NL recommended that the Prosecutor's Office of the State should initiate criminal investigations and prosecute those authorities involved in the human rights abuses, through either their actions or omissions, in order to thwart impunity and the repetition of human rights violations.<sup>49</sup>

The use of elements such as the quest for truth and justice, and in particular the building of a monument to honor the memory of the victims is a situ-

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<sup>45</sup> Ximenes Lopes v. Brazil, Inter-Am. Ct. H. R. (ser. C) No. 149, at para. 209 (July 4, 2006), where the Court stated that reparations should include *restitutio in integrum* and were it impossible, any other measure that aims to repair the consequences of the human rights violation, including measures of compensation and satisfaction.

<sup>46</sup> "A victim's right to access justice includes the State's duty to prosecute those responsible for human rights violations. [However, a] victim's right to prosecution... is not a substitute for the State's duty to ensure respect for international human rights and humanitarian law, but rather co-exists with it." Cherif Bassiouni, *supra* note 14, at 263.

<sup>47</sup> Recomendación Casino Royale, *supra* note 40, at 195-196. "[In the same sense], truth can help provide a historical record, educate people, promote forgiveness and prevent future victimisation. Truth is an imperative, not an option to be displaced by political convenience." Bassiouni, *supra* note 14, at 276. See also Penal Miguel Castro Castro v. Peru, Inter-Am. Ct. H. R. (ser. C) No. 160, at paras. 381, 393 (Nov. 25, 2006), regarding the need for a serious investigation and prosecution as a requirement to respect and fulfill the right to truth.

<sup>48</sup> González y otras ("Campo Algodonero") v. Mexico, Inter-Am. Ct. H. R. (ser. C), No. 205, at para. 454 (Nov. 16, 2009).

<sup>49</sup> In the opinion of the current UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, it is necessary to break the cycle of impunity to prevent the repetition of similar human rights violations, a posture that has been repeatedly endorsed by the universal and regional human rights organisms. Méndez, *supra* note 21, at 161.

ation that recurs in the context of transitional justice, which aims at moving forward a society that has been afflicted by conflict.<sup>50</sup>

In the same sense, this resolution echoes Lambourne's model of *transformative justice* which is based on the principles of transitional justice with the combined aim of peacebuilding by addressing the roots of the problem.<sup>51</sup> This model holds that there are four pillars upon which social reconstruction and peacebuilding should built: *accountability* (legal justice), *truth* (knowledge and acknowledgement), *socioeconomic justice* (historical and prospective) and *political justice* (institutional reform, rule of law and respect for human rights). In comparison, the *Casino Royale* recommendation clearly fulfills and implements this model by demanding *accountability* in the criminal and administrative procedures of public officials (legal justice), revealing the *truth*, issuing a public apology, recognizing the shortcomings of state organs (knowledge and acknowledgement), awarding *remedies and reparations* that encompass the economic, medical, psychological, legal and social needs of the victims and their families (prospective justice), and requesting the respect of human rights and the rule of law through the criminal and administrative procedures against those found responsible<sup>52</sup> by means of human rights education and training of public officials and the private sector, as well as by a request to file an initiative to reform the laws that regulate private corporations to comply with the current international standards on corporate responsibility for human rights.<sup>53</sup>

This CEDH-NL resolution is a landmark case that shows a commitment not just to the respect of international human rights law, but also and more specifically to the central importance of victims in any human rights procedure. A particularly important point is that respect of the rule of law will necessarily include a respect for human rights, which are the foundations of a democratic society. Furthermore, it will also bring in a much needed scenario in cases in which a given State —like Mexico in this case— faces a transitional process in both its justice system and its politics.<sup>54</sup> The next chapter

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<sup>50</sup> Arias Marín, *supra* note 27, at 16.

<sup>51</sup> Lambourne, *supra* note 22, at 37.

<sup>52</sup> "...vetting of public officials must be accompanied by the creation of robust prosecutorial mechanisms if vetting is to be reasonably seen as more than an administrative, bureaucratic initiative." U. N. Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, para. 25, UN Doc. A/HRC/21/46 (August 9, 2012).

<sup>53</sup> "Transformative justice not only deals with the past but also establishes conditions and structures in order to ensure justice in the present and the future... In addition to accountability or legal justice, attention needs to be paid to psychosocial processes, socioeconomic conditions and political context in order for transitional justice to support peacebuilding." Lambourne, *supra* note 22, at 45, 47.

<sup>54</sup> TEITEL, *supra* note 4, at 220. ["Transitional operative acts include pronouncements of indictments and verdicts; the issuing of amnesties, reparations and apologies; and the promul-

will argue that a turning point may have been reached through the Mexican Supreme Court's ruling on a case in which arbitrary detention and the lack of respect of the rule of law and human rights turned a presumed criminal into a victim of human rights abuses. This ruling emphasized the fact that law enforcement officials and other public authorities must pay attention to these aspects in order to avoid having both the criminals and the crime victims resulting in two sets of victims of human rights violations.

#### V. *FLORENCE CASSEZ AND THE SUPREME COURT: (RE)CREATING THE RULE OF LAW*

The *Florence Cassez* case has been another paradigmatic and controversial situation for the Mexican judicial system that engrossed the international press, academia, activists and civil society in general in a very passionate debate on human rights, the rule of law and due process.

Florence Cassez, a French national, was detained by the police on December 9, 2005, during the raid of a ranch in the outskirts of Mexico City, after being informed that said ranch was being used to hold three kidnapping victims, including an 8-year-old boy, hostage. Apparently, Cassez's sentimental partner was the leader of the group, and "evidence" pointed out that she was involved in the kidnappings, at the very least. Judicial records show that they were "officially" captured by law enforcement agencies at 04:30 in the morning.<sup>55</sup> They were then brought to the ranch at around 05:00, to recreate a live television "capture" of a band of kidnappers at 06:47, which was broadcast by the main television stations in the country. Due to the recent rise of spiraling violence in Mexico, it was a much needed opportunity to build social trust in law enforcement institutions, as well as to portray an image of strength and legitimization of the police forces. However, after public outrage against the alleged kidnappings carried out by a foreigner and a live telephone confrontation between Cassez and a high-ranking public official on a TV show, on February 10, 2006, public authorities admitted that the arrest had been staged and that the kidnappers had been captured a day earlier under different circumstances. The public authorities pointed out that it would not change their guilt regarding the kidnappings they were accused of in any way.

After a long judicial process that lasted six years and condemned by all three instances (a District Court which imposed a 96-year prison sentence,

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gation of constitutions and reports, for transitional practices share features namely as ways to demonstrate publicly new collective understandings of truth."]

<sup>55</sup> It was alleged numerous times in the judicial briefs that her detention actually took place at 11:00 on 8 December 2005, and that she was held captive by the police for an entire day before the live broadcast of her "arrest." *Sentencia de Amparo en Revisión 517/2011, Suprema Corte de Justicia de la Nación [S.C.J.N.]* [Supreme Court], Página 31 (Mex.).

a Unitary Circuit Court that reduced the sentence to 60 years and an *amparo* trial in which the Collegiate Circuit Court ratified the sentence given by the Unitary Court), Cassez filed an appeal (*amparo en revisión*) to the Supreme Court of Justice. In light of the constitutional fundamental rights that formed the merits of her case before the Collegiate Court, the appeal therefore requested a constitutional interpretation of the human rights protected by both the Mexican constitution and international human rights law.

On March 9, 2011, her case was assigned to the First Chamber of the Supreme Court in charge of criminal matters, where Justice Arturo Zaldívar Lello de Larrea would prepare the project. On March 21, 2012, Justice Zaldívar presented his sentence project, in which he favored the immediate release of Florence Cassez based on what could be summarized as three important human rights violations: the lack of effective consular assistance,<sup>56</sup> an arbitrary detention in order to manipulate the circumstances and facts involving her capture without presenting her immediately before the corresponding judicial authority,<sup>57</sup> and in light of those two violations, the direct violation of her right to be presumed innocent and to have an adequate defense.<sup>58</sup>

To be able to grant the *amparo* and therefore release Cassez from prison, a majority vote in a chamber with five Justices was required. Nevertheless, only two voted in complete favor of the project (Justice Zaldívar and Justice Olga Sánchez Cordero), with two Justices voting to grant an *amparo* “for effects”<sup>59</sup>

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<sup>56</sup> *Id.* at 103. After her detention, Cassez was not informed of her right to have consular assistance, and the diplomatic representation of France did not have contact with her until 35 hours later. As analyzed by Justice Zaldívar, this position even went against the practice that Mexico has upheld before international courts, especially in the *Avena* case before the International Court of Justice and in an Advisory Opinion rendered by the Inter-American Court of Human Rights at the request of the Mexican Government regarding the obligation of the United States of America to observe the Vienna Convention on Consular Relations, which stipulates the right to consular assistance. Justice Zaldívar concluded that the lack of consular assistance was a situation that violated her fundamental right to be presumed innocent, which was reflected in the first three stages of the criminal trial.

<sup>57</sup> *Id.* at 107. In his project, Justice Zaldívar’s argument was based on the fact that Florence Cassez was not immediately presented before the judicial authorities (in this case, the Prosecutor’s Office), the police were permitted to stage the “live capture.” Therefore, the entire process was corrupted while the police were allowed to present a case that was damaged by the flawed evidence, but which would nevertheless be considered valid by the courts that judged the case. Justice Zaldívar’s main claim is that there is no constitutional or human rights premise that allows the authorities to not bring any detainee immediately after the arrest before the corresponding authorities, and thus the staging and delay in her presentation were fundamental violations of due process that affected her human rights.

<sup>58</sup> *Id.* at 120, 127. In his project, Justice Zaldívar explained that the effects of the lack of an effective consular assistance and of not being immediately presented before the Prosecutor’s Office, as well as the staging, had an important effect on the public’s perception —including that of the courts— of her innocence. As a result, she was judged under a partial basis.

<sup>59</sup> This concept means that the remedy would *only* have effect on some of the elements of the judicial case file so that the judicial authority could reassess the procedure and either take

that would send the case back to the Collegiate Courts to issue a new resolution, and another Justice voting against the project.<sup>60</sup> Due to a lack of a majority, the case was transferred to Justice Olga Sánchez Cordero to develop a new project.

On January 23, 2013, a new project was presented to the Chamber by Justice Sánchez Cordero. This project was intended to send the *Florence Cassez* case back to the Collegiate Courts by granting her an *amparo* “for effects” that would invalidate some of the evidence—particularly witness testimonies, which were significantly and radically altered throughout the procedure, and which were the main bases to convict Cassez—that was considered contaminated by staging the arrest and that also corrupted the entire criminal proceedings. In this second round, three Justices opposed Justice Sánchez Cordero’s project. However, recently-appointed Justice Alfredo Gutiérrez Ortiz Mena also voted against the project, pointing out that the evidence should be invalidated because of the effects the staging of the arrest had in the process and because Cassez did not receive effective consular assistance.<sup>61</sup> With this explanation, Justice Sánchez Cordero discarded her project to adopt the one proposed by Justice Zaldívar in March 2012, in order to obtain a majority vote and grant an *amparo* that would immediately release Florence Cassez from prison.<sup>62</sup>

The Supreme Court judgment sparked another passionate round of arguments in Mexican society that has since been debated as to whether the subject matter of a case should be subjected to form while also arguing to the contrary that this precedent would provide jurisdictional arguments to other criminals to be released from jail in light of the due process violations that the police incur when arresting people or because of the lack of police and judicial authority’s preparation in handling cases. Another important point that is essential to the topic of transitional process of justice and human rights is the

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into consideration an omission or re-evaluate a misinterpretation. In this case, it would imply that any evidence found to be either unconstitutional or in violation of her human rights would have to be discarded and a new resolution would have to be issued without considering the flawed elements in the judgment.

<sup>60</sup> María de la Luz González, *Desecha Corte Proyecto de Ministro Zaldívar*, EL UNIVERSAL, March 21, 2012 <http://www.eluniversal.com.mx/notas/837281.html> (accessed on February 25, 2013).

<sup>61</sup> Justice Gutiérrez Ortiz Mena’s position could even be related to the argument made by Bassiouni since both implied that a remedy must be awarded, with the distinction that Bassiouni clearly mentioned that “[f]ailing to provide an alien with an effective remedy amounts to a denial of justice that subsequently gives rise to an international claim by the alien’s State of nationality,” possibly in the same sense as the International Court of Justice resolved in *Barcelona Traction*. Cherif Bassiouni, *supra* note 14, at 218.

<sup>62</sup> Elisabeth Malkin, *Mexican Court Frees Woman Imprisoned in Kidnapping*, N. Y. TIMES, January 23, 2013, [http://www.nytimes.com/2013/01/24/world/americas/florence-cassez-is-freed-from-prison-in-mexico.html?\\_r=0](http://www.nytimes.com/2013/01/24/world/americas/florence-cassez-is-freed-from-prison-in-mexico.html?_r=0) (accessed 24 February 2012).

argument of the previous chapter on the rights of victims.<sup>63</sup> This particular idea, however, should be analyzed carefully.

In the *Florence Cassez* case, the victims of the kidnapping may have been victims to organized crime and ultimately victims of the State for its omission to act to prevent a transgression of their personal liberty and security by non-State actors. This omission would eventually grant them the right to remedy against the State, including compensation. However, in pondering the transcendence of the case, one can argue that the victims' desire to hold Cassez in prison —who, as was described above, only incriminated her and recognized her as their captor after their second deposition, and in one particular case, recognized her based on televised images— was probably not only guided by fear or the desire to see the rule of law enforced, but by a personal vendetta.<sup>64</sup> Without affirming it, it could be argued that in this case the prosecution should focus on those public officials that authorized and gave way to the violation of Florence Cassez's human rights, for their actions probably excluded the possibility of finding true justice —even if this meant that she was guilty of kidnapping, an issue about which the Supreme Court did not make any statement.

However, considering as the Justices did, that the police forces completely manipulated the proceedings and the evidence, what would be more important for a consolidating democracy, and particularly for a State going through a period of internal instability, would be to demonstrate that the respect for human rights and the rule of law are not to be ignored under any circumstances.<sup>65</sup> Under this premise, the Supreme Court of Justice upheld that the

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<sup>63</sup> An important clarification must be made at this point: while in the last chapter we argued that the *Casino Royale* victims had the right to remedy and reparation under international human rights law, a different perspective appears in this *amparo* trial. In reviewing the interpretation of what is argued as being a constitutional and human rights violation, the Supreme Court of Justice can only rule on matters of constitutionality and conventionality, but is not able to order either reparation or prosecution because its express obligation in reviewing *amparo* trials is to determine the constitutional or unconstitutional interpretation made by lower Courts. However, as noted above, given the fact that Cassez was granted an *amparo*, it could open the door for her to file a claim for reparation in light of the violation of several of her human rights, including what would have possibly been illegal detention.

<sup>64</sup> As stated by Pablo de Greiff, "...since criminal prosecutions without reparations may be thought to provide no direct benefits to victims other than a sense of vindication that otherwise does not change the circumstances of their lives, a policy based exclusively on prosecution is likely to be experienced by victims as an inefficient response to their own justice claims." U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, para. 24, UN Doc. A/HRC/21/46 (August 9, 2012).

<sup>65</sup> "Peace and stability can only prevail if the population perceives that politically charged issues, such as... unequal distribution of wealth and social services [and] abuse of power... can be addressed on a legitimate and fair manner." The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, para. 4, delivered to the Security Council, UN Doc. S/2004/616 (August 23, 2004).

value of a person's dignity is unparalleled and is to be respected, regardless of any internal conflict the country may be experiencing. On the other hand, Justice Sánchez Cordero recognized that the principal rights of the victims in the case were their rights to truth and justice, which should however not be obtained at the expense of a violation of the human rights of others.<sup>66</sup>

Through this interpretation, a clear message was sent: there is a need to reform the prosecutorial, judicial and penitentiary systems, in order for them to respect human rights and the rule of law, as well as to act according to the principle of legality that is so often invoked, but so rarely practiced. It is only through the respect and upholding of the rule of law that democratic ideals and the protection of human rights can be effectively achieved. Therefore, it is the way to build peace and achieve the necessary transformation of the social fabric for the State to concrete its transition into a developed democracy.<sup>67</sup>

## VI. CONCLUSION

Recent quasi-judicial and judicial decisions—two of which were described above—show that Mexico may have started to travel down a road that holds human rights and the rule of law under closer scrutiny and in conditions that would comply with its international obligations under international human rights law and their correlative structures of international criminal law and transitional justice. As stated at the outset, recognizing victims' rights and fostering trust in the State are the starting points to achieve social reconciliation and to strengthen the rule of law. However, although the two cases discussed above are laudable and worthy of being used as examples to follow in a country that desperately needs them, it holds true that a deeper commitment to a cultural and social transformation is required at all levels and in all sectors of society if a permanent transition into a developed democracy is to be made.

Addressing the socioeconomic needs of the population, setting up long-term policies—different from the current six-year policies that are renewed with every change of administration—that will foster social and institutional development, and establishing defined parameters and expectations of public officials in terms of their respect of and abidance for human rights and rule

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<sup>66</sup> “...it is necessary to emphasize that every accusation must be based in solid and reliable evidence, obtained in respect of fundamental rights.” Sentencia de Amparo en Revisión 517/2011, Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Página 31 (Mex.).

<sup>67</sup> In his report, the UN Secretary-General considered that there is a need to have a comprehensive approach that balances accountability, truth, reparation, preservation of peace and the building of democracy and the rule of law, in order to meet the challenges posed by post-conflict environments. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 25, delivered to the Security Council, UN Doc. S/2004/616 (August 23, 2004).

of law standards would allow the State to grow prosperously. In this transitional process, victims must be heard and their demands must be met where possible in order to rebuild the social credibility of public institutions. Meanwhile, institutions should make an effort to follow international standards in areas relating to human rights and due process of law, while adding a distinctively local stamp to policies in other fields that affect and have effects on the general population.<sup>68</sup>

Victims of human rights abuses have an especially important role to play in this transition: they should strive for truth, memory and justice; they should strive for reform; and they should strive for change.<sup>69</sup> The number of victims reveals the increasing importance their voice must have down the road for the reconstruction of both Mexican society and institutions. During this process, they must however remember that just as they have been victims of human rights abuses or omissions, their quest for justice should be based precisely on those fundamental values to mankind that are capable of breaking the cycle of impunity.

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<sup>68</sup> According to the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, the goals of these measures are the recognition of the victims and their status as such, the fostering of trust between individuals and towards institutions, a social reconciliation and the strengthening of the rule of law. U. N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, paras. 28-46, UN Doc. A/HRC/21/46 (August 9, 2012).

<sup>69</sup> “By honouring victim’s rights to benefit from remedies and reparation, the international community expresses solidarity with victims and reaffirms the principles of accountability, justice and the rule of law.” Cherif Bassiouni, *supra* note 14, at 279.