The Inter-American Court's Mexican Tetralogy on Military Jurisdiction: A Case for Principled Jurisprudence

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
Faculty of Law
University of Toronto

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2011

Abstract

Recent Inter-American Court of Human Rights jurisprudence has resulted in major amendments to Mexican military justice law that were previously thought to be impossible, considering the historical role of the armed forces and Mexico's civil-military pact. Yet, with a recent Supreme Court decision, Mexican law has been modified to bring it into compliance with the Inter-American Court's decisions. However, their efficacy has been undermined by aspects of the decisions which were not made on a principled basis.
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“Military justice is to justice, what military music is to music.”

–George Clémenceau

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1 Introduction

Russell Williams is the infamous former Colonel of the Canadian Armed forces convicted of the murder and sexual assault of several women, in addition to many other crimes. Canadian readers know that the charges against Williams were brought before a civilian criminal court as opposed to a court martial. In Canada, this practice is largely unquestioned, and indeed is expected. After all, the Canadian Code of Military Discipline prevents the crime of murder from being tried in a court martial if the alleged offence took place on Canadian soil. In Canada, as in many other countries, there is no question of a civilian court being prevented from exercising jurisdiction simply because the facts involve a person subject to the Code of Military Discipline. This is the case in many countries in the world. But it is not the case in Mexico. A few months after Russell's sentencing hearing, the writer was speaking with someone who attended meetings between Canadian and Mexican foreign service personnel where the case was informally discussed. The case intrigued Mexican diplomatic personnel, who were frankly shocked that the prosecution under ordinary criminal jurisdiction was not only possible, but so easily accomplished. Such a thing was unimaginable to them. It demonstrates the extent of the both the Mexican armed forces’ independence and its untouchability.

The four cases discussed below on Mexican military jurisdiction therefore represent a significant step forward in the Court’s generally cautious jurisprudence in this area. The armed forces have a long held a special position in Mexico, which has resulted in general impunity for human rights violations committed by members of the armed forces. This impunity has been maintained in part by the use of military criminal jurisdiction to investigate human rights


2 National Defence Act, R.S., 1985, c. N-5 at s. 70.

3 Ibid. at s. 71.
complaints. Mexico's increasing reliance on the armed forces for police functions has combined with this to result in an increase in human rights complaints against the military, with very little accountability. Between November 2009 and November 2010, the Inter-American Court of Human Rights issued 4 separate decisions on this topic, each time finding Mexico in violation of its human rights obligations. The cases will be collectively referred to here as the "Mexican Tetralogy." These decisions generally reflect an incremental approach to the development of jurisprudence on the part of the Court. After initially balking, Mexican authorities have very recently modified Mexican law to bring it largely into compliance with the Court's decisions, mainly as the result of a landmark decision from the Supreme Court.

Yet, despite this significant victory, Mexico still faces challenges in effectively implementing the Court's decisions, largely because of its long history of entrenched impunity. Dezalay and Garth's theory about the marginal role of law provides some helpful insights here, although their arguments about human rights as a foreign import are in many ways inapplicable to the Inter-American human rights system. While there were several positive aspects to the decisions, there were also some negative aspects, most notably the lack of a principled justification for the innovation of the Court's jurisprudence. The Court's jurisprudence would be more effective, in terms of maximizing its impact and its legitimacy, if it took a principled approach to innovations in its case law.

2 History of the Armed Forces in Mexico

It is almost trite at this point to refer to President Felipe Calderón’s increased use of the Mexican armed forces to combat criminal organizations in the “War on Drugs” his administration has pursued since his election in late 2006. It is true that the number of troops deployed has increased dramatically, particularly in areas near the northern border, and that the tactics deployed are much more aggressive than ever before. An emphasis on the novelty of the scale, however, risks obfuscating that the use of the armed forces and the concomitant militarization of certain areas in Mexico is not new at all. It is, rather, a continuation and intensification of a decades-old pattern of reliance on the armed forces for the maintenance of internal security.
Some aspects of the relationship between civilian and military authorities were set out during the Mexican Revolution of 1910 and even prior, during the Porfiriato, which refers to the 34-year period where Porfiario Díaz ruled Mexico with an iron fist in the late 19th century. He developed a hierarchical and very personal style of rule, developing a loyal base of support by placing allies and military comrades in power. He used military rank and personal connections to blur the line between civil and military relations and to channel all institutional lines of authority to the executive. The result was a military that answered only to the president. Other branches of government lacked either the authority or the will to limit his actions. Porfiario Díaz centralized power and used force to maintain order. This pattern continued after the Revolution and to some extent still continues to this day, despite the moderations created by democratization.

After the Revolution, during the presidency of Cárdenas, the armed forces were incorporated as a component of the "revolutionary family." The coercive apparatus of the state was blatantly blended into the federal government. This coalition provided the underpinning for a remarkably stable political system for the remainder of the 20th century.

This continued even after civilian political dominance was obtained via the appointment of a civilian president in 1946. In 1958, the Partido Revolucionario Institucional (PRI) -both Mexico's ruling and its only political party for 71 years- enlisted the military to suppress a railroad workers' strike. The military was also involved in the suppression of a student movement in the 1960s, culminating in the infamous Tlatelolco massacre of unarmed students in Mexico City in 1968. Indeed, it was the Mexican military that was responsible for perpetrating most of the human rights abuses during Mexico's Dirty War in the 1960s and 1970s, which

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5 Ibid. at 57.
included the torture and forced disappearance of hundreds of civilians.\(^8\) During this time, several areas in Mexico, including Guerrero state in southern Mexico, became heavily militarized.\(^9\)

In terms of the drug trade, the armed forces have been employed in defence against it since the 1970s, because of the weakness and high rates of corruption in many of Mexico's police forces.\(^10\) In 1977, the Mexican government commenced *Plan Condor*, an anti-drug operation involving close to 16,500 troops.\(^11\) Roderic Camp, writing in 1992, stated that a strong argument can be made that since the 1980s internal security issues have multiplied and been exacerbated by the drug trade.\(^12\) During this time, the armed forces were increasingly deployed to Guerrero to combat the drug trade, where they have been implicated in human rights abuses, particularly against indigenous and *campesino* communities. While repression was reduced during the 80s compared to the bad old days of the Dirty War, the armed forces were becoming increasingly involved in areas typically left to civilian authorities. It is therefore no coincidence that all four of the Inter-American Court decisions discussed in this paper involve incidents in Guerrero state. During the administration of President Carlos Salinas from 1988-1994, the role of the military continued to increase, even in matters that did not truly fall under the rubric of national security,\(^13\) such as when Salinas declared drug trafficking to be an issue of national security.\(^14\) The armed forces were again called in to respond to the armed uprising of the *Ejército Zapatista de Liberación Nacional* (EZLN) in 1994. This changed the focus of the military’s involvement in Guerrero once again from anti-drug operations to counter-insurgency work.\(^15\) Around that time, the army began providing assistance to civilian police by creating Mixed Operation Bases, which

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\(^10\) Díez and Nicholls *supra* note 7 at 33.

\(^11\) *Ibid.*.

\(^12\) Camp, *supra* note 6 at 12.

\(^13\) *Ibid.* at 222.

\(^14\) *Ibid.*.

\(^15\) Military Impunity on Trial, *supra* note 9 at 20.
are checkpoints on roads used to search persons and vehicles. The first such bases were created in Chiapas in 1993 and Guerrero in 1998. In 1996, the appearance of the guerrilla group the Popular Revolutionary Army resulted in increased militarization of Guerrero state yet again. As in the 1960s, indigenous territories were occupied and incursions were made into villages. While the official reason for the military operations remained the drug trade, counter-insurgency remained a clear objective, as evidenced by the fact that persons arrested by soldiers were continuously interrogated for information about the “hooded ones” (guerrillas). In 1998, 11 civilians in a primary school in the community of El Charco were massacred by active duty soldiers.

Camp noted in 1992 that the consensus of analysts over the past 15 years was that increased political unrest would lead to a larger military role and that increased unrest was likely. This comment was prescient as this has, indeed, been the case, mostly in the form of increased insecurity linked to organized crime. Reliance on the military continued under the Zedillo sexenio from 1994-2000. Although President Vicente Fox, the first non PRI president to be elected in 71 years, pledged to reduce reliance on the military for anti-drug operations, the opposite occurred. The armed forces were instead tasked with functions previously within the ambit of civil institutions. In 2000, Brigadier General Rafael Macedo de la Concha was appointed Attorney General, and several other military officers were promoted to high ranking civilian positions. Increased reliance on the military resulted in the number of active personnel increasing from 130,000 to 240,000 in 2003. Opposition to this reliance on the armed forces for internal policing that would typically be under the purview of civilian police forces is also not new. In 1996, for example, an opposition group brought a complaint to the Mexican Supreme

16 Ibid.
17 Ibid.
18 Ibid. at 21.
19 Ibid. at 20.
20 Camp, supra note 6 at 228.
21 Díez and Nicholls supra note 7 at 34.
22 Ibid.
23 Ibid. at 35.
Court, alleging that the use of the army in the fight against organized crime violated the Mexican Constitution. The court ruled in favour of the military.  

The historical relationship between the armed forces and civilian authorities in Mexico is unique in Latin America. Indeed, Mexico was the only Latin American country to not experience a military coup in the 20th century. Instead, the armed forces have remained firmly obedient to the President. This loyalty resulted from a civil-military “pact” between civilian and military authorities during Mexico’s 71 year period of one-party rule under the PRI, whereby the armed forces were permitted full autonomy in their internal affairs in exchange for total obedience to civilian authorities. This autonomy has to a great extent persisted to the present day. It is combined with an insularity and inward-looking disposition that is hostile to outside examination. One of the few authoritative studies in either English or Spanish on the Mexican armed forces is Roderic Ai Camp’s 1992 Generals in the Palacio. Camp wrote that the military had erected such obstacles to outside examination, they impacted the methodological approach he was able to take to his study. He noted that an earlier scholar, David Ronfeldt, writing in the 1970s, had stated that if the Mexican military was not the most difficult institution to research in Latin America, it was certainly the most difficult national institution to research in Mexico. Even today, the armed forces do their utmost to avoid outside scrutiny. For example, representatives of SEDENA (Secretaría de la Defensa Nacional) are much less open to meeting with human rights advocates than most other Mexican public bodies. Camp notes that this insularity has resulted in the forces’ social isolation from other sectors of Mexican society, from

24 Ibid. at 39.
25 Ibid. at 4.
26 Ibid. at 5.
27 Camp, supra note 6.
28 Ibid. at 3.
29 Ibid. at 5.
30 See, e.g. Bar Human Rights Committee of England and Wales, Recalling the rule of law: A report on the lawyers’ delegation to Mexico (July, 2010) [http://www.barhumanrights.org.uk/docs/reports/2010/Mexico_report_2010.pdf - accessed September 14, 2010] [hereinafter “Recalling the Rule of Law”], where representatives of municipal, state and federal levels of government met with members of a delegation of foreign human rights lawyers, most likely with the knowledge the meetings would culminate in a report critical of Mexican human rights practice. SEDENA neither responded to multiple requests for a meeting nor provided any information for the delegation.
average citizens to elite civilian groups. This insularity has resulted in an armed forces that is closed to public criticism and commentary. For example, retired General Brigadier José Francisco Gallardo wrote a master’s thesis at the Universidad Nacional Autonoma de México called “The Necessity of a Military Ombudsman in Mexico” that was critical of the military tribunal system. An extract of the thesis was published in Forum magazine in October 1993. Shortly after publication, he was accused of injurious defamation and slander, contrary to article 340 of Mexico’s Code of Military Justice and ordered to prison on December 18, 1993.

At the same time, Mexican armed forces are known to have one of the highest levels of military discipline in Latin America, with an extreme sense of loyalty to superiors, including the office of the President. This highly-developed obedience is undoubtedly a contributing factor to the Armed Forces longstanding deference to civilian authority in all matters beyond what are considered internal military matters, and probably also to the intensity with which they protect their own. While freedom of information laws passed in 2003 have increased the amount of available information, the forces remain closed off to dialogue with outsiders.

The armed forces have remained one of the most highly regarded institutions in Mexico. In a country where citizens are routinely polled as having extremely low levels of confidence in their police, politicians, and the court system, the armed forces have remained one of the top three most highly regarded institutions in the country. However, recent surveys indicate that this confidence is decreasing. In its 2010 report on confidence in public institutions, Consulta Mitofsky found that the percentage of people with high levels of confidence in the armed forces had decreased 6% in a year from 41% to slightly over 34%. By July 2011, that figure had

31 Camp, supra note 6 at 10.
33 Ibid..
34 Camp, supra note 6 at 11.
35 President Vicente Fox enacted the Access to Information Law in 2003.
36 Along with the Roman Catholic Church and schools.
decreased even further to 31.9%.\footnote{Consulta Mitofsky, “Monitor Mitofsky: Economía, Gobierno y Política, Monitor Mensual de Consulta Mitofsky,” July 2011 at 8.} While the military remains one of the most highly regarded institutions in Mexico, its status is steadily declining, correlative with an increase in organized crime-related violence and the government’s continued reliance on the military to combat the same.

The increased numbers of military deployed in the “drug war” have corresponded with a significant increase in the number of human rights complaints made against them.

While democratization in the 1990s and 2000s changed some aspects of the civilian-military pact, the fundamental terms of the arrangement have remained unchanged. Despite a general movement towards increased democratization and openness in public institutions, the Mexican armed forces remain largely autonomous and not subject to civilian oversight.\footnote{Díez and Nicholls, supra note 7 at 4.} This includes decisions made with respect to promotions and equipment, but also, most notably for this paper, the prosecution of practically all military personnel charged with any criminal offence.

3 Mexican law governing military criminal jurisdiction

The legal basis for military criminal jurisdiction in Mexico lies in article 13 of the Mexican Constitution, which establishes a military court for “crimes and offences against military jurisdiction.”\footnote{Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.) (online: \url{http://www.constitucion.gob.mx/}) at art. 13. See also Antonio Saucedo López, Los Tribunales Militares en México (Mexico City: Editorial Trillas, 2002) at 13 [hereinafter "Constitución"].} Article 13 states:

Military jurisdiction exists for crimes and infractions against military discipline; but the military courts must not in any case or for any reason, extend their jurisdiction over people who do not belong to the Army. When a
civilian is involved in a military crime or infraction, the corresponding civilian authority will try the case. 41

Military jurisdiction, therefore, is constitutionally mandated only for offences against military discipline. However, Mexico’s Code of Military Justice interprets the provision more broadly. Article 57(ii) states that offences against military jurisdiction include all those “that are committed by soldiers whilst in service or carrying out service-related tasks.” 42 The result is that military jurisdiction in Mexico has operated as a personal jurisdiction for all crimes committed by members of the armed forces since the 1930s. The Code of Military Justice was enacted in 1933. Unlike other countries in Latin America, even those with a larger tradition of militarism, military tribunals in Mexico have not been reformed in support of human rights standards. 43 This has resulted in overwhelming impunity for armed forces personnel implicated in abuses against civilians. This phenomenon has been well-documented by both domestic and international human rights organizations.

4 Increasing Human Rights Complaints

This impunity is increasingly problematic in light of President Calderón’s massive deployment of troops in anti-drug operations. Human rights-related complaints against the armed forces have skyrocketed since Calderón took office. The Washington Office on Latin America reports that over 4,800 complaints were made against military personnel between 2006 and 2010. To wit, 182 such complaints were made in 2006 compared with 1415 in 2010. 44 Amnesty International’s data, which includes 2011,

41 English translation from “Military Impunity on Trial,” supra note 9 at 29.


43 Gonzalez Oropeza, supra note 32 at 195

44 Washington Office on Latin America, “Mexico’s Supreme Court Decides to End Military Jurisdiction for Soldiers Who Commit Human Rights Violations,” July 13, 2011, (online:
found that there have been over 6,000 complaints lodged with Mexico’s National Human Rights Commission since December 2006.\textsuperscript{45} This represents a ten-fold increase in complaints since Calderón began his war on drug trafficking organizations. Data from Mexico’s Ministry of the Interior states that only one soldier has been sentenced for human rights violations during that time.\textsuperscript{46} Mexican military jurisdiction has therefore functioned to remove the armed forces from the operation of the rule of law and resulted in near absolute impunity for personnel involved in human rights abuses.

Federico Andreu-Guzmán has observed that military courts generally do not adhere to international legal standards that hold that courts should be independent, impartial, guarantee due process, and comply with human rights obligations.\textsuperscript{47} Military judges are often personnel on active service and subordinate to military commanders, a violation of the principle of judicial independence.\textsuperscript{48} This is the case in Mexico. In her 1999 report on a visit to Mexico, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions observed that judges of the Mexican Military Court are all serving officers who are appointed by the executive and noted that the system was arbitrary and resulted in the miscarriage of justice.\textsuperscript{49} In 1998, the United Nations Special Rapporteur on the Independence of Judges and Lawyers stated that a consensus was developing in international law to restrict, or even prohibit, the use of military tribunals for the

\begin{quote}
http://www.wola.org/commentary/mexico_s_supreme_court_decides_to_end_military_jurisdiction_for_soldiers_who_commit_human
\end{quote}


\textsuperscript{46} “Military Impunity on Trial” supra note 9 at 30.

\textsuperscript{47} Andreu-Guzmán, supra note 1 at 10.

\textsuperscript{48} Ibid.

prosecution of active personnel accused of criminal offences.\textsuperscript{50} In the context of the Inter-American System, this brings into play articles 8(1) and 25(1) of the \textit{Convention}, reproduced and discussed in the below discussion of the Court’s jurisprudence on military criminal jurisdiction. In addition to articles 8(1) and 25(1) in conjunction with article 1(1), there is an \textit{Inter-American Convention on the Forced Disappearance of Persons}.\textsuperscript{51} Article 9 provides that persons alleged to be responsible for acts of forced disappearance must be tried by ordinary criminal jurisdiction, to the exclusion of military jurisdiction. It goes on to state that acts of forced disappearance are deemed not to be committed in the course of military duties. When Mexico signed the \textit{Convention} it entered a reservation to this provision. This provision is the only international treaty to make specific reference to the use of military criminal jurisdiction for the prosecution of alleged human rights abuses.

5 Overview of the Inter-American Human Rights System

The following is intended to provide a brief sketch of the role and function of the Inter-American human rights system for those who are not familiar with its operations. The Inter-American Court of Human Rights resolves contentious disputes and issues advisory opinions on specific questions of law. The Inter-American Commission on Human Rights (IACHR) has a broader role. It is the first step in the admissibility process for contentious Court cases, it promotes friendly settlement between parties, and investigates and presents reports on human rights in states, even where there is no legal claim.\textsuperscript{52} Both the Court and the Commission are responsible for interpreting Inter-American human rights instruments, including the \textit{American Declaration on Human Rights} and the \textit{Inter-American Convention on Human Rights}. There was broad regional support for the \textit{American Declaration} when it was created in 1948. It was the first international human rights document, predating the \textit{Universal Declaration of Human Rights} by 6

\begin{itemize}
  \item \textsuperscript{50} \textit{Ibid.}.
\end{itemize}
months.\textsuperscript{53} Both the Commission and the Court have 7 members. Court members serve 6-year
terms and may be reelected once.\textsuperscript{54} Members of the Commission sit for 4-year terms and may
also be reelected once, pursuant to article 37 of the Convention. While members are nationals of
OAS states, they are to serve in their personal capacity. Individual complaints are brought first to
the Commission, who then assesses the case’s admissibility and merits in accordance with its
procedures. It then has the option of referring cases to the Court’s contentious jurisdiction. While
the decisions of the Commission are advisory, those of the Court are binding on states parties
that have accepted its jurisdiction, which includes most Latin American states, including Mexico.
The Court’s caseload has increased significantly in recent years. It was several years before it
decided its first case on the merits –\textit{Velazquez Rodriguez v. Honduras} in 1986. It decided 3 cases
between 1987 and 1989. By comparison, it dealt with 37 between 2006 and 2008.\textsuperscript{55} In 2005, the
Commission received 1330 complaints of violations and was only able to process and resolve
84.\textsuperscript{56} The overwork of the Commission and the Court mean that it is impossible for the Inter-
American system to serve as a general forum of last resort for victims of human rights abuses.

6 History of Inter-American human rights law on military
jurisdiction

The basis of the Court’s jurisprudence on military justice is grounded in the fair trial and
judicial protection obligations contained in articles 8 and 25 of the \textit{American Convention}. Article
8(1) states:

\begin{quote}
Every person has the right to a hearing, with due guarantees and within a
reasonable time, by a competent, independent, and impartial tribunal,
previously established by law, in the substantiation of any accusation of a
criminal nature made against him or for the determination of his rights and
obligations of a civil, labor, fiscal, or any other nature.\textsuperscript{57}
\end{quote}

\textsuperscript{53} \textit{Ibid.} at 642.

\textsuperscript{54} \textit{American Convention on Human Rights}, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July
18, 1978, reprinted in Basic Documents Pertaining to human Rights in the Inter-American System,
OEA/Ser.L.V./II82 doc.8 rev.1 at 25 (1992), acceded to by Mexico on March 2, 1981 \textit{[hereinafter "American
Convention"]} at art. 54.

\textsuperscript{55} Shaver, \textit{supra} note 52 at 369.

\textsuperscript{56} \textit{Ibid..}

\textsuperscript{57} \textit{American Convention, supra} note 54 art. 8(1).
Article 25(1) states:

>Everyone has the right 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, even though such violation may have been committed by persons acting in the course of their official duties.\(^{58}\)

Contracting states are obligated under article 25(1) to provide effective judicial remedies and under article 8(1) to ensure that these remedies are provided in accordance with the due process of law. These obligations arise as part of the general obligation of states parties to guarantee the free and full exercise of the rights recognized in the *Convention* to all persons within their jurisdiction.\(^{59}\) They often arise in the context of the duty to investigate, which was articulated in the very first case decided under the Court’s contentious jurisdiction. In *Velásquez v. Honduras*, the Court stated that the “state has a legal duty to use the means at its disposal to carry out a serious investigation.”\(^{60}\) This duty has been articulated throughout the Court’s jurisprudence. Article 25(1) also provides states parties with a duty to prosecute and punish persons responsible for human rights violations.\(^{61}\)

The first case to address criminal military jurisdiction was the 1997 case of *Genie Lecayo v. Nicaragua*.\(^{62}\) The case, which involved an extrajudicial execution, was referred to the Court by the IACHR for, *inter alia*, the prosecution of ordinary crimes as though they were military offences simply because the crimes in question were allegedly committed by members of the armed forces. The IACHR argued that this breached the *American Convention* guarantees of judicial independence and an impartial tribunal.\(^{63}\) The Court disagreed with the Commission’s analysis, finding that “the fact that [the prosecution] involves a military court does not *per se* signify that the human rights guaranteed the accusing party by the *Convention* are being

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\(^{58}\)Ibid. art. 25(1).

\(^{59}\)Andreu-Guzmán, *supra* note 1 at 31.


\(^{61}\)Ibid. at para. 7.


\(^{63}\)Andreu-Guzmán, *supra* note 1 at 114.
violated.” This decision was criticized. Next, was *El Amparo Case*, which involved military personnel who were tried under Venezuela’s military jurisdiction for the extra-judicial killing of 14 fishermen. The Court declined to make a ruling on Venezuela’s Military Code of Justice, however there was a dissent that was critical of that decision.

The Court’s jurisprudence started to evolve in the *Case of Castillo Petruzzi et al.*, which concerned the trial of civilians in a military court for treason. Speaking specifically of the trial of civilians in military courts, the Court stated that “when a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated.” In *Case of Durand and Ugarte*, the Court once again reviewed the limits of military jurisdiction for military personnel accused of crimes. The case involved persons who were killed by the authorities in a display of excessive force to quell a prison riot. The Court held that article 25 of the *American Convention* was violated by the prosecution the individuals involved by Peru’s military tribunal. The Court stated that “the penal military jurisdiction shall have a restrictive and exceptional scope related to the functions assigned by law to the military forces.” The Court found that the quelling of the prison riot could not be considered military felonies, but common crimes, “so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not.” The Court went on to find that the military court officials responsible for investigating the events lacked the independence and impartiality required by article 8(1). The reason for this finding was that the

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64 *Genie Lacayo Case, supra* note 62 at para. 84.
65 Andreu-Guzmán, *supra* note 1 at 114.
68 *Case of Castillo Petruzzi et al. (Peru)* (1999), Inter-Am Ct. H.R. (Ser. C) No. 52.
court was “a high Body of the Armed Institutes” and the judges were simultaneously members of the armed forces on active duty and therefore “unable to issue an independent and impartial judgment.”

In Case of Cantoral Benavides, the Court made additional commentary on military jurisdiction, stating that “its application is reserved for military personnel who have committed crimes or misdemeanors in the performance of their duties and under certain circumstances.” The Court did not, however, state exactly what those circumstances were. The Court did say, however, that Peru’s military tribunal did not meet the requirements of independence and impartiality in article 8(1) because the armed forces had “the dual function of combatting insurgent groups with military force, and of judging and imposing sentence upon members of such groups.” The Court’s analysis that criminal military jurisdiction is to be restricted and exceptional in scope from Durand and Cantoral Benevides was repeated in the Case of Las Palmeras. Once again, the Court found that military personnel are to be tried for crimes or misdemeanors that, by their very nature, harm the juridical interests of the military. While the extrajudicial executions of that case clearly did not come with that ambit of harming the juridical interests of the military, the Court again did not shed any light on what would. As in prior cases, the Court also found that the requirement of a competent and impartial tribunal is violated by military tribunals comprised of members of the armed forces who are also involved in fighting the insurgent groups the deceased were alleged to be members of.

The Court continued to apply the Durand analysis in subsequent cases up to 2008. The analysis was applied without distinction to cases where civilians were tried for crimes in military

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74 Ibid. at para. 126.
76 Ibid. at para. 112.
77 Ibid. at para. 114.
79 Ibid. at para. 51.
80 Ibid. at para. 53.
courts and where military tribunals took jurisdiction over cases involving military personnel implicated in human rights abuses. All cases applied the “restrictive and exceptional” doctrine and found violations of articles 8(1) and, in cases involving the failure to prosecute crimes against civilians, article 25(1). Some merely found that the military tribunals in question were incompetent to exercise jurisdiction, some additionally explicitly found that the tribunals or their judges were not impartial and/or independent. In these latter instances, the Court linked this to specific factual findings, as it did in earlier cases. In cases where only a finding of incompetence was made, the Court made no mention of impartiality or independence, and never explicitly elected not to make a finding on impartiality because it was rendered unnecessary by a finding of incompetence.

In the 2008 Case of Tiu Tojín, the court made the first significant modification to its jurisprudence in this area since Durand. This case involved the forced disappearance of Maya people by army officers. The Court initially repeated the Durand analysis, stating that military criminal jurisdiction must have a “restrictive and exceptional scope and only try soldiers for the commission of crimes or offences that due to their own nature endanger the juridical rights of the military order itself” and that “when the military justice system assumes jurisdiction over a matter that must be heard by the regular justice system, the right to a competent, independent and impartial tribunal previously established by law and, a fortiori, due process, which is, at the same time, intimately related to the right to a fair trial itself, is affected.

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83 Ibid. at para. 118.

84 Ibid.
The Court went on to state: “Specifically, the Tribunal has established that the prosecution of grave violations of human rights corresponds to the court of ordinary jurisdiction.”85 Cited in support of this were paragraphs 117 of Durand, 142 of La Contuta and 131 of Almonacid Arellano.86 The three cases involved extrajudicial executions and forced disappearance. The Court’s jurisprudence sets out that grave human rights abuses are those involving violations of non-derogable human rights.87 Nothing in the three cases, however, specifically established that grave human rights violations must be prosecuted in the ordinary jurisdiction. Indeed, while the Court had made specific findings in each case that the proceedings should have properly been brought before the ordinary court because they were unrelated to legal military functions, it provided no analysis of why that might be. For this reason, this case represented the most significant advancement in the Court's jurisprudence on military jurisdiction since Durand. The court also took the opportunity to simplify the differently yet always awkwardly-worded second portion of its “restrictive and exceptional” test to restrictive and exceptional and “linked to military functions.”88 With Tiu Tojín, the Court came full circle and overruled Lacayo, where the use of military criminal jurisdiction for the prosecution of an extra-judicial execution was found not to violate article 8(1) of the Convention in and of itself. Where Lacayo permitted an interrogation of the circumstances to determine whether the judicial guarantees were upheld in the circumstances, with Tiu Tojín it became clear that military tribunals were not competent fora for the prosecution of any military personnel accused of grave human rights abuses.

85 Ibid. at para. 119.
86 Ibid. at n.31.
87 Barrios Altos Case (Peru) (2001) Inter-Am. Ct. H.R. (Ser. C) No. 74 at para. 41. Note that the English translation of the case translates the Spanish grave as “serious” in Barrios Altos and “grave” in Tiu Tojín. Scholar Federico Andreu-Guzmán has translated it as “gross.” While the word choice changes in the English versions of different cases, even those translated by the Court, the Spanish cases, which are the original and official versions, consistently use the word grave.
88 Case of Tiu Tojín, supra note 82 at para. 120.
7 The Mexican Tetralogy

7.1 Radilla Pacheco v. Mexico

The Radilla case\(^{89}\) was the first Inter-American Court decision to address Mexico’s use of military jurisdiction for the prosecution of members of the armed forces who are accused of grave human rights abuses. The decision represents a watershed moment in human rights advocacy and practice in Mexico. Mr. Radilla was arrested by members of the armed forces in rural Guerrero in 1974, in response to his having written a *corrido* (Mexican narrative folk ballad) critical of the armed forces and performing it in front of the local barracks. This took place during Mexico’s Dirty War, which as mentioned above was a period from the 1960s to the 1980s characterized by widespread militarization, state intolerance to critique and fears of rural and indigenous radicalization. Mr. Radilla was detained incommunicado in the local barracks, where other prisoners observed him being blindfolded and beaten. Eventually he was forcibly disappeared, and his remains were never found. Because of fears of retribution in Mexico’s then climate of political repression, the family waited until 1991 to file an official complaint. During the proceedings, Mr. Radilla's relatives who brought the case to the Court have been repeatedly threatened. According to Peace Brigades International, a human rights organization that provides accompaniment to human rights defenders in danger, Mr. Radilla's daughter Tita was placed under surveillance by federal authorities and threatened at gunpoint to stop pursuing this case.\(^{90}\)

During the proceedings, representatives for Mexico made a partial admission of international responsibility. Mexico admitted to violations of the rights to humane treatment (article 5), liberty (article 7), a fair trial (article 8) and the right to an effective remedy, which is called judicial protection in the *Convention* (article 25). The tactic of partial admissions of responsibility is increasingly common at the Inter-American Court.\(^{91}\)

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proceedings may be seen as a positive step, this strategy is sometimes used by state representatives to attempt to obtain tactical advantage.\footnote{Ibid.} For example, in some cases after an admission of liability is made, the Court has declined to hear the matter and not made any findings of fact. This can be to the significant detriment of domestic human rights advocates, as the findings of fact made by the Court are often the only full and complete factual record of the violations.\footnote{Ibid.} The Court appears to have become sensitive to this issue and cognizant of the important role its fact-finding plays. In \textit{Radilla}, the Court continued to hear the proceedings in their entirety and made full findings of fact. In this case, Mexico’s partial admission of responsibility was combined with an argument that the case was inadmissible because the alleged facts took place in the 1970s, prior to Mexico’s ratification of the Convention. This preliminary objection was rejected by the Court via an application of its standard analysis of continuing violation, as it is a violation of a continual and permanent nature.\footnote{Radilla, supra note 89 at 24.}

The Court, citing its prior jurisprudence in the area, noted that forced disappearance is a violation of several rights. It is an inexcusable abandonment of the essential principles on which the Inter-American system is based.\footnote{Ibid. at para. 139.} This prohibition has reached the level of \textit{jus cogens}.\footnote{Ibid., citing \textit{Case of Tiu Tojín v. Guatemala}, supra note 82 at para. 9, among others.} The Court went on to hold that it is fundamental that the next of kin be able to access prompt and effective proceedings to determine the whereabouts and state of health of the disappeared relative.\footnote{Ibid. at para. 141.} Parties to the \textit{Convention} undertake not to tolerate the forced disappearance of persons under any circumstances and to punish those responsible.\footnote{Ibid. at para. 142.} Any time that it is reasonable to suspect that a person has been forcibly disappeared, an investigation must be started, regardless of whether an official complaint is made. The Court reiterated that the obligation to investigate is \textit{ex officio}, without delay and in a serious, impartial and effective matter.\footnote{Ibid. at para. 143.}
continues until the disappeared person is freed or their remains are found. The Court stated that for an investigation to be effective, states must have an adequate regulatory framework in place to develop the investigation.\(^{100}\)

**Rights to personal freedom, humane treatment and to acknowledgement of juridical personality**

The Court found as fact that Mr. Radilla was arrested by army soldiers at a military checkpoint in 1974, whereupon he was held in the military barracks of Atoyac de Álvaraz for several weeks. He was last seen there by other prisoners, blindfolded and beaten. The Court found that although 35 years had passed, Mr. Radilla’s family still does not know what happened and the Mexican authorities have failed to provide a clear response regarding Mr. Radilla’s fate.\(^ {101}\) The Court found that this was not merely a violation of the right to personal liberty contained in article 5 of the *American Convention*, but, because of the context of the Mexican Dirty War, which included mass arrests and force disappearances, Mr. Radilla’s life and personal integrity were also at risk.\(^ {102}\) The Court reiterated its previous jurisprudence that forced disappearance violates the right to humane treatment and to life, even if it can’t be specifically proven in a particular case that torture or death occurred. On this basis, the Court found Mexico in violation of the rights to life (article 4), liberty and humane treatment (article 5).

Article 3 of the Convention concerns the right to juridical personality, which states that everyone has the right to be recognized as a person before the law.\(^ {103}\) The Court has identified the content of this right as including the acknowledgement of a person as a subject of rights and obligations, the enjoyment of fundamental rights, and the capacity to bear civil rights and duties.\(^ {104}\) The right is violated when the state party disregards the possibility that an individual is a bearer of civil and fundamental rights and duties.\(^ {105}\) The right to juridical personality also

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103 *American Convention, supra* note 54 at art. 3.
104 *Radilla, supra* note 89 at para. 155.
105 *Ibid.* at para. 155
includes a corollary general duty for the state to offer the means and juridical conditions to ensure that the right can be freely and fully exercised. The Court found that Mexico’s disregard for Mr. Radilla’s whereabouts or the present location of his remains persists to this day and that there has been no effective investigation of his whereabouts, thereby violating Mr. Radilla’s rights under article 3. 106 In addition, with respect to Mr. Radilla’s next of kin, the Court found that their right to humane treatment was also violated for all that they suffered in relation to Mr. Radilla’s detention and forced disappearance. 107

**Access to justice and the obligation to carry out an effective investigation**

The Court next turned to the right to access justice and the obligation to carry out an effective investigation. The Court noted the investigation of the National Human Rights Commission, but found that it was no substitute for judicial proceedings. 108 The court declined to make a finding under article 13 (freedom of expression and information) because the right to the truth is already contained in articles 8 and 25. 109 The Court found that the state undertook several proceedings, including an investigation by the Special Prosecutor on Forced Disappearances. The Court found as a fact that none of the investigations undertaken by the state were conducted with due diligence, resulting in impunity. 110 The Court defines impunity as the “lack of a complete investigation, persecution, capture, prosecution and conviction of those responsible for the violations of rights protected by the American Convention.” 111 The Court noted that although 35 years had passed since Mr. Radilla had disappeared and 17 years since his next of kin filed their first criminal complaint, there had still been no effective investigation undertaken. 112 The Court reiterated its established jurisprudence on the obligation to investigate, which is maintained regardless of who may have committed a violation (even a private person).

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111 *Ibid.*, citing Case of *Tiu Tojín*, supra note 82 at para. 69, among others.
The reason for this obligation is that if the acts are not investigated seriously, they are in effect assisted by public power and therefore the state’s international responsibility is invoked.  

**Reasonable term for the duration of investigation**

Moving further into its analysis of the requirements respecting investigation of human rights violations under the convention, the Court stated that one day element of the right to a fair trial in article 8(1) is that cases must be determined within a reasonable time. The Court uses a multifactorial analysis to determine whether a period of time is reasonable, including the complexity of the case, procedural activity of the interested party, the behaviours of the judicial authorities, the infringement generated and the juridical situation of the person involved in the proceedings. In cases such as this one, however, the Court noted that the duty to fully satisfy the requirements of justice prevails over the guarantee of a reasonable term. The burden of proof lies with the state to show what is a reasonable period of time in the circumstances of each case, however if it does not to do this satisfactorily, the Court will make its own estimate. In this case, the state waited 10 years after the initial complaint to start the investigation at the Office of the Special Prosecutor for Forced Disappearances. Writing its decision more than 7 years after that investigation was started, the Court noted that the preliminary inquiry was still open. The state provided no justification for this 17 year delay. The Court therefore found that Mexico “excessively” passed the term that can be considered reasonable and was therefore in violation of article 8(1).

**Right to participate in criminal proceedings**

The Court also found a violation of 8(1) for the state’s failure to guarantee that victims are permitted to present arguments, receive information, provide evidence and make allegations.
and defend their rights. Mr. Radilla’s next of kin was denied this when she was denied access to the dossier of the criminal case.\textsuperscript{117}

**Proceedings under military jurisdiction**

The preceding analysis provides a build-up to this section, which represents the crux of the case and novel part of the court’s analysis. For the first time in the history of its jurisprudence, the court finds that Mexican military jurisdiction is not a competent jurisdiction to investigate human rights violations. It also makes some modifications to its previous jurisprudence on military criminal jurisdiction generally.

The Court notes that it has repeatedly found that military criminal jurisdiction in democratic states in peace time have tended to be reduced or disappeared.\textsuperscript{118} This is a slightly different restatement of the Court’s traditional “restrictive and exceptional” analysis. This, however, is the first case where the Court has spoken of the complete abolishment of military criminal jurisdiction in times of peace. The Court goes on to state that if a state maintains use of military jurisdiction, it should be used minimally and only as strictly necessary, inspired by the principles and guarantees that govern modern criminal law. It shall have exceptional and restrictive scope and be directed toward the protection of the special juridical interests related to the tasks characteristic of military forces. The court noted that only active soldiers should be prosecuted under military jurisdiction and only for crimes and offences that by nature threaten the juridical rights of the military order itself.\textsuperscript{119}

The Court then states that it has previously established that military jurisdiction is not the competent jurisdiction to investigate, prosecute and punish human rights violations. That must take place within the regular criminal justice system.\textsuperscript{120} In support of its finding that military courts are not competent to prosecute all human rights violations, it cites *Case of the Massacre of La Rochela* and *Case of Escué Zapata*, neither of which explicitly state that, but rather which

\textsuperscript{117} Ibid. at para. 259.
\textsuperscript{118} Ibid. at para. 272.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid. at para. 273.
simply state the “restrictive and exceptional and related to military juridical interests” doctrine discussed above. Rather interestingly, it does not cite *Tiu Tojín*, the case where it stated for the first time that military courts are not competent to exercise jurisdiction over the prosecution of grave human rights abuses (but not all).

The Court then states that when a military court takes jurisdiction of a case that is properly within regular criminal jurisdiction, the right to a competent tribunal and due process is violated. It is only now that the Court cites the *Case of Tiu Tojín*, among others, however it merely cites the paragraph in *Tiu Tojín* that was a restatement of the Court’s earlier law on military jurisdiction, and does not mention the “grave human rights” portion that was new in that case.121 The Court noted that the prosecution of human rights violations involves not only the accused, but the right of the victim to participate in the proceedings and his or her right to the truth.122 The Court reviewed evidence of the scope of article 57 of the Mexican *Code of Military Justice* and determined that it is overly broad because it is applied to all crimes committed by armed forces members. Mexico was found to be in violation of the principle of a competent tribunal under article 8(1) because Mexico's military criminal jurisdiction operates as a rule rather than an exception, and therefore fails the restrictive and exceptional test.123 As Mexico had not adjusted its domestic legislation to comply with the *American Convention*, it was also found to be in violation of article 2.124

The arrest and forced disappearance of a person is not related to military discipline.125 The Mexican government had stated in its defence that it is legally possible that military decisions be revised by civilian appellate courts (although in practice this does not happen). The Court, however, found that the mere possibility of this was immaterial, as the process must be viewed as a whole.126 When finding that article 8 is violated because Mexican military

jurisdiction operates as a rule rather than an exception, and is therefore incompetent as a forum, the Court is careful to note that because it has found that military courts are not competent to hear crimes involving alleged human rights violations, it does not need to make a finding on whether the courts lack independence or impartiality. This is a rather curious aspect of the Court's decision. As noted above, the Court has often made findings that military tribunals both lack competence and impartiality/independence. Using the standards applied in its previous case law, the Mexican military courts would appear to lack both independence and impartiality. The author submits that, by declining to make this finding, however the Court is demonstrating sensitivity for the political context in Mexico. As noted above, the armed forces is the most popular and trusted organization in Mexico after the Catholic Church and educational institutions. Upwards of seventy per cent of Mexicans have a positive view of the military, compared with the 37% who had a positive view of the justice system in a 2007 Gallop poll. In this context, since the Court already had sufficient grounds to find a violation of article 8(1), it was wise to decline making a finding that would very possibly be politically unpopular and that might even lead to a backlash against the Court and its decision.

The Court goes on to note that article 57, part II of the Code of Military Justice states that acts of ordinary jurisdiction go under military jurisdiction when they are committed by soldiers who are active soldiers or based on acts of the same. The Court found that this definition is broad and imprecise. The result is that the military justice system may prosecute any soldier for any crime. Indeed, at the time, it was practically unimaginable in Mexico that any civilian authority would investigate any member of the armed forces for criminal behaviour at any time, as the anecdote presented at the beginning of this paper is intended to demonstrate.

The Court considered the right to an effective remedy contained in article 25 of the Convention, and notes that it is not sufficient that resources to appeal exist, they must be effective, which was not the case here.

127 Ibid. at para. 282.
128 David Shirk, "Judicial Reform in Mexico: Change & Challenges in the Justice Sector" (May 2010) Trans-Border Institute, Joan B. Kroc School of Peace Studies, University of San Diego, at 5.
129 Radilla, supra note 89 at para. 286.
130 Ibid. at para. 298.
Military Justice and The Inter-American Convention on Forced Disappearance

The Court next turned to the provisions of the Convention on Forced Disappearance (hereinafter "CIDFP") that concern military jurisdiction, noting that the object and purpose of the Convention is the protection of fundamental human rights.\textsuperscript{131} This treaty bans the use of military jurisdiction for the investigation or prosecution of forced disappearances, but Mexico has entered a reservation to that provision. By signing and ratifying a treaty, the Court noted that states submit to a legal order where they assume the obligations with respect to individuals who are under their jurisdiction. This view has been taken by the Inter-America Court, the International Court of Justice and the United Nations Human Rights Committee.\textsuperscript{132} The Court noted that the CIDFP includes the effective protection of human rights and the effective punishment of the crime of forced disappearance by a competent tribunal, which is linked to the right to due process of law and to a fair trial. Those rights are non-revocable and non-derogable.\textsuperscript{133}

The Court then reiterated its jurisprudence on this topic, which states that a reservation to a provision in a treaty that suspends a fundamental right whose content is non-revocable shall be considered incompatible with the object and purpose of the Convention and therefore incompatible with the Convention.\textsuperscript{134} The Court here says the result might be different if the reservation only restricted a certain part of the domestic legislation without depriving the right of its basic content.\textsuperscript{135} The reservation entered by Mexico, however, leads to disregard of the right to a competent tribunal. All of the above is in detriment to the right to know the truth, which results in a violation of articles 8(1) and 25(1) in relation to 1(1) and 2 of the Convention and articles 1(a) and (b) and 1(d) of the CIDFP.\textsuperscript{136}

\textsuperscript{131} Ibid. at para. 304.
\textsuperscript{132} Ibid.. 
\textsuperscript{133} Ibid. at para. 309.
\textsuperscript{134} Ibid. at para. 310.
\textsuperscript{135} Ibid.. 
\textsuperscript{136} Ibid. at para. 314.
Reparations

Turning next to reparations, the Court noted that Mexico is under an obligation to adequately repair violations of international law. It ordered that the state effectively and with proper due diligence carry out an investigation into Mr. Radilla’s disappearance, and to conduct criminal proceedings to prosecute those responsible.\textsuperscript{137} This kind of reparation is typical of the Inter-American Court. The Court went on to find that Mexico must guarantee that the investigation and prosecution be within civil jurisdiction. The Court further noted that the investigating authorities have a duty to consider the systemic patterns that allowed the commission of grave human rights violations in this case and the context in which they occurred (the Dirty War), thereby avoiding any omissions in the gathering of evidence and following logical lines of investigation. The state was also ordered to guarantee that the victims have the capacity to be involved at all stages and that the results are made public.\textsuperscript{138} To provide reparation of the violation of the right to know the truth, the Court ordered Mexico to continue with an effective search in order to immediately locate Mr. Radilla or his remains, using criminal investigation or another effective procedure. These should be with the agreement and presence of his next of kin, experts and legal representatives. If the remains are found, they shall be supplied to the family along with genetic proof of identity at no cost to them, with funeral costs paid by the state in accordance with the family’s beliefs.\textsuperscript{139}

Reparations: Required legal reforms

The Court then ordered that the interpretation of article 13 of the Mexican constitution shall be coherent with the \textit{American Convention} and the constitutional principles of the due process of law and the right to a fair trial. Regarding judicial practices, the Court noted that judges are subject to the rule of law and must apply the laws of their country, but once a state ratifies a treaty like the \textit{American Convention}, the judges are also submitted to it, and are therefore obligated to ensure provisions of the convention are not deleteriously impacted by the application of laws contrary to its object and purpose. The judiciary must exercise a "control of

\begin{itemize}
  \item \textsuperscript{137} \textit{Ibid.} at para. 333.
  \item \textsuperscript{138} \textit{Ibid.} at para. 334.
  \item \textsuperscript{139} \textit{Ibid.} at para. 336.
\end{itemize}
conventionality" *ex officio* between domestic regulations and the *Convention*, including the interpretation of the Inter-American Court, which is the final interpreter of the *Convention*. Therefore, constitutional and legislative interpretation the laws governing military jurisdiction shall be adjusted to the principles outlined by the Court. The Court found, however, that it is not necessary to modify article XIII of the *Mexican Constitution*; only article 57 of the *Code of Military Justice* is incompatible with the Convention. The state was therefore ordered to adopt legislative reforms within a reasonable period to change the provision in order to make it compatible with international standards, the *Convention* and the *Radilla* judgment.

The Court also ordered that legal agents be educated and trained in human rights, with special reference to the judgment of the Court. The Court ordered that the judgment be published, a public act of acknowledge of international responsibility be made by Mexico, and that a small book be published to re-establish the victim’s memory, that psychological attention be provided to the family for as long as necessary, as well as the payment of pecuniary and non-pecuniary damages. The above non-monetary reparations are typical of those made by the Court.

7.2 *Fernández Ortega and Others v. United Mexican States*

The cases of *Fernández* and *Rosendo*, discussed below, were heard 5 months apart. The representatives, the arguments, and the overwhelming majority of the analysis are the same. They both involve the 2002 rapes of indigenous Me’phaa women by soldiers in rural Guerrero in southern Mexico. Ms. Fernández was working in her home with her children when eleven members of the armed forces knocked on her door. They had seen that there was meat drying on the porch and came to allege that the victim’s husband had stolen it. Three soldiers entered the house and began asking questions, which she could not answer as she did not speak sufficient Spanish. A soldier then raped the victim in the presence of her children, while the other two watched. She attempted to report the assault the next day, but the official working at the

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143 *Fernández*, supra note 141 at para. 82.
public ministry office refused to take her complaint.\textsuperscript{144} The case was transferred to the military criminal jurisdiction, and was never seriously investigated. For example, one of the investigative techniques used by the military investigators was taking a typewriter and the entire platoon to her home and asking her to come outside to give a statement identifying which members of the platoon attacked her. The victim, not surprisingly, was too terrified to come outside.\textsuperscript{145}

Once again the Mexican state partially admitted responsibility,\textsuperscript{146} possibly in a strategic attempt to limit the facts introduced via \textit{viva voce} evidence and thus becoming part of a public record, or possibly for other reasons.

The rape of Ms. Fernández and the subsequent failure of state authorities to take the allegations seriously must be considered in the context in which they occurred: Guerrero is one of the poorest states in Mexico and has a large indigenous population. The indigenous population is extremely vulnerable and there are high rates of poverty. This occurs in the context of increasing militarization of the state, which was discussed above. It should be recalled that the military has been permanently deployed in Guerrero to combat the drug trade and indigenous guerrilla movements. This increased dramatically after the EZLN uprising in Chiapas. The political repression of indigenous and peasant people in Guerrero, especially human rights activists and indigenous people who actively try to conserve their heritage, is well-documented.\textsuperscript{147} This phenomenon was, in this author’s view, demonstrated by attacks, threats and harassment experienced by numerous people associated with the case. The petitioners were personally threatened and attacked. Ms. Fernández’s brother was disappeared and found murdered in 2008, Ms. Fernández’s interpreter Obtilia Eugenia Manuel has received numerous death threats, as has the indigenous rights group that has provided support to the petitioners, their

\textsuperscript{144} Ibid. at para. 85.

\textsuperscript{145} Fernández Rosendo v. Mexico (2009), Inter-Am. Comm. H.R. No. 12.449, at para. 75. This was not contested by the state at the hearing before the IACHR.

\textsuperscript{146} Ibid. at para. 16.

lawyers, and others. The Court made findings of fact confirming all of the above, and noting the vulnerability of indigenous people in the region, especially women who have experienced violence. The Court noted that one form of violence affecting women in Guerrero is institutional violence committed by the military. The Court also noted that the presence of the army has been controversial in relation to individual rights and liberties, and that women have particularly been affected because they suffer from the consequences of patriarchal social structures. Ms. Fernández diligently attempted to denounce her rape, but she was consistently blocked by the authorities. The Court finds as a fact that Ms. Fernández was indeed raped as she claimed. It is the first time any judicial body has made such a finding in relation to her complaint. The Court noted that in the more than 8 years that had passed since the rape, the state had not brought any evidence that contradicted the evidence of Ms. Fernández.

The Court noted that violence against women is not merely a violation of human rights, but also an offence against human dignity and a manifestation of the historical unequal power relations between men and women, which transcends all sectors of society and is independent of class, race, ethnic group, income, culture, education, age and religion. It finds that the sexual assaults in this case amounted to torture and also violated the right to privacy contained in article 11 of the American Convention. These findings are in line with previous jurisprudence of the Court on these issues. The Court also considered the right to privacy of the family, noting that the victim’s brother was found dead and bearing signs of torture in 2008 (the Court is careful not to make any finding of fact here, but there are some indications that this murder was in retribution for Ms. Fernández’s complaint to the Inter-American human rights system and her brother's plans to denounce his sister's rape before the United Nations High Commissioner for

148 Recalling the Rule of Law, supra note 30.
149 Fernández, supra note 141 at para. 78.
150 Ibid. at para. 79.
151 Ibid.
152 Ibid. at para. 108.
153 Ibid.
154 Ibid. at para. 128.
155 Ibid at para. 131.
Human Rights. However, because of a lack of specific evidence proving this, the Court declined to find a violation of the right to humane treatment of her deceased and surviving brothers or other siblings. However, because of the interference with the family domicile by the military without legal authority on the day of the rape, the Court found a violation of article 11(2) for the victims’ relatives who reside with her.

**Military Jurisdiction**

The Court next turned to a consideration of the use of military jurisdiction, repeating its analysis from *Radilla* on the role of military courts, and quoting directly from the decision. Interestingly, when it cited paragraph 273 in *Radilla*, which established for the first time that military jurisdiction is not compatible with the *American Convention* for the investigation or prosecution of any human rights violations, instead of citing the sentence in its entirety: "Likewise, this Court has established that, taking into account the nature of the crime and the juridical right damaged, military criminal jurisdiction is not the competent jurisdiction to investigate[. . .]," it deleted "this Court has established that" so the sentence reads "Likewise. . . taking into account the nature. . ." As discussed above, the jurisprudence cited in *Radilla* to support the Court's statement that it had established this did not actually do so. In this light, the failure of the court to cite that portion of *Radilla* is notable, and perhaps constitutes an acknowledgment of the flimsy authority provided for this portion of its decision.

Moving along in the analysis, as it found in *Radilla* with respect to forced disappearance, the rape of a person by military personnel is in no way related to military discipline or to the mission the unit was on at the time. The Court further clarifies that military discipline is mutually exclusive with human rights issues when it states:

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156 Recalling the Rule of Law, *supra* note 30 at 41.
157 *Fernández*, *supra* note 141 at para. 151.
160 *Ibid.*. Please note that the English version of *Radilla* starts the sentence with the word "likewise" and *Fernández* with "furthermore," however these are merely translation discrepancies. Both official Spanish versions use the word "así mismo.".
In no case does the rape of someone by military personnel bear a relationship to the military discipline or mission. To the contrary, the offence committed by military personnel against Ms. Fernández Ortega affected juridical rights protected by domestic criminal law and the American Convention, such as the victim’s integrity and dignity.\(^{162}\)

The Court therefore finds Mexico to be in violation of the rights to a fair trial and to judicial protection (articles 8.1 and 25.1 in relation to 1(1)). Once again, after finding that the military jurisdiction was not competent to handle the case, the Court declined to make a finding regarding the independence or impartiality of the military justice system.\(^{163}\) Instead of citing Radilla, which was the first case where the Court explicitly made such a decision, it cites Cantoral Benvides, which did not explicitly address that issue.\(^{164}\)

The Court also found that Mexico had violated article 2 of the Convention, in connection with articles 8 and 25, by extending the competence of military jurisdiction to crimes that have no strict connection with military discipline or with subjects properly within the military ambit by virtue of the overly broad wording of article 57 of Mexico’s Code of Military Justice.\(^{165}\) The analysis is identical to that in Radilla. The Court reiterated that the right to judicial protection under article 25(1) of the American Convention requires that states guarantee effective, judicial recourse against violations of fundamental rights to all persons in their jurisdiction.\(^{166}\)

**Obligation to investigate**

The Court found that the obligation to investigate violations of human rights is found in the positive measures that states are required to adopt in order to guarantee the human rights

\(^{162}\) *Ibid.*

\(^{163}\) *Ibid.*

\(^{164}\) *Ibid.* It also cites *Case of Usón Ramírez (Venezuela) (2009)* Inter-Am. Ct. H.R. (Ser. C) No. 207, a case involving the trial of a retired military officer for slander before a military court that was released at the same time as the Radilla decision.

\(^{165}\) *Ibid.* at para. 179.

recognized in the Convention. The Court reiterated its analysis in Radilla to find that the requirement to investigate is an obligation of measures, not results. As soon as the state learns of a violation, it must without delay begin a serious, impartial and effective investigation, utilizing all available legal methods and conducted with an orientation towards determining the truth. The Court found and detailed the many omissions in the investigation of the rape of Ms. Fernández. The Court went on to hold that it is important that the investigation does not revictimize victims of sexual assault. In this case, the court noted, there was a lack of will, sensitivity and capacity on the part of various public servants. Their investigation did not contain the required diligence and the delay exceeded what is reasonable. These factors combined lead to additional violations of articles 8(1) and 25(1) of the American Convention and of article 7(b) of the Convention of Belem Do Para. The Court then analyzed a claim made in the Commission’s application that Ms. Fernandez experienced discrimination in access to justice because Mexico investigated the crime of rape rather than the crime of torture. The Court found that this was consistent with the complaint and, in light of its finding in paragraph 197, it was not necessary to consider this issue.

Threats and harassment of people linked to the case

In light of the aforementioned harassment and threats against persons involved in the case, the Commission asked the Court to find a violation of articles 8 and 25. The Court, however, declined to make such a finding, but stated that Mexico needs to continue to adopt measures to protect and guarantee the security of the victims and others connected to the case, to be sure that they can exercise their rights to judicial protection without restriction. In this respect, the

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167 Ibid. at para. 191.
168 Ibid.
169 Ibid. at para. 196.
170 Ibid. at para. 197.
172 Fernández, supra note 141 at para. 199.
173 Ibid. at para. 214.
Commission also alleged a violation of article 16, however as this was not included in the original application, the court was not able to consider it. 174

Reparations

In terms of reparations, the Court ordered that an investigation be undertaken to identify, judge and punish those responsible for Ms. Fernández’s assault, noting in particular the need to use ordinary civil jurisdiction, 175 as well as to guarantee the security of the victims. 176 As in Radilla, the Court held that Mexico must reform its domestic law to bring it into line with international standards. This includes limiting the use of military jurisdiction to exclude all cases involving human rights violations, especially sexual violence. 177 The Court stated that Mexico must adopt, within a reasonable time, measures to permit persons affected by military jurisdiction to effectively challenge it in court. This comment was made by the Court in response to the attempts of Ms. Fernández to challenge the use of military jurisdiction for the investigation and prosecution of her case. 178 As in Radilla, the Court found that it is not necessary to modify the Constitution, only the subsidiary domestic laws, that is, the Code of Military Justice. The Court also ordered public acknowledgement of Mexico’s international responsibility, the publication of the sentence in various places and the provision of medical and psychological attention at the expense of the state to the victims. 179 Mexico was also ordered to use (and ostensibly therefore develop) a protocol for the diligent investigation of acts of violence and to continue with its process of standardization. 180 As in Radilla, the state was again ordered to provide education programs on the diligent investigation of crimes involving violence against women, and to ensure they include a gender perspective and ethnicity. Mexico was then ordered to provide permanent human rights education for the armed forces and to provide scholarships to

174 Ibid. at para. 219.
175 Ibid. at para. 229
176 Ibid. at para. 232.
177 Ibid. at para. 233.
178 Ibid. at para. 237.
179 Ibid. at para. 245.
180 Ibid. at para. 256.
Ms. Fernández’s children, as well as to form policies to guarantee that indigenous women are able to access justice in a manner that respects their cultural identity. In addition, a variety of monetary damages were ordered. The Court closed by noting that it will supervise the implementation of the judgment.

7.3 **Rosendo Cantú and Others v. Mexico**

In terms of its facts and the legal issues presented, this case is very similar to *Fernández*. Both victims are indigenous Me’phaa women living in the same region of Guerrero state. Both were represented by the same human rights organizations and counsel. From the beginning, the two women have presented their cases together in a united front. The *Rosendo* case involved a 17-year old minor who was raped by members of the armed forces who came upon her while she was washing clothing in a river. She also had great difficulty reporting her case, and her rape was also not investigated. Ms. Rosendo also had great difficulty accessing medical care. Her problems began when the local doctor refused to see her because he did not want to have problems with the military.\(^{181}\) It was over six months before she was able to obtain medical treatment.\(^{182}\)

The Court’s analysis followed the same pattern in this case as in *Fernandez* and covers the same ground. The same rape as torture analysis is used to find violations of the right to humane treatment and the right to dignity and privacy. The analysis also included a finding of rape as torture that follows the approach used by decisions of the International Criminal Tribunal for the Former Yugoslavia, but this is not remarkable as this is the typical approach of the court where the case clearly involves state agents. The Court found no violations of the right to humane treatment with respect to the parents and siblings of the victim, but did find a violation of the right to humane treatment with respect to the victim’s young daughter.\(^{183}\)

Because of the minority of the victim at the time of the assault, the Court also made several findings with respect to article 19 of the *American Convention*, which concerns the best

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\(^{181}\) *Rosendo*, supra note 142 at para. 168.

\(^{182}\) Ibid. at para. 198.

\(^{183}\) Ibid. at para. 139.
interest of the child. The Court noted that the state must take special duty to take care and responsibility for children and must undertake special measures to protect the best interests of the child. This includes the need to provide special attention the needs and rights of minors, in consideration of their particular position of vulnerability. To conform with its international obligations, Mexico would have needed to adopt special measures in favour of the victim, particularly in light of her status as an indigenous person. The Court noted that indigenous children are particularly affected by poverty, which places them in a situation of special vulnerability. The Court also stated that the obligation to protect the best interests of the child in any proceeding leads to the following requirements:

1) Information must be supplied or procedures implemented that are adequate to their particular needs, in order to guarantee legal and other required assistance, in accordance with their needs.

2) It must be ensured, particularly in cases where children are victims of crimes such as sexual abuses or other forms of mistreatment, that their right to be heard is given full protection, that staff are monitored and trained to address them and that interview rooms provide an environment that is safe, non-intimidating, not hostile, insensitive or inadequate.

3) That children are not interrogated more times than is necessary in order to avoid, to the greatest extent possible, their revictimization or increased trauma.

In this case, the Court noted that the victim was not provided with special measures in accordance with her age, resulting in a violation of the right to special protection of her condition as a child, contrary to article 19 read in conjunction with article 1(1).

Military Jurisdiction

The Court's analysis of the use of Mexico's military criminal jurisdiction to investigate the case is identical, paragraph for paragraph, to that in Fernández.

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184 Ibid. at para. 201.
185 Ibid. at para. 201.
Reparations

The reparations ordered in this case were the same as in Fernández, with the addition of an order for the creation of an integral health centre in the victim’s community, and for the state to continue to campaign to raise consciousness and sensibility of the population and the effects of violence and discrimination against indigenous women. The court also indicated that it will supervise the implementation of this judgment.

7.4 Cabrera García and Montiel Flores v. México

This case involves the treatment of two environmental activists after they were detained by members of the armed forces in 1999. The military alleged that they were found with illegal weapons. The victims deny the allegations and claim that their detention was part of a pattern of threats and intimidation they have suffered as a result of their environmentalist activities protesting development projects in rural Guerrero as members of the Civil Association Organization of Environmentalist Peasants of the Sierra of Petatlán and Coyuca of Catalán (Organización de Campesinos Ecologistas de la Sierra de Petatlán y Coyuca de Catalán, hereinafter “the OEPSP”).186 The victims were held incommunicado at the local military barracks for six days before they were brought before a judge. During that time, they claimed they were beaten.187 The victims asked for an investigation, and it was referred to the military jurisdiction. The court found there was inhumane treatment, but declined to make a finding as to whether the treatment was related to their environmental advocacy. The Court stated that it was not able to make such a finding because of the failure of the state to properly investigate the allegations.188 This is interesting in light of the fact that the same failure to investigate the rape complaints of Ms. Fernández and Ms. Rosendo did not preclude the Court from making the same finding. This may be related to some inconsistencies that were alleged with respect to Mr. Cabrera and Mr. Montiel's complaints, although the Court found that they were not "contradictions denoting falsehood" but that the "general framework of their account" was

187 Ibid. at para. 190.
188 Ibid. at para. 133.
consistent. The Court therefore finds Mexico to be in violation of the right to humane treatment [personal integrity] embodied in articles 5(1) and 5(1), together with article 1(1) of the American Convention, as well as in violation of articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, with respect to the state's failure to investigate the alleged acts of torture. The Court also found a violation of article 8(3) for the domestic court's use of confessions obtained under cruel and inhumane treatment, as well as article 8(1) of the American Convention and article 8 of the Inter-American Convention to Prevent and Punish Torture for the state's failure to promptly investigate the allegations of torture.

**Military Jurisdiction**

In 1999, the civilian authorities declared themselves incompetent and the investigation into the allegations of torture were transferred to Mexico's military criminal jurisdiction. The Court cites paragraphs 272-275 of Radilla, which were also cited verbatim in Fernández and Rosendo.

The Court then quite obviously engages in a dialogue with the Mexican state in response to the state’s October 2010 announcement that it introduce legislation ceasing using military jurisdiction to prosecute allegations of forced disappearance, rape and torture, which is discussed further below. The Court states:

In summary, according to the case law of this Court, the military jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of alleged violations of human rights but that instead the processing of those responsible always corresponds to the ordinary justice system. This conclusion applies not only to cases of torture, forced disappearance, rape and torture.

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191 *Cabrera, supra* note 186 at para. 137.
disappearance and rape, but to all human rights violations. [Emphasis added]^{196}

Mexico was therefore found to be in violation of article 8(1) of the American Convention. As in the previous cases, the Court did not make a finding regarding the independence and impartiality of the military courts.^{197} The victims were also not able to effectively contest the use of the military jurisdiction, resulting in a violation of article 25(1) of the American Convention.^{198}

The Court next addressed Mexican domestic law regarding the use of military criminal courts, and found Mexico to be in violation of articles 2, 8 and 25 of the American Convention for its extension of military jurisdiction to crimes that are not related to military discipline or juridical rights characteristic of the military realm.^{199} In a direct response to Mexico's proposed amendments to its laws to transfer only the prosecution of forced disappearance, rape and torture committed by members of the armed forces to civilian jurisdiction (leaving the investigation of all allegations and the prosecution of the rest under military jurisdiction), the Court reiterated that compliance with the American Convention and the Court's previous judgments require that the investigation of violations of all human rights be transferred to ordinary criminal jurisdiction, and cannot be limited to certain violations such as torture, forced disappearance and rape.^{200}

Reparations

The Court ordered, \textit{inter alia}, that the allegations be investigated and article 57 of the Code of Military Justice modified. Having received information from the state about the above mentioned proposed reforms, the Court reiterated that Mexico must amend its legislation to establish, without ambiguities, that military justice must abstain from hearing any violations of human rights allegedly committed by members of the armed forces, whether on duty or not, in any alleged situation. The Court found that the proposed amendments that would change the jurisdiction only for selected human rights violations would not comply with its judgments, and

\begin{footnotesize}
\begin{itemize}
\item^{196} \textit{Ibid.} at para. 198.
\item^{197} \textit{Ibid.} at para. 201.
\item^{198} \textit{Ibid.} at para. 204.
\item^{199} \textit{Ibid.} at para. 206.
\item^{200} \textit{Ibid.}.
\end{itemize}
\end{footnotesize}
in any event, the amendments had not yet been enacted. The Court, in a direct message to the Mexican Supreme Court, then wrote that domestic authorities are bound to apply the provisions of the *American Convention* because it has been ratified and because domestic authorities are bound to respect the rule of law, which means they must ensure the provisions of the *Convention* are not adversely affected by the laws contrary to it. The Judiciary must exercise a "conventionality of control" between domestic legal provisions and the *Convention*, within the framework of their competence and procedural rules. This requires both taking into account the treaty and the Inter-American Court's interpretation of it, it being the ultimate interpreter of the *American Convention*.

**Concurring Opinion: The Control of Conventionality**

*Ad hoc* Judge Eduardo Ferrero MacGregor Poisot wrote a lengthy concurring opinion discussing the new elements of the Court's jurisprudence on "control of conventionality" and how it should be applied by domestic judges. This aspect of the Court's jurisprudence will no doubt be controversial and provide opportunity for significant future scholarship, however an in-depth discussion of it is beyond the scope of this paper. The concurring opinion addresses at length how the doctrine shall apply to judges in Mexico in order to comply with the Court's 4 judgments on military jurisdiction, including very specific discussion of Mexican legislation and jurisprudencia. The opinion also discusses the interaction between international and constitutional law generally in terms of moving towards and *ius constitutionale commune* in Latin America. It is no accident that Judge MacGregor Poisot was selected as an *ad hoc* judge in this case and that he wrote this concurring opinion: he is a professor and acknowledged expert in various aspects of Mexican constitutional law and human rights at the Faculty of Law at the *Universidad Nacional Autónoma de México*. On the Court's website, most separate opinions appear as discrete documents underneath the main case. This opinion appears in this manner, but

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201 Ibid. at para. 224.
202 Ibid. at para. 225.
203 Ibid.
204 For a discussion of this concept, please see José María Serna de la Gerza, “The Concept of Jurisprudencia in Mexican Law” 2 M.L.R. 131, which explains the manner in which court decisions in Mexico become legally binding.
it is also included in the main body of the judgment, so that everyone who downloads the
decision will have the concurring opinion, even without downloading it separately.

8 Mexico’s response to the Tetralogy: Ambivalence to Implementation

The Mexican federal government did not respond positively to the judgments. In October
2010, after the decision of the Court in the Rosendo and Fernández cases were released,
President Calderón announced his plan to introduce legislation to remove the prosecution of
rape, torture and forced disappearance to the civilian court.205 All other offences committed by
members of the armed forces would remain under military jurisdiction and the investigation of
all offences would remain under the auspices of the military. This reform was unlikely to result
in any substantive effects. In the above 4 cases, the violations were only marginally investigated,
if at all. This failure to investigate is endemic within the military justice system.206 In addition,
the reform would only apply to three specific kinds of human rights violations instead of all of
them. This would not have conformed with the orders of the Court.

In interviews of Mexican government authorities conducted by the author in December,
2009, the author was informed that the issue of military jurisdiction was an extremely sensitive
matter and that reforms would only be undertaken with great difficulty. It was intimated that
negotiations were ongoing and an agreement was in the works. It appears, therefore, that the
October 2010 proposed reforms have been planned for some time. The Court’s decisions were
widely anticipated and the results expected. While the Court had yet to pronounce specifically on
the compatibility of Mexican military jurisdiction with Mexico’s convention obligations, it was
widely surmised the Court's decisions would have the verdicts that they did.

205 Víctor Ballinas y Alonso Urrutia, “Envía Calderón al Senado iniciativa de reforma al Código de Justicia Militar”
206 Uniform Impunity, supra note 8.
Mexican civil society and foreign human rights organizations reacted quickly to condemn the proposed reforms as inadequate. The state seemed to be moving towards taking the position that the Court exceeded its authority in the decisions and, for several months, did not take any steps to implement the judgments. Federal authorities had also asked the Mexican Supreme Court for a ruling on the applicability of the Radilla decision. Government officials cancelled two scheduled meetings of working groups of government officials and Ms. Fernández and Ms. Ortega and their lawyers aimed at working with the applicants to implement the judgments. They finally met in March 2011, but nothing substantive was agreed to.

Furthermore, Mexican representatives asked the Mexican Supreme Court to comment on the judgment and whether the Inter-American Court exceeded its jurisdiction. In addition, President Calderón sent a request for interpretation of the Fernández and Ortega decisions to the Inter-American Court in December 2010 to ask for clarification on the implementation of the judgment and to challenge certain of the Court's findings. This is the first time Mexico had ever made such a request to the Inter-American Court. The Court rendered its decisions in late May, 2011, dismissing Mexico's challenges and confirming the binding nature of the judgments. The Mexican authorities continued to make no move to explicitly implement the judgments, yet there was some indication of movement in June 2011 when Mexico's Constitution was reformed to provide the human rights cited in international treaties signed and ratified by Mexico with constitutional status. By according constitutional status to Mexico's international human rights obligations, Mexico was moving towards implementing the "control of conventionality" doctrine discussed, inter alia, in the Cabrera decision.

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But what of military jurisdiction? On July 7, 2011 the Supreme Court of Justice of the Nation issued its verdict on the impact of the Inter-American Court's decision in *Radilla* in Mexican law. This decision found that Mexico's courts are obligated to comply with *Radilla* and that the Inter-American Court's jurisprudence should be taken into account by Mexico's judges. The impact of this decision was to fully implement "diffuse control of conventionality" into Mexican law, and must do so by implementing the *pro persona* principle by adhering to whatever interpretation of law that most advances human rights. On July 12, 2011, in a landmark decision that overruled its previous jurisprudence, Mexico's Supreme Court ruled that members of the armed forces who are accused of crimes that violate the human rights of civilians cannot be tried in military courts, but must be tried in the ordinary criminal jurisdiction. Civilian judges are empowered to hear such cases despite article 57 of the *Code of Military Justice*, both because of the *Radilla* decision of the Inter-American Court and also because of the constitutional reforms that provided international human rights obligations constitutional status. The Court ordered that, effective immediately, all future cases alleging human rights abuses by the military shall be investigated and prosecuted in the ordinary criminal jurisdiction. In the event of a disagreement over jurisdiction between military and civilian authorities, the conflict shall be determined by the Mexican Supreme Court. The decisions of the Mexican Supreme Court have been lauded by representatives of the victims in the Mexican Tetralogy and human rights groups in Mexico and around the world. José Miguel Vivanco, Director of Human Rights Watch's Americas Division, called the ruling "legally impeccable" and noted that it reflected "tremendous moral courage." In a joint statement by the Ministries of the Interior, the Navy, and National Defence, the Mexican federal government indicated that it would respect the Supreme Court's

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211 *Suprema Corte de Justicia de La Nación, Sesión Ordinaria del Tribunal Pleno* (July 12, 2011).

decision.\textsuperscript{213} On August 10, 2011, President Calderón met with the President of the Inter-American Court Diego García-Sayán in a private meeting at Los Piños (the President’s residence). The judge publicly recognized the efforts of Mexico to implement the Inter-American Court’s judgments.\textsuperscript{214} On August 12, 2011, what was long thought to be impossible in Mexico occurred: representatives for Ms. Fernández and Ms. Ortega, the two Me’phaa women who were raped by soldiers in 2002, were informed that both of their cases had been transferred to the federal civilian criminal jurisdiction.\textsuperscript{215}

9 Potential limits on the realization of human rights: the role of law versus the rule of law

The Mexican Tetralogy and its historic level of implementation by the Mexican state, thanks mostly to the Supreme Court of Justice of the Nation is undoubtedly an historic and unprecedented steps towards realizing the protection of human rights in Mexico. Yet, while there is cause for celebration, the impact of the decision may be impacted by other factors in Mexican society. In contrast to the highly regarded armed forces, the civilian justice system is negatively viewed by Mexican society. This is for good reason, as the law is generally applied arbitrarily and the rule of law has not been institutionalized in Mexico.\textsuperscript{216} While human rights are formally embedded in the human rights system, there are many respects in which they are not realized in practice.\textsuperscript{217} There is a pervasive sense of insecurity in the country currently: violence, corruption and violations of the rule of law by authorities are part of daily life in Mexico.\textsuperscript{218} Even in the

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\item Agencia EFE, "Calderón se compromete a cumplir sentencias de Corte Interamericana de DD.HH." (August 10, 2011).
\item Edmonds-Poli and Shirk, supra note 4 at 139.
\item Niels Uildriks with the collaboration of Nelia Tello Peón, Mexico’s Unrule of Law – Implementing Human Rights in Police and Judicial Reform under Democratization (Toronto: Lexington Books) 2010 at 99.
\item Ibid. at xiv.
\end{thebibliography}
civilian justice system, it is extremely difficult to prosecute criminals. The majority of crimes are
neither investigated nor prosecuted. In addition, civilian prosecutors possess a large amount of
discretion, rendering them vulnerable to criminal targeting. Indeed, criminals can generally buy
their way out of prosecution, and there is no legal resource for victims in such instances.219 The
rule of law shortfall is caused by a number of factors, including systematic resource limitations,
inadequate professional training, procedural and organizational efficiencies, and corruption.220
According to crime victimization surveys taken at the start of the Fox regime in the early 2000s,
only 25% of crimes are reported, because of the intense distrust and lack of confidence Mexicans
have for police and the authorities.221 Statistics indicate that this mistrust is justified. Of those
the 25 crimes out of 100 that are reported, only 4.6 are actually investigated. And of those, only
1.6 (35%) result in the filing of criminal charges.222 The result is a shockingly high rate of
impunity for all crimes, such that even transferring cases of military abuse to civilian courts is far
from a guarantee that offenders will be brought to justice. In all Mexican legal fora, impunity
often still reigns. Indeed, impunity is the "root cause"223 of the failure to fully realize human
rights in Mexico.224 The victory of the Mexican Tetrology has not, or not yet, changed that
fundamental dynamic.

This limitation is well explained by Dezalay and Garth who have written, inter alia, on
the role of law in Mexico in The Internationalization of Palace Wars, where they used long form
interviews to obtain data regarding the importation of American legal ideals into Mexican,
Brazilian, Argentine and Chilean law, based on the rationale that law is shaped by interactions
and competitions between states.225 By focusing on international strategies, they observe the

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219 Edmonds-Poli and Shirk, supra note 4 at 139.
220 Ibid. at 308.
221 Ibid.
222 Ibid.
224 Military Impunity on Trial, supra note 9 at 5, observing the constant across all the cases before the Inter-
American Court.
225 Dezalay, Yves, & Bryant G. Garth, The Internationalization of Palace Wars: Lawyers, Economists and the
“hegemonic processes” and “new universals” that have transformed the state. However, their core hypothesis is that the importation and exportation of dominant “expertises” from the United States are shaped both by national agendas and national histories. An important part of their thesis is the historically marginal position of law in Mexican society. Dezalay and Garth's approach is helpful to understanding the potential limits of the Tetralogy to the extent that it provides an explanation of for the marginal role of law in Mexico today.

However, their argument that the Inter-American system, being international human rights, was imposed on states like Mexico and represents an imperial imposition, is somewhat dubious. Both the American Declaration and Convention were created largely by Latin American states, and are representative of a unique Latin American approach to human rights that went beyond the Western/Eastern Cold War distinction of the time. Indeed, Latin American scholars tend to themselves view human rights as distinctly Latin American, such as González Oropeza's argument that equality before the law is the base of Mexican liberalism. Indeed, to refer to the Inter-American Human Rights System as a foreign transplant because it deals with international human rights is inaccurate and would not resonate with common Latin American understandings of the system. The Inter-American Court and the Commission, from the beginning, have essentially been Latin American institutions, as is the approach of its jurisprudence. Furthermore, while all Latin American states except Cuba accept the jurisdiction of the Court, most English American states, including Canada and the US, have not signed the American Convention and show no signs of intending to. Therefore, while Dezalay and Garth's analysis on the role of law is extremely helpful to the analysis, their work on human rights as international transplant is not directly applicable.

226 Ibid. at 28.
228 González Oropeza, supra note 32 at 195.
10 Positive aspects of the cases

Although there are challenges involved in overcoming Mexico's history of impunity in order to realize the full protection of international human rights, there are many aspects of the Court's decisions in the Tetralogy that are likely to have a positive impact in this respect. James Cavallero and Stephanie Eric Brewer have provided a model of human rights advancement in regional courts when dealing with states that, like Mexico, are characterized by systematic human rights violations and resistance to supranational authority. James Cavallero has also written with Emily Schaffer about litigating economic, social and cultural rights before the Inter-American Court. Many of those observations are relevant to the Mexican Tetralogy as well.

The case studies conducted by Cavallero and Brewer indicate that Inter-American proceedings have the biggest impact when the work of the Court contributes to the efforts of domestic activists as part of broader human rights campaigns.229 This was certainly the case with the Mexican Tetralogy, all of which were part of a complex and concerted campaign coordinated by many Mexican human rights advocates. Cooperation with TN advocacy networks in order to trigger international shaming can be helpful towards creating a case that will result in effective protection of human rights.230 This was certainly present in these cases, with military jurisdiction being, for example, a prime campaigning issue for Amnesty International.231 In addition, Media coverage can increase the perceived legitimacy of a case,232 and there was significant positive coverage of these cases in the Mexican press, particularly with respect to Ms. Fernández and Ms. Ortega’s cases.

Cavallero and Brewer’s study indicate that there is a need for Courts to render judgments that are responsive to the domestic reality of the state in question.233 While, as discussed below, there were some shortcomings in the Court's reasoning in the Tetralogy in this regard, there were

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229 Cavallero and Brewer, supra note 91 at 775.
230 Ibid. at 788.
232 Cavallero and Brewer, supra note 91 at 789.
233 Cavallero and Brewer, supra note 91 at 771.
many aspects of the decisions where the Court had obviously turned its mind to the domestic conditions in Mexico. This is most notable in the discussions of "control of conventionality," most notably in the concurring opinion in Cabrera. Additional positive aspects include the fact that the Court ensured there was a full and factual record in most instances (with the exception of Cabrera) and that each case was very clearly crafted in consideration of the broader impact that it would have in Mexico and indeed all of Latin America beyond the particular facts of the case.

11 Problematic areas: a case for principled jurisprudence

Because of the extremely limited resources of the Inter-American system, Cavallero and Schaffer argue that "less is more" when it comes to regional supranational litigation. They warn that the result of developing a legal standard that may not be applied can undermine the respect that states have for the entire system.\textsuperscript{234} States will generally accept and implement the decisions of the Inter-American Court to the extent that, within its internal political system, the Court is recognized as legitimate.\textsuperscript{235} In addition, Cavallero and Brewer observe that, in cases where endemic human rights problems are implicated, implementation is unlikely.\textsuperscript{236} As established in the introductory sections of this paper, the use of military criminal jurisdiction resulting in impunity for human rights violations in Mexico was a textbook example of an endemic human rights problem. If the underlying political dynamics of a country are not understood in the Court's, it can provoke a backlash.\textsuperscript{237} In light of these serious risks, it is recommendable that the Inter-American Court take an incremental approach to its decisions. However, while in this case an incremental approach was taken, it was, in this author's view, not a principled one.

\textsuperscript{235} Ibid. at 250.
\textsuperscript{236} Cavallero and Brewer, supra note 91 at 769.
\textsuperscript{237} Cavallero and Brewer, supra note 91 at 777.
The Court uses *jurisprudencia constante*, or established case law, to develop its jurisprudence. 238 It maintains, however, that each case must still be examined individually. 239 While this is certainly the case, in *Tiu Tojín*, the Court misstated the content of its previous jurisprudence when it stated that its previous cases had already established that military jurisdiction was not an appropriate forum for the prosecution of military personnel accused of grave human rights abuses. The cases did not specifically say that. However, the conclusions made in the Court's prior jurisprudence could have easily been extrapolated to come to the same conclusion. Likewise, in *Radilla*, a similar citation is made, only this time presenting the Court's previous jurisprudence as though it had already referred to all human rights abuses, when it actually it was only in *Tiu Tojín* that the Court began to specifically refer to them, and only grave ones at that. This is disingenuous and undermines the impact of the Court's decisions. Because of the challenges in obtaining implementation in Inter-American Court decisions, particularly in an area as highly sensitive as military criminal jurisdiction in Mexico, it would be preferable for the Court to take a principled approach that explicitly extrapolates the general principles hinted at in previous jurisprudence to come to new conclusions, when it makes them. This is far preferable to misstating the content of previous cases. In the instant cases, the initial response of the Mexican authorities was strongly negative. Indeed, the state passed legislation that was clearly in violation of the judgments and went so far as to seek confirmation that the Inter-American Court had overstepped its jurisdiction in not one, but two fora: the Supreme Court and in an application for interpretation to the Inter-American Court. This author met with a variety of human rights actors in Mexico in late 2010, and the mood with respect to the prospect of implementation of the decisions was generally negative. It was only thanks to the intervention of the robust judgment of the Supreme Court, albeit combined with a well-timed constitutional amendment, that ultimately lead what appears to be significant implementation of the decision, at least with respect to the use of criminal military jurisdiction (obtaining proper investigations and prosecutions from civilian authorities will likely be another matter, considering Mexico's history in this area).


239 *El Amparo*, supra note 66 at para. 34.
12 Conclusion

The Mexican Tetralogy on military jurisdiction represents an immense step forward for human rights in Mexico. However, these cases go to the heart of the Mexican civil-military pact and therefore was very difficult for Mexican authorities to accept. However, the increasing use of the military to fight the drug war has resulted in a massive increase of accusations of human rights violation from hundreds to thousands in the last 5 years. This shifting tide may bring the necessary change in public opinion in support of limits on the military. As of now, the Mexican government seems to have implemented the judgment mainly in deference to the Supreme Court. It is notable that it after the *Cabera* decision with its detailed Mexico-specific concurring opinion that Mexico because to take more positive steps towards implementation. In order to avoid backlash and rejection of the Court's decisions, and therefore threats to its legitimacy, the Court should be clear when it deviates from its previous case law and provide a principled basis for it, rather than obfuscating the change behind unclear citations.
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