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Javier Dondé

ABSTRACT:

One of the most heated debates over Mexico's ratification of the Rome Statute for the International Criminal Court dealt with a violation of the *non bis in idem* principle. Whether one agrees with the jurisdiction of the ICC or not, what came to light with this disagreement is that the Mexican Constitution might be at odds with international human rights standards with regard to this Principle. Consequently, there is a need to make a comparative assessment between both bodies of law. While the obvious starting point is Article 23 of the Mexican Constitution, which states this principle, an extensive study cannot stop there but must include its judicial interpretation. Furthermore, only the precedents that seem to stretch the application of the principle will be considered, because it is through these borderline cases that we can establish the extent of the Principle (It should be noted that this approach is not common, since there is no system of precedents in Mexico; however, it is only through the judicial gloss that we can ascertain the extent of the Principle). Next I will examine (using the same method) International Human Rights Law, in particular the American Convention on Human Rights, because it is the only international instrument that includes a *non bis in idem* provision that applies to Mexico. Once the descriptive part of the paper is done, there will be enough material to make a full comparative analysis to determine whether Mexican regulation of *non bis in idem* fulfills international human rights standards and, in case this is answered in the negative, what is needed to comply.

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***Non bis in idem*: Mexican Regulation and International Standards**

Javier Dondé Matute*

INTRODUCTION

One of the most heated debates over Mexico's ratification of the Rome Statute for the International Criminal Court dealt with a violation of the *non bis in idem* principle. Whether one agrees with this international jurisdiction or not, what came to light is that the Mexican Constitution might be at odds with international human rights standards with regard to this principle. Consequently, there is a need to make a comparative assessment between both bodies of law in order to determine any discrepancy.

While the obvious starting point is Article 23 of the Mexican Constitution, which states this principle, an extensive study cannot stop there but must include its judicial interpretation. Furthermore, only the precedents that seem to stretch the application of the principle will be considered, because it is through these borderline cases that we can establish its extent.¹

This same method must then be used to examine International Human Rights Law, in particular the American Convention on Human Rights because it is the only international instrument that includes a *non bis in idem* provision that applies to Mexico.²

Once the descriptive part of the paper is done, there will be enough material to make a full comparative analysis to determine whether the Mexican regulation of *non bis in idem* fulfills international human rights standards and, in case this is answered in the negative, what is needed to comply.

MEXICAN REGULATION OF THE NON BIS IN IDEM PRINCIPLE

Constitutional background

Article 23 of the Mexican Constitution states in its relevant part: "No one can be judged twice for the same crime, whether acquitted or found guilty."³

From this brief incorporation into the Bill of Rights there are several statements that can be made before proceeding to the interpretation given by the federal tribunals.

Firstly, the constitutional text limits the *non bis in idem* principle to trials, not judgments, which means that a second trial may not start based on the same crime.

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¹ It should be noted that this approach is not common, since there is no system of precedents in Mexico.

² The Covenant of Civil and Political Rights is another international treaty that includes this principle and applies to Mexico. However, since this study will rely heavily on judicial interpretation, it is necessary to look at a human rights system that includes an adjudicating body. The United Nations Commission on Human Rights oversees the compliance of the Covenant by member States, but the obligatory nature of its decisions is open to debate.

³ "Nadie puede ser juzgado dos veces por el mismo delito, ya sea que en el juicio se le absuelva o se le condene" (author's translation).

In Mexico the criminal procedure formally starts with the *auto de formal prisión*, which is the point where the charges are confirmed by a judge.⁴ This means, based solely on the reading of this precept, that a new investigation (*averiguación previa*) may be initiated regardless of the result of the first sentence.

It may be argued that the investigation may never result in a new trial, so there will not be negative implications for the individual. While formally this may be true, the fact remains that under the current inquisitorial system of criminal procedure, the prosecutors (*agentes del Ministerio Público*) have quasi-judicial powers, which have made it necessary to incorporate certain due process rights into this part of the proceedings.⁵ This means that during this stage there can still be certain infringements on the individual, regardless of the final outcome of the first trial.

Secondly, the word “crime” is used, which means that the principle does not apply to the same facts, but rather to the *nomen iuris* of the illicit conduct. This makes the previous comments more meaningful, since an acquittal for a certain crime may be subject to a new investigation, which, in turn, may result in a new trial based on the same facts but under a different heading.

The uncertainty created by this scheme is more troubling since the judiciary can change the heading of the indictment (*consignación*) before ratifying the charges.⁶ Therefore, not only the prosecutors but also the judge may change the crime’s denomination, which, if different from the first trial, will not constitute a constitutional violation.

The Supreme Court, however, has put a stop to this interpretation by expanding the scope of this right; in doing so they have disregarded the literal meaning of the term “crime,” exchanging it for the phrase “concrete conduct.”⁷ In an earlier case, the Court mentioned that what was relevant in determining a violation of Article 23 were the facts, not the name of the crime.⁸ While the actual meaning of the words used does not appear to have been the subject of any particular decision, the wording of the precedents (*tesis aisladas*) switches the above terms in at least two circuit court cases.⁹ Furthermore, another circuit court has mentioned that in confirming the charges, the judges may not take into

⁴ CONST., art. 19.

⁵ CONST., art. 20, A. This article sets out the basic due process requirements, and in its final paragraph states that the right to be free during the trial, the right to present evidence and to discovery, and the right to an attorney apply to the investigation stage.

⁶ CFPP, art. 163.

⁷ *Vid. NON BIS IN IDEM, VIOLACION NO CONFIGURADA AL PRINCIPIO DE. Semanario Judicial de la Federación*, 7ª. Época, Primera Sala, Tomo: 58 Segunda Parte, Pág: 57.

⁸ *Vid., ARTICULO 23 CONSTITUCIONAL. Semanario Judicial de la Federación*, 5ª Época, Primera Sala, Tomo: XXXII, Pág: 2082.

⁹ *Vid. NON BIS IN IDEM, GARANTIA DE. SE LIMITA A LA CONDUCTA DELICTUOSA CONCRETA Y NO SE EXTIENDE AL DELITO GENERICO. Semanario Judicial de la Federación*, 7ª Época, Sala Auxiliar, Tomo: 169-174 Séptima Parte, Pág. 217; *NON BIS IN IDEM. VIOLACIÓN AL PRINCIPIO DE. Semanario Judicial de la Federación y su Gaceta*, 9ª Época, Tribunales Colegiados de Circuito, Tomo: VIII, Octubre de 1998, Tesis: I.3o.P.35 P, Pág: 1171. Using the term “*hechos delictivos*”; *NON BIS IN IDEM. CUANDO NO SE VIOLA EL PRINCIPIO DE. Semanario Judicial de la Federación*, 8ª Época, Tribunales Colegiados de Circuito, Tomo: XII, Julio de 1993, Pág: 251. Using the term “*actos distintos*.”

consideration facts that have been the subject of another trial;¹⁰ the judiciary has enhanced the scope of the principle.

Thirdly, although not expressly mentioned in the constitutional text, it is obvious that the *non bis in idem* principle applied to the same person who was sentenced in the first trial. The implication is that if other individuals took part in the offense, the principle does not apply to them. In a particular precedent, the Supreme Court has stated that there is no violation where the accomplices of an individual who is on trial have been acquitted by another judicial organ, such as a jury.¹¹ This concept has been further explained by the Fourth Circuit Court, which has stated that if the first judgment were to transcend to a new case, with a different defendant, no trial would be necessary since the first sentence would also serve to convict or acquit the second defendant, without taking into account the particulars of the new case.¹²

Further judicial developments

In addition to the judicial gloss provided to the constitutional text, the federal courts have looked at two different types of cases. The first set involves possible violations to the *non bis in idem* principle from a legislative perspective, through different criminal definitions. In other words, at first glance Article 23 establishes a limitation on the start of criminal proceedings, a function that rests on the judiciary. However, this prohibition can also be directed towards the legislatures if, in drafting criminal definitions, it can be shown that two trials may be initiated on the basis of the same facts.

The other judicially developed rule of the *non bis in idem* principle is closely related to the federal system of government. In cases that are initiated in federal or state courts, where the court had no jurisdiction over that particular criminal matter but sentence has been passed, the question has risen whether that person can be tried again before the competent tribunal.

With regard to the first set of cases, there seem to be some controversies that raised the issue whether a criminal definition that encompasses another crime or a previous crime is in violation of the *non bis in idem* rule.

The most recent case involved a challenge to Article 189 of the Federal Penal Code, which makes it a crime to commit a crime against a civil servant. This

¹⁰ *Vid.*, **AUTO DE FORMAL PRISIÓN. ES INCONSTITUCIONAL EL QUE TOMA EN CUENTA HECHOS QUE FUERON MATERIA DE UNA CAUSA ANTERIOR.** *Semanario Judicial de la Federación y su Gaceta*, 9ª. Época, Tribunales Colegiados de Circuito, Tomo: III, Junio de 1996, Tesis: VI.2º.68 P, Pág: 1171; **ARTICULO 23 CONSTITUCIONAL, GARANTIA DEL.** *Semanario Judicial de la Federación*, 5ª Época, Tomo: XXIX, Pág.: 85. This is a very old precedent from the Supreme Court, but it states that a new trial may not start when the same set of facts has already been judged. Since the *auto de formal prisión* coincides with the formal start of a trial, this precedent would seem to confirm the conclusions of the circuit courts.

¹¹ *Vid.*, **NON BIS IN IDEM, INAPLICABILIDAD DEL PRINCIPIO, DE CUANDO NO HAY IDENTIDAD DE PERSONA.** *Semanario Judicial de la Federación*, Primera Sala, Tomo: Segunda Parte, CXXIV, Pág.: 38.

¹² *Vid.*, **COSA JUZGADA. CASO EN EL QUE NO OPERA EN FAVOR DEL ACUSADO.** *Semanario Judicial de la Federación*, 8ª Época, Tribunales Colegiados de Circuito, Tomo: IX, Febrero de 1992, Pág: 162.

disposition makes it clear that an additional one to six years in prison will be imposed in addition to the original crime committed.¹³

The Supreme Court determined that this definition does not establish an independent crime, but rather prescribed an additional penalty to whichever crime would be committed. Accordingly, this new prison term made this crime against public officials an independent and distinct entity, with regard to whichever crime is committed. This scheme also has a different objective, because it protects the work of public servants, which is not the objective of the crime from which this new conduct may derive.¹⁴

Another case taken to the Supreme Court involved the crimes of use of false documents and fraud, as prescribed in the Federal Penal Code. The first of the criminal definitions requires that the use of false documents be done with the intention of obtaining some gain. On the other hand, fraud requires that some gain be obtained. The Court determined that these two crimes can co-exist without violating the *non bis in idem* clause of the Constitution, since they only share one element. Additionally, in the first crime this is only a possibility, which in the case of the second crime must be proven. Furthermore, Article 251 states that in the case that a false document is used to commit fraud both penalties should be imposed.¹⁵

A different case arose out of the Federal District Penal Code, which at the time had two schemes for theft. Under the first scheme a basic criminal definition was prescribed and its punishment was set to the monetary value of the object; thus the prison terms increased with the value. The second scheme started out with the same criminal definition, but set out a different prison term when the theft was committed by at least two people, violence was used, and the victim was left defenseless. Consequently, the indictment and ultimately the sentence could be handed down within one of these two sets of rules. This was actually the most important part of the Supreme Court's rationale. Since the prosecutors and the judges could choose only one of the two definitions and penalties, but not both, there was no constitutional infringement. Had the judge been able to impose prison terms for each of the two types of theft in one particular case, then there would have been a violation.¹⁶

The cases mentioned above deal with the interaction between different offenses that are similar in nature. However, in the case of certain vagrancy crimes, part of the criminal definition requires the existence of a criminal record. The Twenty-Third Circuit Court has established that this is a violation of the *non bis in idem* principle. Since the criminal records are based on a previous sentence, no

¹³ "Al que cometa un delito en contra de un servidor público o agente de la autoridad en el acto de ejercer lícitamente sus funciones o con motivo de ellas, se le aplicará de uno a seis años de prisión, además de la que le corresponda por el delito cometido."

¹⁴ **DELITOS COMETIDOS CONTRA SERVIDORES PÚBLICOS O AGENTES DE LA AUTORIDAD. EL ARTÍCULO 189 DEL CÓDIGO PENAL FEDERAL QUE LOS TIPIFICA, NO VIOLA LA GARANTÍA DE SEGURIDAD JURÍDICA A LOS PROCESADOS CONTENIDA EN LA SEGUNDA PARTE DEL ARTÍCULO 23 DE LA CONSTITUCIÓN FEDERAL.** *Semanario Judicial de la Federación y su Gaceta*, 9ª Época, Primera Sala, Tomo: XXI, Mayo de 2005, Tesis: 1a. XXXVIII/2005, Pág. 470.

¹⁵ *Vid.* **FALSIFICACION DE DOCUMENTO Y FRAUDE, COEXISTENCIA DE LOS DELITOS DE.** *Semanario Judicial de la Federación*, 7ª Época, Primera Sala, Tomo 44 Segunda Parte, Pág. 25.

¹⁶ *Vid.*, **ROBO. EL ARTÍCULO 371, PÁRRAFO TERCERO, DEL CÓDIGO PENAL PARA EL DISTRITO FEDERAL QUE PREVÉ LA PENALIDAD APLICABLE PARA EL TIPO ESPECIAL EN ÉL CONTENIDO, NO TRANSGREDE EL ARTÍCULO 23 DE LA CONSTITUCIÓN FEDERAL.** *Semanario Judicial de la Federación y su Gaceta*, 9ª Época, Primera Sala, Tomo: XIV, Agosto de 2001, Tesis: 1a. LXVIII/2001, Pág. 186.

new crime can have as its fundamental element the outcome of a previous judgment.¹⁷

The second group of cases has dealt with *non bis in idem* challenges deriving from the complex system of courts where state tribunals have to interact with the federal judiciary. The problem arises out of cases where a tribunal lacking jurisdiction issues a sentence. The Supreme Court has had to determine if the competent tribunal can adjudicate the case without infringing on the *non bis in idem* principle.

The Court has been consistent in determining that the sentence of the tribunal that lacks jurisdiction cannot be legally binding. Thus a new decision would not infringe the Constitution.¹⁸ The rationale behind these decisions consists of two different aspects. On the one hand, it has been argued that the *non bis in idem* principle is as much part of the Constitution as the federal system. Thus this rule has to be understood within the particulars of a two-tier court system like the one that operates in Mexico.¹⁹ On the other hand, besides the rights argument, this maxim rests on the belief that certain order is needed in the judicial system, such that there are not two trials instituted for the same facts or two sentences on the same matter, which might also contradict each other.²⁰

There are some other decisions that are important in determining the extent to which this principle has been interpreted by the Supreme Court. Appeal decisions that order the reinstatement of first instance proceedings do not violate the *non bis in idem* rule.²¹ It should also be noted that this criterion has been extended to include cases where the decision has been declared null and void for other reasons rather than for jurisdictional matters.²² Conversely, non-criminal measures, such as

¹⁷ *Vid.* VAGANCIA Y MALVIVENCIA. EL ARTÍCULO 190 DEL CÓDIGO PENAL DEL ESTADO DE AGUASCALIENTES, AL PREVER PARA LA CONFIGURACIÓN DEL CUERPO DEL DELITO QUE EL ACTIVO TENGA MALOS ANTECEDENTES COMPROBADOS POR LOS ARCHIVOS JUDICIALES, TRANSGREDE LAS GARANTÍAS DE SEGURIDAD JURÍDICA Y LIBERTAD PERSONAL QUE TUTELA EL PRINCIPIO NON BIS IN IDEM, CONTENIDO EN EL ARTÍCULO 23 CONSTITUCIONAL. *Semanario Judicial de la Federación y su Gaceta*, 9ª Época, Tribunales Colegiados de Circuito, Tomo: XVI, Octubre de 2002, Tesis: XXIII.3o. J/4, Pág. 1301; *cf.* VAGANCIA Y MALVIVENCIA (NON BIS IN IDEM). *Semanario Judicial de la Federación*, 6ª Época, Primera Sala, Tomo: Segunda Parte, II, Pág. 129. In this old precedent, the Supreme Court had decided that since the criminal records were not subject to a new trial, there was no violation.

¹⁸ *Vid.* NON BIS IN IDEM, INOPERANCIA DEL PRINCIPIO DE, CUANDO EL TRIBUNAL QUE CONOCE EN PRIMER TERMINO ES INCOMPETENTE. *Semanario Judicial de la Federación*, 7ª Época, Primera Sala, Tomo: 3 Segunda Parte, Pág. 77; NON BIS IN IDEM. *Semanario Judicial de la Federación*, 6ª Época, Primera Sala, Tomo: Segunda Parte, LXXII, Pág. 31. The principle also applied in relation to military courts; *cf.* CONFLICTO COMPETENCIAL. CASO EN QUE DEBE DECLARARSE SIN MATERIA. *Semanario Judicial de la Federación*, 8ª Época, Primera Sala, Tomo: XIII, Marzo de 1994, Tesis: 1a. III/94, Pág. 5. According to this precedent, if the jurisdictional challenge is not resolved before the sentence is issued, then the decision is final and the *non bis in idem* principle applies.

¹⁹ *Vid.* NON BIS IN IDEM. *Semanario Judicial de la Federación*, 6ª Época, Primera Sala, Tomo: Segunda Parte, LVIII, Pág. 44; COSA JUZGADA, AUTORIDAD DE LA. *Semanario Judicial de la Federación*, 6ª Época, Primera Sala, Tomo: Segunda Parte, LXIII, Pág. 16.

²⁰ *Vid.*, NON BIS IN IDEM. *Semanario Judicial de la Federación*, 6ª Época, Primera Sala, Tomo: Segunda Parte, VI, Pág. 194.

²¹ *Vid.* NON BIS IN IDEM, VIOLACION NO COMETIDA A LA GARANTIA DE. *Semanario Judicial de la Federación*, 7ª Época, Primera Sala, Tomo: 121-126 Segunda Parte, Pág. 111; ARTICULO 23 CONSTITUCIONAL. *Semanario Judicial de la Federación*, 5ª Época, Primera Sala, Tomo:XXIX, Pág. 1746; ARTICULO 23 CONSTITUCIONAL. *Semanario Judicial de la Federación*, 5ª Época, Primera Sala, Tomo:XXII, Pág. 2082.

²² *Vid.* NON BIS IN IDEM. *Semanario Judicial de la Federación*, 6ª Época, Primera Sala, Tomo: Segunda Parte, LXIII, Pág.45; "NON BIS IN IDEM", CASOS EN QUE NO OPERA EL PRINCIPIO. *Semanario Judicial de la Federación*, 6ª Época, Primera Sala, Tomo: Segunda Parte, LXI, Pág. 33.

finer, are not to be considered as sentences insofar as this principle is concerned. Thus a person may be put on trial after being fined by an administrative body.²³

FOREIGN JUDGMENTS

One issue that is not resolved by the constitutional provisions and the court decisions is the consequence of foreign judgments on the *non bis in idem* principle. The Federal Penal Code does not offer any direct solutions either, but it gives certain guidelines toward a possible answer.

The Federal Penal Code sets out the rules for the jurisdiction of federal courts. The basis for jurisdiction is the territorial principle,²⁴ which is complemented by a restricted version of the active personality and passive personality principles,²⁵ along with the protective principle.²⁶ The personality principles are limited because when a Mexican national commits a crime or is the victim of a crime abroad, the federal tribunals have jurisdiction only when there has been no trial in the other country. The Supreme Court has determined that this is an expression of the *non bis in idem* prohibition with regard to foreign judgments.²⁷ This piece of legislation does not solve the entire problem, since there can be other situations where Mexico can have jurisdiction along with another State. This can happen, for instance, when a particular State has territorial jurisdiction over a crime but Mexico could exert protective jurisdiction, or when a crime is committed in Mexican territory but another State wishes to exercise jurisdiction based on any of the other principles. In short, the judicial systems of (at least) two countries could pass judgment over the commission of a crime, but the *non bis in idem* principle could be upheld only in the case where Mexico has passive personality jurisdiction. This seems to be a problem that is not solved by the Constitution, federal enactments, or judicial precedent.

INTERAMERICAN COURT OF HUMAN RIGHTS

The American Convention on Human Rights recognizes the *non bis in idem* principle as part of its regulation on due process: “An accused person acquitted by a non appealable judgment shall not be subjected to a new trial for the same cause.”²⁸

At first glance there are some aspects of this provision that can be pointed out. The text of this treaty uses the term “facts” instead of “crimes”; the prohibition

²³ Vid. **NON BIS IN IDEM**. *Semanario Judicial de la Federación*, 5ª Época, Primera Sala, Tomo: CXV, Pág. 402.

²⁴ Vid. CPF, art. 1º. “Este Código se aplicará en toda la República para los delitos del orden federal.”

²⁵ Vid. CPF, art. 4º. “**Artículo 4o.**- Los delitos cometidos en territorio extranjero por un mexicano contra mexicanos o contra extranjeros, o por un extranjero contra mexicanos, serán penados en la República, con arreglo a las leyes federales, si concurren los requisitos siguientes: I.- Que el acusado se encuentre en la República; II.- Que el reo no haya sido definitivamente juzgado en el país en que delinquiró, y III.- Que la infracción de que se le acuse tenga el carácter de delito en el país en que se ejecutó y en la República.”

²⁶ Vid. CPF, art. 2º “**Artículo 2o.**- Se aplicará, asimismo: I.- Por los delitos que se inicien, preparen o cometan en el extranjero, cuando produzcan o se pretenda que tenga efectos en el territorio de la República, y II.- Por los delitos cometidos en los consulados mexicanos o en contra de su personal, cuando no hubieren sido juzgados en el país en que se cometieron.”

²⁷ Vid, **NON BIS IN IDEM (DELITO COMETIDO EN TERRITORIO EXTRANJERO)**, *Semanario Judicial de la Federación*, 6ª Época, Primera Sala, Volumen: Segunda Parte, XII, Pág. 158.

²⁸ American Convention on Human Rights, art. 8.4.

applies to a new trial, not to a new judgment or investigation and it only comes into effect in regard to acquittals. Apparently it does not apply to convictions.

On the other hand, the case-law developing the content of this principle has been scarce. There have only been three cases that have dealt with it in any detail. Thus it is necessary to look at all of them in turn.

In the *Loayza Tamayo Case*,²⁹ the Interamerican Court had to consider the Peruvian anti-terrorist legislation and its application. The Court noted that the criminal definition of treason was very similar to the criminal definition of terrorism; thus the prosecutors and judges could choose to indict and convict on any one of these offenses on the basis of the same facts.³⁰ The applicant was acquitted of treason before a military tribunal, but was later on trial (although not convicted) before a civil court on the crime of terrorism.³¹

The decision identified two distinct violations of the *non bis in idem* principle. The Court stated that the legislature had to be careful in defining crimes, since giving the authorities any discretion in determining whether a particular conduct falls within one criminal definition or another will constitute a violation to the Convention.³² The second infringement took place when the civil tribunal initiated proceedings on the same facts, despite the change in the heading of the indictment.³³ It is important to take into consideration that the Court determined that the final judgment of the military court was an acquittal and not a declaration on jurisdiction, as the State argued. To reach this conclusion, the Court considered the technical meaning of the term “absolution” (*absolución*) in addition to the Court’s decision in which it looked at the facts, considered the evidence, and passed judgment.³⁴

This last part is important because it lays out the characteristics of an acquittal, and it implicitly accepts that when a court declines jurisdiction, the *non bis in idem* prohibition does not take effect.

In the next case before the Court an apparent exception to this principle was carved out. In the *Carpio Nicolle Case*,³⁵ the State was held responsible for several human rights violations, including the wrongful death of the applicant, and was sentenced to multiple forms of reparation. As part of these, the Court considered that the investigations dealing with the victim’s death had been seriously flawed, resulting in biased acquittals. The Court named this phenomenon fraudulent *res judicata* (*cosa juzgada fraudulenta*). Furthermore, it explained that it takes place

²⁹ *Caso Loayza Tamayo*, Serie C., No. 33, Sentencia de 17 de septiembre de 1997.

³⁰ *Idem.*, par. 67 – 68.

³¹ *Idem.*, par. 75.

³² *Idem.*, par. 68. “Ambos decretos-leyes se refieren a conductas no estrictamente delimitadas por lo que podrían ser comprendidas indistintamente dentro de un delito como en otro, según los criterios del Ministerio Público y de los jueces respectivos y, como en el caso examinado, de la ‘propia Policía (DINCOTE)’. Por lo tanto, los citados decretos-leyes en este aspecto son incompatibles con el artículo 8.4 de la Convención Americana.”

³³ *Idem.*, par. 77. “De lo anterior la Corte concluye que, al ser juzgada la señora María Elena Loayza Tamayo en la jurisdicción ordinaria por los mismos hechos por los que había sido absuelta en la jurisdicción militar, el Estado peruano violó el artículo 8.4 de la Convención Americana.”

³⁴ *Idem.*, par. 76. “La Corte considera que en el presente caso la señora María Elena Loayza Tamayo fue absuelta por el delito de traición a la patria por el fuero militar, no sólo en razón del sentido técnico de la palabra “absolución”, sino también porque el fuero militar, en lugar de declararse incompetente, conoció de los hechos, circunstancias y elementos probatorios del comportamiento atribuido, los valoró y resolvió absolverla.”

³⁵ *Caso Carpio Nicolle y otros v. Guatemala*, Serie C., No. 117, Sentencia de 22 de noviembre de 2004.

when the due process standards are not met or when the tribunals are not impartial and independent.³⁶

In this particular case, the Court ordered the reopening of the investigations and the punishment of those involved with Carpio Nicolle's assassination. This decision is interesting because the Court did not find that the State had infringed the *non bis in idem* principle. Rather, the decision was taken in the context of reparations. In essence the judgment sidestepped this principle so that Guatemala could comply with its due process obligations and punish those responsible for violations of the human right to life.

Sergio García Ramírez, in his concurrent vote in the *Gutiérrez Soler Case*,³⁷ has further developed the concept of fraudulent *res judicata*. The President of the Interamerican Court stated that the *non bis in idem* principle only applies to judgments that are not illegal or illegitimate; thus, when there are due process violations or false statements presented at trial, the final judgment does not serve the interests of justice or legal certainty.³⁸ It is important to stress the point that fraudulent *res judicata* can only be considered in human rights or international criminal law tribunals, not within a national legal system.³⁹

COMPARATIVE ANALYSIS

The basis of the *non bis in idem* principle seems to be the same in Mexico and in the Interamerican Human Rights System. They both consider that starting a second trial is enough for an infringement. Both regulations also coincide in that facts, not crimes, should be the fundamental parameter to determine a violation to this principle. However, in the case of Mexico, this comes out of the judicial interpretation of the Constitution and not its literal meaning. The problem with this is that there is no doctrine of precedent by which these decisions are binding; therefore, the judiciary may consider a literal interpretation of the Constitution at any time, thus restricting the scope of the right.

There are several issues that the federal judiciary has considered that have not been brought up before the Interamerican Court: the nature of appeals, foreign

³⁶ *Idem.*, para 131. "El desarrollo de la legislación y de la jurisprudencia internacionales ha permitido el examen de la llamada 'cosa juzgada fraudulenta' que resulta de un juicio en el que no se han respetado las reglas del debido proceso, o cuando los jueces no obraron con independencia e imparcialidad."

³⁷ *Caso Gutiérrez Soler v. Colombia*, Serie C, No. 132, Sentencia de 12 de septiembre de 2005.

³⁸ *Caso Gutiérrez Soler v. Colombia* (García Ramírez concurring), par. 19. "La improcedencia o impertinencia de la resolución judicial interna que pone fin a una contienda puede advertirse a partir de diversos datos: error en el que incurre quien la emite, sin que se añada otro motivo de injusticia; o bien, ilegalidad o ilegitimidad con las que actúa el juzgador, sea en actos del enjuiciamiento (violaciones procesales que destruyen el debido proceso), sea en la presentación (falseada) de los hechos conducentes a la sentencia. En ambos casos se arribará a una sentencia que no sirve a la justicia y sólo en apariencia --formalmente-- atiende a la seguridad jurídica."

³⁹ *Caso Gutiérrez Soler v. Colombia* (García Ramírez concurring), par. 19. "Es notoria la decadencia de la autoridad absoluta de la cosa juzgada inherente a la sentencia definitiva y firme, entendida en el sentido tradicional de la expresión. Difícilmente podrían actuar con eficacia, y quizás ni siquiera existirían, la jurisdicción internacional de derechos humanos y la jurisdicción internacional penal si se considera que las resoluciones últimas de los órganos jurisdiccionales nacionales son inatacables en todos los casos."

judgments, administrative sanctions,⁴⁰ and the trial of accomplices and others involved in the commission of the crime.

Both courts agree on the fact that tribunals lacking jurisdiction cannot issue binding decisions; thus a second trial would not violate the *non bis in idem* principle. However, they seem to disagree as to when this can take place. While the Supreme Court will allow a second trial after the first judgment has been vacated, the Interamerican Court will only allow a second trial if the first tribunal did not adjudicate the case, but merely declared itself incompetent.

As for the issues where both courts have clearly decided differently, the most important has to do with criminal definitions. The Interamerican Court has rejected definitions that are similar and that give the prosecutors and judges too much discretion in determining against which crime to proceed. The Supreme Court has upheld similar enactments, as long as only one penalty is imposed.⁴¹

The matter of the fraudulent *res judicata* is not a disagreement, but it poses a challenge. Since this concept was developed in the context of human rights reparations, it does not modify the scope of *non bis in idem* as a right. However, it requires that the States have a procedure by which illegal and illegitimate sentences are vacated and a new trial is initiated in its place. The Supreme Court has held such a criterion with respect to jurisdictional challenges, but not broader issues such as due process violations or trial instituted before questionable tribunals.

CONCLUSION

There are some changes that need to be implemented in Mexico. The most radical would be to change the Constitution so that the *non bis in idem* principle applies to “facts,” not “crimes,” thus avoiding a situation where a change in the precedents of the Supreme Court results in a restricting of human rights.

As mentioned above, the issues arising out of the fraudulent *res judicata* need to be addressed. Consequently, there is a need to revise criminal procedure law in order to find a mechanism by which a fraudulent decision is vacated in those cases where the Interamerican Court orders it.

As for the rest of the discrepancies, most are based on court decisions rather than constitutional or legislative issues. The only way to solve this is to make judges more aware of International Human Rights Law and its usefulness. There is no reason why the Mexican courts could not use the decisions found in the Interamerican Human Rights System to close the gap between the Constitution (or rather, its interpretation) and the American Convention on Human Rights. In doing so, it should be noted that the incorporation of the Interamerican jurisprudence can not be applied directly, since it does not constitute a source of law in the Mexican

⁴⁰ Vid. *Case of Franz Fischer v. Austria*, Third Section, *Application no. 37950/97*, Judgment. 29 May 2001. The European Court of Human Rights has addressed this issue, and has concluded that there is no *non bis in idem* violation.

⁴¹ Vid. *Ponsetti and Chesnel v. France*, Reports of Judgments and Decisions 1999-VI, Decision, 14 September 1999; *Gradinger v. Austria (1)*, A328-C, Judgment, 23 October 1995. The European Court of Human Rights has applied a criterion more akin to the Supreme Court.

legal system. What is submitted is that the arguments and the criteria which have been established in said forum be used by the courts.