

The London School of Economics and Political Science

**Policing the Past: Transitional Justice  
and the Special Prosecutor's Office in  
Mexico, 2000-2006**

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## **Declaration**

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## Abstract

This thesis looks at how Mexico's new democratic regime led by President Vicente Fox (2000–2006) faced past state crimes perpetrated during the Institutional Revolutionary Party's (PRI's) seventy-year authoritarian rule (1929–2000). To test the new regime's democratic viability, Fox's administration had to settle accounts with the PRI for the abuses the party had perpetrated in the past, but without upsetting it in order to preserve the stability of the new regime. The PRI was still a powerful political force and could challenge Fox's efforts to democratise the country. Hence, this thesis offers an explanation of the factors that facilitated the emergence of Mexico's 'transitional justice' process without putting at risk Fox's relationship with the PRI elite.

This thesis is framed by a cluster of literature on transitional justice which follows a social-constructivist approach and it is supported by exhaustive documentary research, which I carried out for six years in public and private archives.

This thesis argues that Fox established a Special Prosecutor's Office (SPO) as he sought to conduct 'transitional justice' through the existing structures of power: laws and institutions (e.g., the General Attorney's Office) administered by members of the previous regime. So, Fox opted to face past abuses but left the task in the hands of the institutions whose members had carried out the crimes or did nothing to prevent them. The PRI rapidly accepted the establishment of the SPO because the most relevant prosecutorial strategy to come to terms with the PRI was arranged by the PRI's own elite during the authoritarian era – prosecutorial strategy that led to impunity.

In this process, the language of human rights played a decisive role as it framed the SPO's investigations into the past: it determined the kind of violations that qualified for enquiry and, hence, the type of victims who were counted in the process, which perpetrators would be subject to prosecution, and the authorities that would intervene. Categories of human rights violations (e.g. genocide or forced disappearance) were constructed and manipulated in such a way as to grant a *de facto* amnesty to perpetrators. Fox was able to preserve the stability of the new regime as his prosecutorial strategies never really threatened the PRI elite.

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## Introduction

Vicente Fox's victory in the 2000 presidential elections in Mexico ended the 71-year-old political rule of a single political party, the Institutional Revolutionary Party (*Partido Revolucionario Institucional*, PRI). The PRI regime stayed in power for more than seven decades for four main reasons. First, the state actively intervened to limit social and political pluralism: the hegemonic party (the PRI) created an adverse environment for independent participation – no significant social movement or political group could exist outside the official party. Opposition political parties were marginal (Eisenstadt 2004; Loaeza 1999). Second, the PRI regime successfully demobilised groups not part of the government: the state controlled mass participation through worker and peasant unions, which were incorporated into the official party (Meyer 1980; Ortega-Ortiz 2008). Third, the centralisation of power allowed the executive power to manipulate mass media, censor intellectual critics, co-opt dissidents, and use public funds for private ends (Aguayo 1998; Meyer 1977). Finally, and crucially, the regime brutally exterminated its enemies – a powerful security apparatus (e.g. police, secret police, the Military) repressed thousands of dissidents of the regime (Aguayo 2001a; Stevens 1970). The use of kidnappings, torture, forced disappearances, and assassinations to attack the regime's opposition was not an isolated practice perpetrated by 'rotten apples' in the army. The abuses were part of an official policy maintained for decades (Aguayo 2001b; Doyle 2003c; Rodríguez Munguía 2006). Hence, since the late 1960s, there was a general consensus on the authoritarian nature of the Mexican political regime (Eisenstadt 2000; González Casanova 1965; Kaufman Purcell 1973; Keck and Sikkink 1998; Linz 1975; Meyer 1977; Middlebrook 1986; Needleman and Needleman 1969; Ortega-Ortiz 2004).

The triumph of Vicente Fox's conservative National Action Party (*Partido Acción Nacional*, PAN) in 2000 was the culmination of a slow process of political openness and of the gradual liberalisation of the PRI regime, which resulted from a succession of reforms initiated in the 1970s (Eisenstadt 2004; Loaeza 1999; Ortega-Ortiz 2000). However, for many observers, Fox's victory was not the end of transition, but rather a point from which a series of political and social reforms could be implemented in order to consolidate a democratic regime in Mexico, e.g. the transformation of the judicial system, the reform of the police and the intelligence services, and the incorporation of human rights norms into local legislation (Middlebrook 2004).<sup>1</sup> Thus the 2000 presidential election was a decisive step in the protracted democratisation process as it was the result of the electoral reforms that preceded it, but it was not the conclusion of the democratisation process. In the government's official discourse and from the standpoint of many observers, Fox's administration was rather its starting point, which, through diverse reforms, would eventually lead to the consolidation of democracy. Hence Fox's ascendance to power, more than a change of the ruling party, established a change of regime – the transition from an authoritarian system to an incipient democracy (Bruhn 2004; Middlebrook 2004; Ortega-Ortiz 2008).<sup>2</sup>

Consequently, immediately after the July 2000 election the team of the newly elected President Fox designed a series of governmental programmes with the intention

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<sup>1</sup> The term 'consolidation', as used both in Mexico's official discourse and by scholars in Mexico's transition, refers to the strengthening of some elements of democratic rule: respect for minimum individual rights (such as freedoms of expression) and protection from arbitrary state intervention; the consolidation of fair and clean elections; and institutional mechanisms to ensure that citizens can make public actors accountable for their public deeds. See, for instance, O'Donnell and Schmitter (1986) and Middlebrook (2004: 2).

<sup>2</sup> There is no consensus, however, on how to classify Mexico's current political system (Aristegui and Trabulsi 2009). Some observers consider that Mexico is currently a true democracy in the process of consolidation. Others believe the transition to a real democratic regime remains unfinished (Aguayo 2010b; Meyer 2007). Others claim that Mexico's transition was a farce – the alleged transition simply modernised the authoritarian system (Lopez Obrador 2010).

of democratising the country (Poder Ejecutivo Federal 2001b). Within the list of urgent institutional changes the new administration sought to carry out – reforms in national security, freedom of information issues, and a fiscal scheme – President Fox included ‘transitional justice’ as a priority (Presidencia de la República 2001b). In this regard, ‘transitional justice’ was one of the first and foundational acts of the new democratic regime, which would serve to accentuate and legitimate its authority and moral right to govern.

Fox’s ‘transitional justice’ promise was supported by national and international human rights scholars, experts and activists who demanded accountability for the abuses perpetrated during the previous regime as a requirement for democratic consolidation (HRW 2003). From this perspective, by punishing the guilty, President Fox aimed to put an end to decades of impunity, and to send a signal that in the new democratic regime no one was above the law. In addition, human rights experts claimed that the investigation of tainted institutions that made the abuses possible – e.g. the army, the police, and the intelligence services – would allow Fox’s government to begin the reform and democratisation of such institutions (Benítez Manaut 2008a; Rodríguez Sumano 2008). In sum, the establishment of a ‘transitional justice’ process in Mexico aimed to send clear message that, unlike the PRI, the new regime was committed to human rights. I will return to this point in Chapter One.

However, some of the new administration’s cabinet members were openly against any attempt to come to address the past. They believed that the consolidation of democracy required other reforms (e.g. the fiscal system reform), which depended on the PRI’s approval.<sup>3</sup> From this perspective, the new administration could not pretend to investigate and prosecute the members of a political party – the PRI – with which

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<sup>3</sup> These political changes included judicial or tax reforms, changes in military–civil relations, and transformations in the relationship between the state and labour unions and the business sector. See, for instance, Bensusán (2004); Ai Camp (2004); Lawson (2004); Magaloni and Zepeda (2004).

President Fox sought to reach agreements and negotiate reforms. The PRI was still a dominant political force – powerful enough to challenge the new government in many areas and undermine Fox's chances of success. The PRI was the largest party in Congress after the 2000 elections and so it was capable of blocking President Fox's reforms. At the state level, the PRI controlled eighteen out of the thirty-two states. Moreover, officials implicated in violations (e.g. members of the Military) were never dismissed. Therefore, members of Fox's cabinet argued that the most sensible option for the new administration was to bury any attempt at accountability. This group was joined by the complaints of the members of the same PRI who had openly warned that they would not be willing to tolerate Fox using 'transitional justice' to discredit their party.

President Fox and his strategists faced a series of dilemmas. In order to test the new regime's democratic viability, Fox sought to end an era of impunity, but by prosecuting former perpetrators of past human rights violations he placed at risk the incipient stability of the new regime. To implement important reforms to consolidate Mexico's democracy, Fox had to negotiate with the PRI, which was now a powerful party in the opposition. But to negotiate with the former 'official party' certain reforms to democratise the political system implied preserving the previous regime's impunity. The new administration had to settle accounts with the PRI for the abuses perpetrated in the past, but without upsetting it in order to negotiate the reforms necessary to advance democratisation.

The way in which the Fox government solved this dilemma – complying with demands to face the past, without disturbing the PRI elites – is the topic of this thesis. Supported by exhaustive documentary research, conducted over six years in public and private archives, this thesis offers an explanation of the many factors that facilitated the emergence of Mexico's 'transitional justice' process without putting at risk its

relationship with political elites from the previous authoritarian regime. In doing so, this thesis identifies some of the most significant consequences of the so-called transitional justice process in Mexico's democratisation.

### **Mexico's 'transitional justice' process**

The so-called transitional justice process formally began with the change of regime in 2000. With the arrival of Fox to the presidency a significant debate began in Mexico about whether or not to come to terms with the past in the first place. Simultaneously, another no less important debate centred on whether to face the past through a restorative or a retributive model of justice – a truth commission or a prosecutor's office. 'Transitional justice' became a site for political negotiations and moral justifications, for the construction of rules and institutions, where diverse state and non-state actors intervened, and sought to impose their political agendas.

This controversy lasted almost a year. On November 27, 2001, President Fox established a Special Prosecutor's Office (SPO) to investigate and prosecute the perpetrators of past human rights violations (Poder Ejecutivo Federal 2001a). There were no temporal limits to the operation of the SPO. It could prolong its work *sine die*.

However, the SPO officially ceased to exist when President Fox ended his term in office on November 30, 2006. The SPO cost twenty million dollars, but its investigations led nowhere (Aguayo and Trevino-Rangel 2007). During its five years of existence, the SPO did not obtain a single criminal conviction (HRW 2006; ICTJ 2008).

### **Approaches to transitional justice**

Mexico's 'transitional justice' process has been practically ignored as a topic of academic research. To the best of my knowledge, apart from Mariclaire Acosta's (2006) and Louis Bickford's (2005) journal articles, there has been no research into Mexico's reckoning with past abuses. Both articles are descriptive in nature: they take the SPO as

a departure point and from there describe its alleged benefits and flaws. The silence around Mexico's SPO is particularly noteworthy in the transitional justice literature, as transitional justice is the main field of enquiry that seeks to explore how states and societies deal with past atrocities in political transitions. By offering a complete account of the diverse factors that facilitated the emergence (and policing) of Mexico's 'transitional justice' process, this thesis attempts to address this void in the literature.

The concept of 'transitional justice' emerged during the mid-1990s, reflecting the different ways in which at that time certain transitional societies sought to address past state crimes (Arthur 2009; Bell 2009). It arose with reference to three particular processes of political change: the democratisation of some Latin American countries (e.g. Argentina, Chile, and Uruguay) in the 1980s and early 1990s; the dismantling of the Soviet Union and, thus, the political liberalisation of former communist states in Eastern Europe during the late 1980s; and the end of apartheid in South Africa in the mid-1990s (Cohen 1995; Teitel 2003). Since then, transitional justice has been the favoured label to describe efforts to deal with past human rights abuses within societies going through political transitions: in countries transitioning from dictatorships to more democratic rule; and in transitions from war or civil conflict to peace (Bell, et al. 2004; Ni Aolain and Campbell 2005; Root 2009). However, in the last decade the concept of 'transitional justice' has gradually expanded – beyond accountability and transitions to democracy – to include a wide set of practices carried out by different societies seeking to amend past atrocity and suffering – what Claire Moon (2008) terms cases of 'historical injustice' (e.g. Australia's strategies to repair the damage caused to its Aboriginal population in the past).

But transitional justice is not only a set of practices established in different countries in transitional contexts. It is also a growing, heterogeneous, and powerful field

of academic enquiry (Bell 2009). Moreover, transitional justice has become a site in which activists work, a field of ‘policy expertise’, a domain for a new sort of human rights activity (ICTJ 2009). Hence, this thesis considers that transitional justice comprises both a set of ideas (knowledge) and a sphere of practices, actions, and intervention (power).

In the mid-1990s, a first cluster of studies on transitional justice centred mainly on a conceptual and doctrinal debate that revolves around two interpretations of justice – retributive or restorative – on which most characteristic institutions to face the past, the tribunals and the truth commissions, have been founded (Hayner 1994; Orentlicher 1991). Retributive justice is identified with the punishment of perpetrators of abuses according to the rule of law (Zalaquett 1989). The restorative model of justice proposes to restore the dignity of victims by compensating them for the suffering they endured without, necessarily, the need to identify or punish the perpetrators (Minow 2000).

Although these approaches (retributive and restorative) differ in the way in which they suggest facing the past, they share the idea that transitional justice is useful given the alleged moral, normative, or social benefits it generates (Malamud-Goti 1989; McAdams 1997; Méndez 1997a; Minow 2008; Zalaquett 1992). Moreover, echoing the early enthusiasm of transitional justice practitioners, the authors who make up this cluster focused on a series of explanations for the diverse – and sometimes contradictory – merits of transitional justice. They point out that it strengthens the new regime’s democratic institutions, averts the repetition of abuses in the future, aids political reconciliation, and has a therapeutic effect on society. These arguments circulate within this cluster as apparently incontrovertible truths, as ‘articles of faith’ (Ignatieff 1996; Mendeloff 2004).

During the last decade, a second cluster on transitional justice emerged (Gutmann and Thompson 2000). Its authors partly draw on the existing body of work on retributive and restorative justice. As with the first cluster, this group of authors assumes that the establishment of transitional justice is indispensable in societies that have suffered abuses. However, the literature of the second cluster differs from that of the first cluster in one main way. Scholars in the second cluster consider that transitional justice has proved unable to deliver the benefits promised to society – political reconciliation, social healing, public acknowledgement of the suffering of victims (Ensalco 1994; Goldblatt and Meintjes 1998; Sideris 2001). These scholars have focused on how to make transitional justice work better, with the purpose of truly delivering the benefits it should theoretically be able to provide. To do so, they have examined transitional justice institutions and proposed diverse methods to measure or quantify their scope and effects on society, new ‘tools of transition management’, with the objective of them achieving more effective change in society (Arenhovel 2008; Mallinder 2007; Stahn 2005). Additionally, these studies have suggested extending the original scope and goals of transitional justice, e.g. gender, social, and cultural or economic development (Meintjes, et al. 2001; Pillay 2001).

Despite their differences, scholars writing in the two clusters share the same values: transitional justice is ‘intrinsic’ in transitions; transitional justice is ‘good’ because of the benefits it brings with it, e.g. democracy, societal healing, reconciliation; ‘all good things go together’, e.g. truth has a cathartic effect, which leads to healing, which leads to reconciliation; even if transitional justice fails, the scholars offer to accomplish it by better means.

More recently, a third cluster of studies on transitional justice emerged as a reaction to the two aforementioned clusters. This third academic cluster, framed by a



social-constructivist approach, raises concerns about practices and the more familiar ideas in transitional justice (Ainley 2008; Christodoulidis 2001; Du Bois 2001; McEvoy 2007; Ross 2003; Short 2007; Veitch 2001; Wilson 2001). Authors in this cluster, sceptical of the assumptions accepted and promoted as self-evident by transitional justice activists and scholars, have exposed their contingent character (Moon 2008). Unlike the first and second clusters of literature, scholars participating in this social-constructivist approach do not seek to ‘promote’ or ‘rectify’ transitional justice values or practices. They are instead concerned with analysing how transitional justice came to be an authoritative guide for thinking about and acting on the past in transitional societies (Wilson 2001). Thus the third cluster examines how claims about transitional justice are constructed, and how such claims affect the implementation of policies. From this perspective, transitional justice and human rights are not self-evident ideas, but the outcome of social actions and political interventions. This is a body of academic enquiry that seeks to understand the contingent and contextual factors that make the emergence and policing of transitional justice knowledge and practices possible.

These scholars have sought to prove that far from being a necessary condition in transitions, as activists and experts on this issue would have us believe, transitional justice has mediated political agendas in conflict (Moon 2008). According to these explanations, rather than seeking moral and social benefits, transitional justice has served political interests (Short 2007). For example, in South Africa it served to bolster the construction of a new nation state and to maintain the political stability of the post-apartheid regime (Wilson 2001).

This thesis follows the research agenda opened by the third cluster of literature on transitional justice. The implication of this agenda, from a theoretical perspective, is that it problematises the feeling of inevitability that surrounds these types of institutions

and challenges the ‘articles of faith’ upheld faithfully by scholars of the first and second literature clusters. From an empirical perspective, this agenda’s most significant implication is that it opens the door to investigate transitional justice episodes as processes that far from being inherent to transitions have instead been instrumental to the legitimacy of incipient democratic regimes, and whose creation is the result of social and political manipulation.

I share with scholars of the third cluster the assumption that the so-called transitional justice institutions in Mexico were neither necessary nor indispensable for transition, nor take as valid the alleged merits of transitional justice that promoters describe. Echoing the critical spirit of this cluster, this thesis demonstrates the contingent character of Mexico’s apparent transitional justice and shows the political purposes it served in the democratisation process. This work must thus be understood as a contribution to the theoretical and empirical agenda opened up by this third academic cluster, given that it offers a detailed account of how Mexican so-called transitional justice, far from bringing moral or social benefits, became a site for the negotiation of political agendas whose results benefitted Fox’s administration and, more importantly, the PRI elite. It shows how Mexico’s apparent transitional justice process was not inevitable, but contingent. As the PRI was still influential enough to thwart the stability of the new democracy, President Fox could have articulated a policy of oblivion (such as Spain’s ‘pact of forgetting’ about the repressive legacy of the Francoist dictatorship). Alternatively, as the truth commission method was so popular during Fox’s first year in office, he could have established a Mexican truth commission (I will return to this point in Chapter Three). But he did not. Instead, a SPO emerged with the critical consequence that it helped to perpetuate the impunity of perpetrators.

This is only a succinct revision of the literature on transitional justice. Moreover, the classification here presented is neither exact nor chronological. I will return to the analysis of these academic clusters in Chapter Two. This brief introduction into this field of research simply seeks to situate my work in relation to these studies.

### **Research questions**

This research began when the so-called process of transitional justice process was still under way. Many observers had seen in ‘transitional justice’ proof that Fox’s administration really sought to advance democratisation in the country (HRW 2006). However, three years after being initiated, the SPO’s results were disappointing: not a single criminal was in jail, the public found it difficult to access the former secret police’s files, and the victims still had not received reparations. It seemed that ‘transitional justice’ had not generated the merits that academics and activists of the first and second clusters claimed it would. On the contrary, in Mexico ‘transitional justice’ seemed to be manufacturing impunity.

Victims and human rights NGOs immediately blamed the Fox administration. They claimed that the SPO’s ‘failure’ was related to the lack of funding, lack of political will, and poor handling of prosecutions (Acosta and Ennelin 2006; HRW 2003). As a result, they demanded more resources and better lawyers so the SPO could do its job efficiently. But, were they correct? I found this explanation unsatisfying. The SPO was actually receiving considerable resources (close to four million dollars) every year.<sup>4</sup> And the sometimes sophisticated strategies of the SPO were scrupulously guided by international human rights law. So why did things go terribly wrong?

An explanation about the factors that led to this outcome – impunity – demanded more in-depth research into the historical development of the ‘transitional justice’

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<sup>4</sup> At the time, information on the SPO’s budget was secret. It was made public after I investigated it in November 2006. I elaborate on the details of this episode in Chapter Two.

process, and especially the effect of the dilemma Fox's government faced at its very origins: confronting the PRI elite without upsetting it. How was Fox able to solve this transition dilemma and, more importantly, how did the way in which it was solved affect the outcomes of 'transitional justice', which included neither truth nor justice?

This was the main research question that guided this thesis: what factors in such a complex political context facilitated the emergence of the 'transitional justice' process, and did these factors lead to its results – i.e. impunity? Three key additional questions also framed this research:

1. Why did Fox venture to establish a 'transitional justice' process that would put at risk the new regime's stability, and why did the authoritarian elite allow it?
2. How was the 'transitional justice' process constructed, and how did its particular construction condition its performance?
3. How, and to what extent, did 'transitional justice' affect the process of democratisation?

The first question is central to understanding why there was a process of 'transitional justice' in Mexico in the first place. It seeks to understand the reasons why, although he sought to negotiate reforms with members of the PRI, Fox accepted the establishment of criminal prosecutions against them. Additionally, and crucially, it aims to shed light on the peculiar fact that the authoritarian elite allowed the creation of an institution – the SPO – whose apparent purpose was to investigate and prosecute its members and send some of them to jail. This is the subject of Chapter Three.

The second question seeks to understand how the 'transitional justice' process allowed the conflicting political interests of the different actors involved to be transcended. If the first question inquires into what made 'transitional justice' possible (*why*), this second question attempts to find out *how* it was made possible. In doing so, it seeks to establish the relationship between the way in which Fox's government

constructed ‘transitional justice’ and its outcome five years later (impunity). The question is relevant because it tries to elucidate how the construction of the ‘transitional justice’ process opened the possibility of a particular way of ‘policing the past’, in Stan Cohen’s (1995) words. This is the subject of Chapter Four.

The third question is more general and has been a source of constant concern for many scholars of the third cluster. Its importance lies in its attempt to shed light on the political, social, and material consequences of transitional justice in countries undergoing democratisation. Through the examination of a new empirical case, however, this thesis aims to provide at least a partial answer to the question, showing the most significant social and political effects of ‘transitional justice’ in the Mexican case. This is the subject of Chapter Five.

### **Arguments**

By means of a detailed documentary analysis of private and public archives, and based on the three aforementioned research questions, this work found sufficient evidence to support three central arguments.

First, the ‘transitional justice’ process instituted by Vicente Fox was in no way intrinsic or necessary to Mexico’s democratisation. President Fox opted to establish ‘transitional justice’ in his first year in office for three political and pragmatic reasons. First, the ‘transitional justice’ process contributed to validate the Fox government’s democratic credentials and showed its commitment to human rights. Second, strategically, by creating the ‘rules of the game’, Fox could regulate the participation of the other actors involved: activists, academics, human rights NGOs, victims’ relatives, or left-wing political groups such as the Revolutionary Democratic Party (*Partido de la Revolución Democrática*, PRD) – whose members demanded to know the truth of what happened and to see justice done – as well as those members of the new government

who were not necessarily loyal to president Fox himself and who disagreed with his stance (e.g. members of the cabinet who promoted the establishment of a truth commission). Third, by establishing a retributive justice model (the SPO), President Fox sought to conduct the ‘transitional justice’ process through the existing structures of power: laws and institutions that were operated by members of the previous authoritarian regime (the courts, the attorney general). So, Fox opted to face past abuses but left the task in the hands of the institutions whose members had carried out the crimes or did nothing to prevent them. The result of this operation was that Fox was able to preserve the stability of the new regime as his prosecutorial strategies never really threatened the PRI elite. This is the reason why the PRI did not oppose the ‘transitional justice’ process.

In addition, the PRI rapidly accepted (in fact, promoted) the establishment of the SPO because, as I will demonstrate, some of the prosecutorial strategies to come to terms with the PRI were arranged by the PRI’s own elite during the authoritarian era – prosecutorial strategies that led to impunity. Therefore, this thesis argues, in the new democratic regime the actors of the previous authoritarian system sought to protect the impunity they had enjoyed in the past. They did not have sufficient power to oppose ‘transitional justice’ mechanisms completely, but did preserve sufficient power to intervene in their making. The PRI elite could not slow down the ‘transitional justice’ process, but was able to influence its effects.

Second, Mexico’s ‘transitional justice’ process preserved the impunity of perpetrators. The language of human rights played a decisive role. It was the language of human rights that framed the SPO’s investigations into the past: the kind of human rights violations that qualified for enquiry and, hence, the type of victims who were counted in the process, the perpetrators of certain crimes who would be subject to

prosecution, and the institution and authorities that would intervene. However, categories of human rights violations (e.g. genocide or forced disappearance) were constructed and manipulated in such a way as to grant a *de facto* amnesty to perpetrators.

Third, even if the ‘transitional justice’ process did not obtain truth or justice, it brought about important consequences for the Fox administration. It helped to legitimise key political institutions (e.g. the police, the General Attorney’s Office, and the Military) still working under authoritarian premises; it helped to improve the image of the justice system, which seemed no longer to be subordinated to the president as it was during the PRI era; it granted a *de facto* amnesty to former perpetrators and did not expose tainted officials, who were then incorporated into the new democratic system as if nothing had happened; and it blocked other ‘transitional justice’ efforts (e.g. a truth commission).

Before describing the contributions of this thesis, let me clarify what I mean by the language of human rights. By human rights discourse, language of human rights, or human rights talk, this thesis refers to the set of ideas, assumptions, rules, concepts, and categories codified mainly through the vocabulary of international law which generates practices, institutions, and mechanisms for its implementation and rule (Chinkin 1998; Evans 1998 and 2005; Fields and Narr 1992; Stammers 1999).<sup>5</sup> This language includes ideas and practices about human rights accountability in transitions to democracy. I assume that these ideas on human rights are not objective, but political. They are discussed, adopted, adapted, worked out, clarified, manipulated, and contested. They are in constant flux and a great number of actors – such as state agents, human rights experts, academics, and activists – intervene in their development, promotion,

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<sup>5</sup> The United Nations system has articulated human rights discourses through numerous international treaties and conventions, which states later adopt and adapt (Chinkin 1998).

surveillance, rectification, or replacement. Therefore, these ideas are historically situated and formed within an assemblage of institutions, advocates, newspapers articles, lawyers, court decisions, legal proceedings, NGO reports, and so on. The language of human rights has material effects – e.g. human rights commissions, truth commissions, ad hoc tribunals, special prosecutor offices – and their materiality is consequential on transitional societies.

In Mexico's transitional moment, the language of human rights was particularly relevant for two reasons. First, because the Fox administration used human rights talk as a language of political legitimation. President Fox and his strategists deployed this human rights rhetoric in order to demonstrate the new regime's commitment to democracy; they sought to underline the discontinuity between the authoritarian era and the new democratic government. For example, the Fox administration justified – *a priori* or *ex post facto* – in the name of human rights every decision related to the process of 'transitional justice'. If a truth commission was promised and then never instituted, Fox justified simultaneously his promise and then his refusal to fulfil his promise in the name of human rights. For instance, he has stated both that 'to know the truth via a truth commission is an obligation according to human rights international law', and that 'Mexico cannot establish a truth commission because it observes due process guarantees and hence it would violate human rights laws' (Presidencia de la República 2000b; Garduño 2001).

Second, the language of human rights was relevant because, as I said before, it determined how crimes (e.g. genocide and forced disappearance) and protagonists of the past (victims and perpetrators) were constructed in order to frame the investigations into past crimes.



### **Originality and contributions of this thesis**

The contributions of this thesis include the following. First, there are practically no academic studies on Mexico's 'transitional justice' process.<sup>6</sup> This thesis is the most comprehensive study to date of the country's efforts to come to terms with the past. Whilst the conclusions of this thesis relate specifically to Mexico, they make important contributions to some of the debates addressed by scholars on transitional justice, and give reason to re-examine transitional justice processes in other countries in a new light.

Second, this thesis is valuable as it offers a comprehensive empirical snapshot of Mexico's 'transitional justice' process. While the first and second clusters of literature on transitional justice provide many reasons to welcome transitional justice practices, the use of empirical data is just now catching up to the conceptual framework and urges greater caution. The relative paucity of empirical evidence has in part resulted from the fact that most scholarship in this field has mainly focused on elaborating its normative and theoretical benefits. In joining more recent efforts to provide empirical evidence and to analyse the different factors that facilitated the emergence of Mexico's 'transitional justice' process, this work is based on a detailed documentary analysis of private and public archives, some of which were just recently made available to the public (e.g., the former secret police's files in 2002; Adolfo Aguilar Zinser's Archives in 2009). Moreover, this research includes evidence that was previously inaccessible for public consultation until I suggested that the government disclose it through Mexico's 'transparency law'.<sup>7</sup> The result is a unique study of concrete examples and primary sources specifically focused on the development of 'transitional justice' in Mexico, a contribution that has only now been made possible.

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<sup>6</sup> I exclude reports generated by NGOs, and articles or book chapters I have published throughout this research. I refer to these items throughout the thesis and list details in the bibliography. As said, apart from Bickford (2005) and Acosta (2006)'s articles, there is no research on Mexico's transitional justice.

<sup>7</sup> The way I requested official documents to the Fox administration is analysed in detail in Chapter Two.

Third, a study such as this is valuable because it contributes to an emerging body of scholarship (the third cluster) that seeks to understand the different contextual factors that shape transitional justice ideas and practices. Unlike the first and second clusters of literature on transitional justice, this research does not assume that transitional justice is ‘good’, ‘apolitical’, ‘necessary’, or ‘inherent’ to transitional societies because of its alleged merits (e.g. social healing). On the contrary, this thesis aims to increase our understanding of how transitional justice efforts are constructed and shaped by their historical and institutional contexts, social actions, and political bargains.

### **Outline**

This thesis is divided into six chapters. In Chapter One I situate Mexico’s ‘transitional justice’ process in the broader context of the country’s transition towards democracy. I describe the PRI’s seventy-year authoritarian regime, the political transition which began in 1968 and concluded with Vicente Fox’s victory in 2000, and the human rights violations committed by the state throughout both periods. Mexico was an auspicious scenario for the emergence of ‘transitional justice’, and I explain the reason for this.

In Chapter Two I evaluate the relevant literature on transitional justice, present my approach in relation to it and explain my methodological considerations.

In Chapter Three I demonstrate how the process of ‘transitional justice’ emerged as an answer to the dilemma faced by Fox’s government – whether to confront or bury the past – and examine the phase in which ‘transitional justice’ was merely a possibility. Thus I explore the contingency of the events that led to the establishment of the SPO as the key mechanism by which the past would be examined.

In Chapter Four I examine how categories of human rights violations (e.g. forced disappearance) were constructed in such a way as actually to perpetuate impunity. In doing so, I shed light on the important role performed in this phase by the

National Human Rights Commission (NHRC). Although it was a tainted institution associated with the PRI era, the NHRC defined the kind of human rights violations that would qualify for investigation in the ‘transitional justice’ process.

In Chapter Five I analyse the development and workings of the SPO and its consequences for Mexico’s democratic transition. I examine how the functioning of the SPO was affected by continuous political negotiations between the different actors involved in the process, and how the SPO’s prosecutorial strategies to do justice served to grant a *de facto* amnesty to the perpetrators.

Finally, in Chapter Six I summarise the key findings. In so doing, I highlight how this thesis answers the research questions posed. The chapter also raises a number of important issues which would benefit from further research.

## **Chapter One**

### **The Background:**

### **Authoritarianism and Past Atrocity in Mexico**

This chapter seeks to situate Mexico's 'transitional justice' process (2000-2006) in the larger context of the country's democratic transition. It renders an account of the authoritarian regime (the PRI era) since it began its rule in 1929 for almost seventy years, the protracted process of political transition which began in 1968, and the human rights abuses perpetrated by the state and its agents throughout both periods. Thus, this chapter outlines Mexico's history of abuses in order to understand why the country became a scenario for the emergence of 'transitional justice'.

The conventional explanations of Mexico's transition from authoritarianism to democracy have focused on the electoral reforms implemented by the authoritarian regime since the 1970s (Alvarado 1987; Bazdresch, et al. 1992; Dominguez and Lawson 2004; Dominguez and McCann 1996; Drake 1986; Harvey and Serrano 1994; Loaeza 1999; Merino 2003; Peschard 1994 and 1995). These reforms gradually liberalised the Institutional Revolutionary Party (PRI) regime and reached their 'felicitous culmination in the 2000 presidential election' with the triumph of the National Action Party (PAN) and its candidate, Vicente Fox (Schedler 2005: 10). In their analysis of electoral reforms, these interpretations highlight the continuous political negotiations between the elites in power and the opposition parties' elites (Loaeza 2000b). In doing so, they disregard that these reforms occurred in a context characterised by political violence, and ignore the state's brutal extermination of the regime's enemies before and during the transition. They consider that the *guerra sucia* (dirty war) – in which hundreds of dissidents were assassinated and 'disappeared'

during the 1970s and 1980s – was a ‘minor skirmishing compared to the barbarities of the southern cone versions’ (Knight 1992: 100).

Let me make it clear that the idea of Mexico as an authoritarian regime has not been entirely contested. What has been ignored or denied is the systematic violation of human rights during the authoritarian regime and its transitional period. The reasons why political violence was ignored – until recently – by the literature on Mexico’s democratisation are analysed in detail later in this chapter. Let me, however, list briefly some of them here: (a) local mass media was tightly controlled by the state; (b) scholars and journalists were repressed or co-opted by the PRI elite; (c) the PRI’s ideology concealed, discursively, the possibility of violent rule; (d) the authoritarian regime successfully maintained a democratic facade before the international community; and (e) other Latin American cases (e.g. Military dictatorships in Argentina, Chile, or Brazil) were more extreme and this is the horizon against which Mexico has been judged – even by Mexican scholars.

The point is that, according to most of the dominant accounts, it seems as if Mexico experienced a ‘velvet’ transition, ‘smooth, soft, almost imperceptible’ (Espino 2010: 127). However, if Mexico lived a non-violent political transition from authoritarianism to democracy as these conventional interpretations suggest, why did a ‘transitional justice’ process seem so ‘necessary’ at the beginning of the democratic regime?

The assumptions that the authoritarian regime had a ‘peaceful development’ and that the transition from authoritarianism to democracy took place without violence have been recently questioned in empirical studies that have shown that there were political violence, state crimes, and mass atrocity during the transition (Aguayo 1998 and 2001a; Eisenstadt 2004; Ortega-Ortiz 2000 and 2004). According to these investigations, if we

do not take into account the existence of social movements and the occurrence of political violence during the transition, we cannot understand why the authoritarian regime promoted electoral reforms with the alleged aim of democratisation. In fact, almost all of these reforms were the state's answer to violence (Ortega-Ortiz 2004). Additionally, according to these studies, if we ignore state repression against the threats to the authoritarian regime we cannot understand why it survived for seven decades (Aguayo 1998). This chapter builds on this interpretation and offers new empirical evidence that bolsters it. This is not to suggest that the chapter's objective is to confront opposing explanations of Mexico's transition. Neither is it to delve into theoretical studies on transitions to democracy, political parties, or political systems. This chapter's objectives are more modest. First, it shows the basic characteristics that allow us to describe the PRI regime as authoritarian. Second, it shows that the PRI era was not free of social and political conflict, and explains how these became neutralised by the state through a complex 'repressive machine'. Third, it shows that during the democratic transition the PRI regime intensified the repression of dissidents, although at the same time it implemented electoral reforms that made greater political plurality gradually possible. Finally, it explores the reasons why state crimes, at one time 'invisible', became visible – i.e. Vicente Fox's decision to 'do something' with the past; new transparency laws and the disclosure of secret files; a more democratic atmosphere that allowed scholars, activists, and victims' families to dig into the past without fearing adverse consequences (death threats, repression, imprisonment).

In sum, this chapter provides the background to an understanding of why 'transitional justice' mechanisms – which sought to investigate and punish past atrocity – came to be so relevant to the inauguration of the new democratic regime.

### **The Mexican Authoritarian Regime (1929-1968)**

The Mexican authoritarian regime began in 1929 when the military elites that won the bloody Mexican Revolution created a state party, the Institutional Revolutionary Party (PRI), which remained in power until 2000.<sup>8</sup> In spite of being a heterogeneous group, for decades the PRI elite managed to maintain a certain consensus on the general norms for the competition for power, and shared the common objective of promoting national economic growth and modernisation – i.e., industrialisation, ‘depeasantization’ of the countryside (Aguilar Camín and Meyer 1993). The result of these political agreements was a one-party regime, which enjoyed power for seventy years with a relative political and social stability that other Latin American countries envied (Knight 1992).

Mexico was *socially stable* because it did not suffer major social conflicts like those that affected the country during the Mexican Revolution in the 1910s and 1920s, in which an estimated one million people died (Aguilar Camín and Meyer 1993; Gilly 1983; Katz 1998; Knight 1986; Womack 1970). The government also did not face a sustained guerrilla insurgency for decades, as occurred in Peru with *Sendero Luminoso* or in El Salvador with the FMLN (Wickham-Crowley 1992). The indigenous communities that had not yet undergone an ‘acculturation’ process were relatively ignored in practice – although not in the official discourse – by the ‘revolutionary’ governments, but they were not subjected to genocidal policies as had been the case elsewhere in the Americas (Falcón 1999; Knight 1990 and 1994).<sup>9</sup> That is, PRI governments, whose attitudes towards indigenous people fluctuated between

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<sup>8</sup> The PRI was founded in 1929 as the National Revolutionary Party (PNR) with the purpose of unifying within this institution the different revolutionary elites that had triumphed in the Mexican Revolution in the 1910s and 1920s. Hence, from 1928 to 1934, the General Plutarco Elías Calles was able to control political life in Mexico, achieving political stability and ending the rivalry between different political groups. In 1938, the PNR was restructured as the Mexican Revolutionary Party (PRM). The change implied the transformation of the official party into one of the masses re-founded on four sectors: agrarian, worker, military, and popular. In 1946, after a new process of reorganisation, the PRM was renamed the PRI.

<sup>9</sup> By ‘acculturation’ I refer to the process of cultural modification of Mexico’s indigenous population as a result of its contact with the Spanish population living in Mexico.

indifference and paternalism, did not perpetrate a systematic ethnocide like the one that occurred, for instance, in Guatemala.

Mexico was *politically stable* between 1929 and 2000 because there were no abrupt regime changes like those that occurred in the rest of Latin America. Whilst South American countries like Argentina, Uruguay, Brazil, and Chile experienced the drastic rise of military dictatorships – sometimes, on more than one occasion – the Mexican military remained in their headquarters during this period. The last military insurrection in Mexico took place in 1929, and since 1940 the political participation of the Military has been officially limited to certain public offices (e.g. the Ministry of Defence). Since 1940 Mexico has had a series of civilian governments, elected periodically according to existing electoral legislation and the Constitution (Ai Camp 1992).

This relative political and social stability in Mexico allowed the PRI regime to maintain an appearance of ‘democratic normality’ for decades. The democratic façade of the PRI regime was consistent with the stipulation in the Constitution since 1917 that Mexico was a federal republic with a democratic, plural, and representative government (Loaeza 2008a: 45). So, why might we question this appearance of democratic normality?

The problem with this formal definition in the Constitution – of Mexico being a federal republic with a democratic, plural, and representative government – was that it was very far from reality. Far from seeming an Occidental democracy, in fact Mexico resembled more the authoritarian model of limited pluralism and non-participation set forth by Juan J. Linz in his analysis of the Francoist dictatorship (Linz 1975). The appearance of democracy contrasted with the authoritarian *praxis* of an executive power whose actions overcame the attributions conferred by the established legal order



(Carpizo 1998). The notion of a pluralist and representative state apparatus was in sharp contrast with the factual presence of both a hegemonic political party (the PRI) as well as a security apparatus (police, secret police, Military, paramilitary groups), which *de facto* created an adverse environment for independent participation (Aguayo 1998). Hence, since the 1970s, academic writers, some segments of the country's population, and international human rights organisations, have explicitly considered Mexico to be an authoritarian regime.<sup>10</sup> This characterisation is based on the active intervention of the Mexican state to (a) limit social and political pluralism; (b) control or repress political mobilisations; and (c) articulate political and social demands (Middlebrook 1986: 124; Molinar 1993).<sup>11</sup>

#### *Limited political pluralism*

The state successfully limited political pluralism because the PRI, the official party, enjoyed organisational and resource superiority, which marginalised other political organisations. The 1917 Constitution had included universal voting rights and legally recognised the existence of opposition political parties, but this was not enough to establish the foundations of a liberal democracy (Loaeza 1999: 53-60). Introducing the universal vote was merely a symbolic move because, in fact, voters did not have the option of choosing between different political parties (Loaeza 1999: 60-66). Even though elections to compete for political office took place regularly, electoral campaigns were a mere formality; electoral processes lacked content because

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<sup>10</sup> Of course, this classification was never accepted by the PRI regime, which carefully sought to maintain a democratic façade before the international community. I will go back to this point later in this chapter.

<sup>11</sup> Before the 1970s, disagreement prevailed among scholars over the appropriate classification of Mexico's political system. In 1969 Carolyn and Martin Needleman charted differing interpretations about Mexico's system: it was labelled as being 'imperfectly democratic', or 'in transition to democracy'. For instance, Juan Linz recognised Mexico as one of the 'rare cases' in which 'a non-traditional regime' has been 'transformed into a democracy without constitutional discontinuity and the use of force to remove the incumbent'. However, Linz called into question those authors who 'want to classify it [Mexico] as a democracy' (Linz 1975: 185). In 1973 Susan Kaufman Purcell (1973: 29) 'demonstrate[d] the utility of classifying' the Mexican regime 'as authoritarian'. Since then, there has been a general consensus on the authoritarian nature of the Mexican political regime (Meyer 1977; Molinar 1993).

presidential candidates of the official party did not have any significant opponents between 1952 and 1988 (Lindau 1992). Until the end of the 1980s, the legally recognised opposition parties did not provide a real alternative, nor did they jeopardise the PRI's hegemony (Meyer 1977: 10).

Even with the presence of opposition parties, which gradually acquired a more relevant role in the 1980s, the absence of free and reliable electoral processes predictably ended in the triumph of PRI candidates (Aguayo 2010b: Chapter Two; Meyer 1977: 11). The executive power defined the number of parties that could contend through the electoral norms, diverted public resources in order to support the official candidate, directed the institution in charge of elections, and controlled the electoral results (Crespo and Gómez Tagle 2004). Krauze points to the different ways in which the government orchestrated fraud in each election:

The methods [...] encompassed all stages of the electoral process [...]. Months before [the election], a rigged and selective electoral list is organised: all those suspected of favouring the opposition are removed from this list and members of the PRI are privileged [...]. All bureaucrats and most areas of the corporatist workers' and peasants' organisations receive instructions to vote massively for the official candidate, or to risk (the 'stick') their posts, jobs or lands respectively, or with the promise (the 'carrot') of increasing them. Many times these votes are placed days before or after the election as a 'filling', in separate ballot boxes that are brought in for the final counting. Big buses bring peasants from remote places to vote with their ballot papers already filled out in favour of the PRI (1996: 117).

During the PRI's rule, elections took place regularly and according to the law, but in effect simply endorsed decisions made beforehand – i.e., the outgoing President designated his successor, who was then formally nominated by the PRI, and then legitimised through the electoral process. Until 1989, there was not a single opposition governor in any state of the Mexican Republic. The universal vote and opposition parties were legal, but the struggle for power was resolved *de facto* between the official

party's elites (Ai Camp 1984; Hernández 1985; Smith 1979).<sup>12</sup> The opposition was tolerated only within the Lower House 'where it was kept as a minority that legitimised the democratic forms without the ability to really influence the behaviour of the legislative body' (Meyer 1980: 121). Elections served as propaganda for the authoritarian regime's activities and achievements.

### *Political demobilisation*

The PRI governments also successfully promoted political and social demobilisation. The state controlled mass participation through worker and peasant unions and headquarters, which since 1938 had been 'absorbed' by the official party (Loaeza 2008b: 28). Certainly, the inclusion of these vast social groups – workers and peasants – within the 'revolutionary' party provided an important source of political legitimacy for the authoritarian regime, for it was simultaneously 'both elite dominated and mass based' (Middlebrook 1986: 125). By incorporating worker unions and peasant organisations into the PRI, the state was able to regulate their social demands and constrain their political participation (Meyer 1980: 143). For instance, labour leaders could not form a union or hold a strike without the approval of the state; the PRI had also the discretionary authority to manipulate union elections and to influence the outcome of disputes regarding a union's title to a collective contract. So, by being incorporated to the official-party, unions constructed formal and exclusive linkages with the PRI that generated leadership privileges (e.g. party posts), but also raised the costs of challenging the party's authority. Additionally, the state control of workers and peasants through unions subordinated to the official party had a demobilisational

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<sup>12</sup> The PRI was a stage for competition between the elites. Hence, at least until the mid 1980s, the challenges to the PRI's official presidential candidate came from within the party itself. Even so, on only two occasions did PRI official candidates find significant opposition within the party: first, against the Almazán movement in 1940; later in 1952 with the Henriquista movement. Both the Almazán and the Henriquista movements were defeated (Lindau 1992).

consequence: as the majority of these groups had been encompassed by the PRI, opposition leaders had little chance of mobilising mass groups against the regime.

Another factor that contributed to political and social demobilisation was the legal neutralisation of those dissatisfied within unions. In spite of the unions' diversity, their leaders were 'united in their opposition to worker dissent' (Middlebrook 1991: 282). In order to facilitate the control of dissidents, unions employed the 'exclusion clause'. This clause, included in all labour contracts, legally urged employers to fire any worker who had been previously expelled from the union. The clause was a powerful dissuasion tool: the price of dissidence was unemployment. It gave union leaders and employers an efficient legal resource to exterminate dissatisfied workers arbitrarily.

#### *The centralisation of power*

Electoral processes characterised because the official party did not have significant opponents, and political demobilisation facilitated the centralisation of power in the presidency. The effect of this striking concentration of power was the emergence of a dominant presidency characterised by the discretionary use of its attributions (e.g. law, resources), since it was not accountable for any of its actions to any institution (Meyer 1980: 136). The vast power of the president, legally established in the Constitution, was reinforced by the power granted by being the leader of the government party, which was in fact a state-party (Carpizo 1998; Casar 1996; Cosío Villegas 1972). Hence, the president was able to limit the legislative and judicial powers as well as those of local governments.

From 1940 onwards, the presidency was a central element of the Mexican political system. The president had enough power to restrict the participation of the rest of the political forces and control political events (Flores Olea 1976; Reyna 1976). All presidents removed, arbitrarily, those state governors who, for any reason whatsoever,

they considered uncomfortable or threatening (Hernández 2005: 104). Additionally, as I explain later in this chapter, the centralisation of power allowed the executive to manipulate mass media, censor intellectual critics, co-opt dissidents, use public funds for private ends, and repress threats to the regime. The president and his party were indifferent to public opinion, which had no real means to make them accountable, as democratic systems of power require (Loaeza 2008a: 52).

*Oppressing and repressing threats to the PRI regime*

In 1990, prominent Mexican intellectuals, Octavio Paz and Enrique Krauze, organised a meeting of international intellectuals in Mexico City. Among the participants to the event were Cornelius Castoriadis, Daniel Bell, Michael Ignatieff, Hugh Thomas, Czesław Miłosz, Adam Michnik, and Carlos Monsiváis (Paz and Krauze 1991; Vargas Llosa 1991 and 1992). These distinguished intellectuals gathered to reflect on ‘the experience of freedom’ in a country whose regime was seen as authoritarian by academics at the time.<sup>13</sup> The event was significant since it occurred in the context of the abrupt democratic transitions in Eastern Europe, which at the time surprised the world (Dominguez Michael 2009). To the amazement of those gathered, Mario Vargas Llosa referred to Mexico as the ‘perfect dictatorship’. For Vargas Llosa ‘the perfect dictatorship is not communism. It is not the USSR. It is not Fidel Castro. The perfect dictatorship is Mexico [...] it is the camouflaged dictatorship.’ ‘The Mexican is [such] a dictatorship’, he concluded, ‘that all Latin American dictatorships since I can recall have tried to create something equivalent to the PRI’ (Vargas Llosa 1991).

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<sup>13</sup>Another remarkable thing about some of these intellectuals is that they were also involved in the broader ‘justice in transition’ debates that dominated the post-89 wave of transitions in Eastern Europe, and those transitions from military rule in Latin America – Ignatieff and Michnik, for instance. Monsiváis was involved in Mexico’s transitional process.

In describing the Mexican political regime as ‘a *sui generis* dictatorship’, Vargas Llosa (1991) referred mainly to its ‘permanence, not of a man, but of a party. And a party which is immovable.’ The prolonged permanence of the regime, as I mentioned before, was the result of the active intervention of the Mexican state to limit social and political pluralism, demobilise groups not part of the government, and articulate political demands through the official party. However, this does not mean that the PRI governments were free of social or political conflict (Ortega-Ortiz 2008; Rodríguez Munguía 2007). On the contrary, the regime faced multiple challenges between 1929 and 2000. When the bureaucratic mechanisms of social and political control failed, the ‘revolutionary’ state repressed and suppressed any form of politically independent participation (Aguayo 2001a and 2008; Ortega-Ortiz 2004; Rodríguez Munguía 2006 and 2008; Stevens 1970).

In order to keep opposition parties, independent movements or antigovernment groups at bay, the regime combined, successfully, negotiation with co-option, intimidation, repression, oppression, and censorship – what Sergio Aguayo calls ‘the Mexican style of the use of violence’ (Aguayo 1998: 27). These strategies, which sought to neutralise threats to the regime, depended on a sophisticated ‘security apparatus’ (Aguayo 1998: Chapter Two). At the centre of this ‘opposition crushing machine’ was the Interior Ministry, where two groups specialised in coordinating anything related to the country’s ‘internal security’: the Federal Security Direction (DFS), which ran from 1947 until 1985, and the Direction of Political and Social Research (IPS). The first had the power to survey and inform ‘on facts related to the nation’s security’ (Aguayo 1998: 30). The second carried out ‘research and analysis on the country’s issues of political and social nature’ (Aguayo 1998: 32). The DFS was a peculiar institution because, unlike other intelligence services in the world, it was also

‘operative’: it was in charge of persecuting, punishing, and eliminating the state’s enemies.

The legal definitions of ‘internal security’ were characterised by their ambiguity (Rodríguez Sumano 2008). This allowed the Internal Ministry and its secret police to act in a rather discretionary and arbitrary fashion: in fact, the secret police had legal faculties to ‘neutralise’ (i.e. repress, oppress, exterminate) groups and individuals who, in their eyes, represented a threat to the country’s internal security. As a result, ‘despite its repeated official disclaimers, the Mexican government has [...] shown a consistent tendency to regard any opposition movement as subversive’ – hence opposition movements (independent unions, activists, students protestors, members of opposition parties) were systematically repressed (Stevens 1970: 67). The work of the DFS was facilitated by its American counterpart. The Central Intelligence Agency (CIA) delivered daily ‘intelligence reports’ giving information on the activities of leftist groups (Aguayo 1998: 94).

But the secret police (the DFS) was not alone in being responsible for silencing opposition. Two additional groups were a part of the ‘repressive machinery’: the police and the Military. The police depended on the executive power; it was made up by the General Attorney’s Office, the Riot Police, the Judicial Police, and Mexico City’s Preventive Police (Aguayo 1998: 26). These groups participated daily in the coercion of antigovernment groups. For example, in order to protect the security of the American President Lyndon Johnson during his state visit to Mexico in 1966, the police detained, ‘just in case’, ‘five hundred potential rioters’ (Aguayo 1998: 68).

Even though Mexico has had a civilian government since 1929, the army ‘was constantly involved in handling and controlling dissidents’ (Aguayo 1998: 32). The army fiercely repressed the railroad workers union’s movement in 1959, its most

significant challenge during the 1950s (Ortega-Ortiz 2008: 157). The army also took part in less known episodes, like the illegal arrest of six ‘communist agitators’ in the city of Tampico in 1966 (Aguayo 1998: 64). As documented by Aguayo, the participation of the armed forces in the repression of dissidents was more common than the literature allows. The Rural Guards, who also depended on the Ministry of Defence, carried out intelligence tasks in rural areas. Finally, there was the Presidential Major State, a military elite group that, until this day, depends directly on the president.

The list of violently repressive state mechanisms does not end here. In addition to the army, police, and secret police, there were ‘informal’ or para-state organisations which were also responsible for repression. By being ‘informal’ these groups acted clandestinely and their relationship to the state was unclear. Examples are the multiple paramilitary groups, which flourished all over the country, like *Ola Verde* (Green Wave) in the state of Sonora, and the so-called ‘irregular forces’, which acted together with the Judicial Police, but without an official appointment, like the ‘*Mandarinas*’ (Tangerines) or ‘*Aspirinas*’ (Aspirin) (Aguayo 1998: 33).

The groups that participated in the oppression and repression of state opponents did not necessarily act illegally. Sometimes, coercion was authorised by law. The police corporations neutralised dissidents protected by the law of ‘social dissolution’, which has existed in Mexico since 1941. This law was part of the Federal Penal Code. The law allowed the incarceration for from two to twelve years of anyone who ‘in a spoken or any other manner’ carried out ‘political propaganda’ among foreigners or Mexicans ‘promoting ideas, programs or action norms of any foreign government that disturb the public order or affect the Mexican State’s sovereignty’ (Código Penal 1950). According to this law, ‘public order’ was disturbed when political propaganda ‘*tended*’ to ‘produce rebellion and sedition, mobs or riots’. The state was perceived to be under threat when



political propaganda hindered the functioning of ‘legitimate institutions’ or when it propagated ‘contempt on the part of Mexican nationals towards their civic duties’ (Código Penal 1950).

By sending the project of the law of social dissolution to the Lower House for its approval, President Manuel Ávila Camacho (1940-1946) warned that his only wish was to ‘comply with his constitutional mandate of watching over the preservation of interior peace [...] within the democratic principles of our Constitution’ (Cámara de Diputados 1941). Paradoxically, the PRI regime justified the existence of a law that sought to ‘dissolve’ (i.e. to quell) society in the name of democracy. During discussion of the law in the Mexican congress, the PRI congressmen argued that Mexico had to be always alert to the regime’s enemies. Hence, the law of social dissolution would not be of an ‘emergency’ or temporary disposition; rather, it would have an anticipatory and ‘permanent’ character. ‘Why should we wait for a rebellion to come upon us and destroy our form of government if we can avoid it and punish the acts preliminary to the rebellion?’ (Cámara de Diputados 1941).

The vagueness of the law of social dissolution gave the police ample faculties to make use of it arbitrarily. The law did not demand that the acts defined by it as ‘crimes of social dissolution’ were the direct and immediate cause of ‘rebellion, sedition, mobbing or riots’. The only requirement the law demanded was that these acts (to carry out propaganda, promote ideas) ‘tended’ to produce such effects (Stevens 1970: 65). In other words, the law left it to the discretion of state agents to interpret the type of ‘ideas’ or ‘propaganda’ that, according to them, could *tend* to disturb public order. Therefore, it was up to the whim of the police to select the dissidents who ended up in jail for propagating such ideas. Certainly, it was not strange for the PRI governments to regard ‘as a threat to the equilibrium of the political system any movement that appears capable

of capturing widespread public sympathy, regardless of the ends for which this sympathy might be mobilized' (Stevens 1970: 69).

The last measure that enabled the opposition to be crushed was the formation of a group of state organisations which had nothing to do with issues of 'internal security', but once in a while became involved in them. An example of this was the Agrarian Affairs Department, which occasionally spied on independent peasant organisations. Another example is that of the Postal Administration, which sporadically intercepted letters directed to dissident organisations (Aguayo 1998: 33). A final example is that of the Ministry of Health, which allowed the illegal and secret detention of political dissidents in mental hospitals – some of whom have been found alive at the time of writing this thesis (A case relevant to the thesis is discussed in detail in Chapter Five).

In order to illustrate the nature of state violence between 1929 and 1968, I will explore briefly three episodes in which the state repressed dissident groups. The cases selected are not intended to be a representative sample, but they serve the purpose of demonstrating empirically the authoritarian nature of the regime and prove the sustained use of repression.

As already indicated, the control of the demands of workers and peasants through unions docile towards the PRI structure was one of the main reasons why the authoritarian regime remained stable. However, worker movements did not always respect the regime's guidelines. For example, in 1958 the railroad workers initiated a series of strikes in order to demand a salary increase and social benefits (Ortega-Ortiz 2008: 157). In response, the government tried to co-opt the movement, granting workers a minimal salary increase and agreeing that the dissidents' leader – Demetrio Vallejo – should become the new general secretary of the railroad union (Meyer 1980: 143). In 1959 the railroad workers made further social claims, but on this occasion the

government opted to eliminate the movement. The authorities began by declaring that the movement did not exist and therefore the strike was ‘illegal’. So, through this significant legal operation, the movement ceased to exist, but as the members continued with the strike, it was regarded as a criminal act. Afterwards – and here the irony is obvious – the police and army brutally, but lawfully, repressed the dissidents. Carr offers a brief account of what occurred: ‘two suburbs of Mexico City inhabited by rail workers were besieged by troops, and large parts of the railways installations were occupied by the army. Up to ten thousand *ferrocarrileros* [rail workers] lost their jobs’ (Carr 1992: 207). The repression was accompanied by a wide media campaign designed to present the strike as Soviet subversion (Ortega-Ortiz 2004: 170). Twenty-five railroad leaders remained in jail until the 1970s accused of being communists. Whilst it is beyond the scope of this thesis to compare Mexico’s history of abuses with other experiences of state repression, it is important to note the extent to which the discursive justification of state repression in Mexico was doubled in power by the international rubric of the ‘War against communism’, as was the case with Argentina’s ‘Dirty War’, and Augusto Pinochet’s rule over Chile.

During the 1960s the violent confrontations between the authoritarian state and different dissident groups proliferated. Two good examples that illustrate the ‘Mexican style of the use of violence’ during this decade are the cases of the ‘*navista* movement’ in 1961, and the ‘doctors’ movement’ in 1965. ‘*Navismo*’ was a local movement. It was born in the city of San Luis Potosí in 1959 and headed by Dr. Salvador Nava, dean of the university (Meyer 1980: 142). In order to end decades of PRI governments in the state, Nava formed the civic union *Potosino*, a coalition that brought together a great number of followers with diverse political preferences, e.g. communists, PAN members,

independent sympathisers. Its common objective was to topple the PRI in the local elections.

Dr. Nava won the municipal presidential elections of San Luis Potosí and the President accepted the PRI's defeat. As a consequence, PRI national authorities and the President began a damage control operation. According to the President, the main person behind the 'success' of '*navismo*' was the PRI's governor of San Luis Potosí – Miguel Álvarez – who had allowed the aforementioned opposition movement to exist in the first place. Governor Álvarez could have repressed Dr. Nava's movement before the elections – as other governors did, annihilating democratising movements that emerged in their respective states – but he did not.<sup>14</sup> As punishment, the President removed governor Álvarez from his post.

However, the *navista* movement's history does not end here. Two years later, in 1961, Nava dared to compete for the position of governor of the state of San Luis Potosí, but the PRI did not allow it and made heavy use of electoral fraud. Dr. Nava lost the election and his movement's efforts were reoriented towards protesting against electoral fraud (Ortega-Ortiz 2008: 162).

In a context where the only way to gain power was through the PRI, Salvador Nava had made a double mistake: being part of the opposition against the regime and protesting against electoral fraud. As a result, the *navista* movement faced diverse state strategies in order to neutralise dissidents. First, the government tried to co-opt its members (Calvillo 1986). Afterwards, the press allied with the PRI accused Salvador Nava of being an ambitious man 'without any other desire than to occupy, by whatever means, the command chair' (Aguayo 1998: 118). They also disparaged the *navista* movement for having no reason to oppose the PRI governments, whose 'program

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<sup>14</sup> For example, in 1945 the governor of the state of Guanajuato ordered the zone's military to repress the Leonese Civic Union, a democratising movement similar to Salvador Nava's. On that occasion, twenty six people died.

always rich and always enriched by an ongoing Revolution is fulfilled via institutions' (Aguayo 1998: 118). In the end, the army occupied the *navista* movement's offices and arrested forty-nine of its members, including Salvador Nava, who was accused of 'agitation' and 'disturbing public order'. The police suspended *La Tribuna*, an independent newspaper, which had favoured the *navista* movement, and arrested and tortured its director, Manuel Montiel (Ortega-Ortiz 2008: 163). Ironically, that same year, Mexico was to host the United Nations Hemispheric Conference on Human Rights.

The doctors' movement took place in Mexico City in 1965. It demanded better salaries and labour security. This movement warned that its 'demands are not only of an economic character'. Rather, they sought 'to exercise our right to belong or not to a union [...] for we are forced to belong to pseudo unions' which 'lack autonomy' (AMMRIAC 1964). According to the magazine *Política* – a magazine critical of the PRI regime – the medical conflict was a question of 'freedom of association' and 'the need to purge and democratize the internal life of unions' (*Política* 1965b).

However, according to the PRI regime there were other reasons behind the medical movement: it sought to 'show the [...] Head of State as incompetent'. In the eyes of the government, the movement was created by 'resentful, bitter politicians [...] and disloyal [to the PRI regime]' (Aguayo 1998: 47). The doctors had forgotten their 'moral duty to safeguard the system', they were 'enemies of our progress', 'counterrevolutionaries', and 'anti Mexican' (Aguayo 1998: 55 & 80; See also, *Política* 1965a: A-B).

The central government's response was to fire more than five hundred doctors 'at bayonet point' – in the end 'there are plenty of doctors'; others were beaten, fled from Mexico, or ended up in jail (Ortega-Ortiz 2008: 164; Pozas Horcasitas 1993:

Chapter Five). The doctors' movement's repression was endorsed by the PRI's congressmen. According to them, 'the health of Mexicans is part of our national heritage. Nothing, absolutely nothing can justify those who, having the sacred mission of taking care of it, abandon this responsibility for the sake of selfish interests' (Aguayo 1998: 55). In the face of state repression, the movement was diluted because, according to the secret police's reports, the doctors 'no longer want to know about politics', rather 'above all things they wish to keep their jobs' (Aguayo 1998: 59). The latter is significant because forced unemployment – the exclusion of any employment opportunity – became a very common strategy for the PRI regime. 'The object of such blacklisting', Stevens has demonstrated, was designed 'to so intensify the problem of earning a livelihood that the individual concerned will have little time or energy to engage in antigovernment activities' (1970: 70).

As it had done in the past with the railroad movement, the central government invoked the law of social dissolution to 'dissolve' the medical movement. However, the doctors who participated in the movement continued to be the object of repressive and intimidating practices. A year later still, 'several of the leaders were arrested on a charge ostensibly unrelated to the strike [...]. Later they were convicted of participating in a plot to overthrow the government by armed force' (Stevens 1970: 70).

Finally, it is necessary to tackle an additional factor that facilitated the use of repression during the authoritarian regime: secrecy. The lack of information regarding repression helped to preserve the state's impunity, because people both nationally and internationally were unaware of these state crimes.

The absence of evidence of state crimes can largely be attributed to the way in which state agents acted. State repression went from 'assault and battery to assassination', but the central government was 'almost never connected in any direct

fashion to such attacks' (Stevens 1970: 72). On the contrary, as Stevens illustrates, atrocities 'take place at the local level and are usually carried out by unidentified assailants'. Additionally:

Included in the category of covert violence is the kidnapping of the individual who is seen as obstructing a final solution of a conflict in a way favourable to the government. In such cases, persons who may or may not identify themselves as secret service agents call upon the obstreperous individual in his home, or waylay him en route to his home. They transport him to a distant place and hold him there until the conflict is resolved (Stevens 1970: 72).

So there was ignorance of the atrocities committed under the regime because of the work of an experienced secret police, trained to leave no trace of their crimes, but also because the mass media omitted – deliberately, as I will illustrate below – to broadcast information about repression. The details of state violence against other Mexicans had barely been registered by the mass media. This can be explained in part because, as Jacinto Rodríguez Munguía (2007) has shown, the purpose of both the PRI government and the mass media was to hide what was occurring from the rest of the country. No news was broadcast about acts of repression. Therefore, as Mexican writer Carlos Monsiváis said: 'this management of collective memory' was the PRI regime's 'impunity guarantee' because 'what is unknown either cannot be remembered or did not occur' (Monsiváis and Scherer 2004: 146). For instance, neither the unlawful detention of dissidents in mental hospitals, nor 'the death flights' (dissidents killed by state agents and then dumped into the ocean) were atrocities publicly known until recently. This is what Stan Cohen meant when he said that 'we didn't know' may be true for many people in authoritarian regimes as public knowledge of atrocity is limited because of government controls on information and the mass media (2005: 78). That is why, he suggested, authoritarian regimes do not need to elaborate sophisticated responses to allegations of human rights violations because no human rights violations are known,

exposed, or reported. With these regimes, says Cohen, ‘there is only literal denial: the laconic disavowal that nothing happened’ (2005: 104).

Another way in which Mexico’s mass media collaborated with the authoritarian state was by slandering the image of dissident groups. The press transformed the discontented into ‘moral panics’, which stood between the progress of ‘revolution’ and the country (Cohen 2002). The press accused Salvador Nava, for example, of ‘adopting histrionic attitudes unsympathetic with the decorum that any intervention in public life requires’ (Aguayo 1998: 118).

To control the mass media, independent journalists, and intellectuals, the PRI used co-option, censorship, or plain force. Co-option or manipulation of the media was possible because of the formal subsidies or *sub rosa* paid to media bodies (Granados Chapa 2007: 15). By receiving public funds – on which their subsistence depended – the mass media (i.e. print and broadcast media) were careful about the way in which they addressed information on the authoritarian regime. This is why press critiques written against the regime were rather sporadic and relatively inefficient. The PRI governments also tied the intellectuals’ and journalists’ hands through bribes, exile, and diplomatic careers. Vargas Llosa claimed that there was no other case in Latin America ‘of a dictatorship system which had recruited the intellectual medium more efficiently, bribing it in a very subtle manner’ (1991). In 1977, Lorenzo Meyer, an intellectual opposing the PRI regime, questioned that the state provided a ‘living for thousands of intellectuals’; and he criticised Mexican embassies because, instead of having professional diplomats, they were ‘full of writers and social scientists’ (Meyer 1977: 16). Certainly, forced exile was not a punishment reserved for journalists or intellectuals. As Stevens has demonstrated:

The time-honored Russian custom of exile is also observed in Mexico. A troublemaker may be ordered, upon pain of imprisonment or bodily harm, to leave the area where he



has been exercising noxious influence and to reside until further notice at a distant place. When it seems desirable that an individual leave the country and reside abroad, government funds may be furnished to cover his expenses. In a case involving a prestigious individual, he may be prevailed upon to accept an appointment as ambassador to a distant country (1970: 70).

Censorship was a relatively common practice among government agents, who censored or limited previously published information, and it also involved a series of mechanisms aimed at dissuading the press from publishing unacceptable texts. In order to achieve this, the government threatened the press with cancelling their publicity, decreasing their subsidies, and even interrupting the paper supply, which was provided by a government agency, the *Productora e Importadora de Papel* (Paper Producer and Importer or PIPSA). Without paper, there are no newspapers. Certainly, some media – like the magazines *Siempre!*, *Política*, *El Diario de Yucatán*, and *El Día* – were critical of the PRI governments, but they lived under tight secret police surveillance. Journalists' phones were tapped, their mail was opened, and the circulation of magazines or newspapers was impeded when they published 'texts that were offensive to the regime' (Aguayo 1998: 52; Rodríguez Munguía 2007: 24).

When co-optation and censorship failed, the PRI governments fired or incarcerated anti-government journalists or intellectuals. In 1965, Arnaldo Orfila stopped working as the director of the *Fondo de Cultura Económica* (Economic Culture Fund) – a publishing house founded by the Mexican government – for translating into Spanish and publishing the novel *Los Hijos de Sánchez* (The Children of Sánchez), by the North American anthropologist Oscar Lewis (1961). This novel, originally published in English in 1961, was the result of an ethnographic study of five poor families in Mexico carried out by Lewis during the 1950s. Of the five families, Lewis picked the Sánchez to carry out an 'almost obsessive register of the economic, social,

symbolic, religious, psychological, sexual and life ties that make poverty not only a social form but, after a Georg Simmel concept, a way of life' (Semo 2010).

In response, another state agency, the Mexican Geography and Statistical Society (SMGE), sued the book and Lewis before the Republic's General Attorney. Lewis was accused of being 'obscene, crude and offensive to public morality', because of his 'impudent description of erotic scenes that offend the most elemental sense of modesty' of the Mexican people (Política 1965c: 14 – 17). The book was, moreover, 'anti-Mexican and subversive' (Política 1965c: 14). For the SMGE 'the Sánchez family does not represent [...] families with scarce economic resources' in Mexico. According to the SMGE, the type of home the Sánchez family lived in 'belongs to the past', because the PRI's 'republican, democratic and representative regime' had 'built thousands of comfortable, hygienic and affordable homes' for families like the Sánchez' (Política 1965c: 14–17). The penal lawsuit against Lewis fell through, but the government forced Orfila to leave his post.

Other examples of the regime's repression of critical intellectuals involve Daniel Cosío Villegas and Adolfo Gilly. The first, who was President of *El Colegio de México*<sup>15</sup> between 1957 and 1963, was accused – via a libellous book – of serving the interests of the United States, 'the yankee imperialism' (Cosío Villegas 1976). Cosío Villegas was found guilty of 'making up entities that receive Uncle Sam's subsidies' as was the case of *El Colegio de México*, which 'receives a money load which makes the apparently leftist posture of that organism questionable' (Ibarra 1974: 56-65). And historian Adolfo Gilly ended up in the Lecumberri jail between 1966 and 1972, accused of 'conspiracy' and 'criminal association' for writing an article against the government. Once in jail, Gilly was tortured by state agents to make him confess that he was a

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<sup>15</sup> El Colegio de Mexico is a prestigious institute of higher education in Mexico City, specialised in social sciences, with many of Latin America's leading experts in their fields.

member of the Fourth International – the communist international organisation (Bertrand Russell Peace Foundation 1966-1968; Liga Obrera Marxista 1966).

### **Mexico's protracted transition towards democracy (1968-2000)**

#### *1968: the beginning of transition*

The significant number of social conflicts and the propagation of political violence in the 1960s revealed the structural changes that had occurred in Mexican society between 1930 and 1960: e.g., demographic growth, industrialisation, urbanisation, and the transformation of values, attitudes, and lifestyles (Loaeza 2008b).<sup>16</sup> For example, between 1963 and 1968 there were at least fifty-three student riots (Aguayo 1998: 84). Social discontent in the 1960s exposed, in particular, how the middle classes had become stronger; having benefitted from the economic growth that the PRI regime had guaranteed during the three previous decades, they demanded that their individual interests should be defended and asked for more participation in political events (Loaeza 2008a).<sup>17</sup> Even North American intelligence services were placed on alert following these socioeconomic changes. In 1967 the CIA noticed that the middle classes had achieved a 'level of sophistication that could lead them to a conflict with the paternalistic Mexican government' (Aguayo 1998: 112). At the same time, the political violence deployed by the state seemed to suggest that the traditional bureaucratic mechanisms of control successfully employed by the PRI regime until then were no longer sufficient to maintain state power (Loaeza 2005).

In this context, the most important challenge to the regime was the student movement of 1968. On July 23<sup>rd</sup> of that year there was a confrontation between the

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<sup>16</sup> In 1940 Mexico was a barely populated rural country. It had only twenty million inhabitants; almost seventy percent of the workers worked in agriculture and only twenty percent of the population lived in urban areas. Only a fifth of the population could be considered middle or upper class. In contrast, in 1980 there were more than fifty million people – three times as many as in 1940 – and less than forty percent worked in agriculture (Meyer 1991: 365; Meyer 1980: 131).

<sup>17</sup> Between 1940 and 1980, the GNP had an average growth of six percent (see Meyer 1991: 365).

students of two high schools in Mexico City. The police intervened: students were frisked, beaten, and some of them were arrested. In response, three days later, thousands of students protested against police brutality. The police quelled the demonstration again. This time, however, the confrontation between the students and the police left three protestors dead. From then until September 1968 a series of student protests took place, all of which were repressed by security forces (protests were suppressed; students were brutally beaten or illegally arrested). Each student protest had more participants (more universities, schools and unions joined the movement), and brought about a greater intensity of state violence (the Military joined the police in trying to quell the protests). On September 18<sup>th</sup> the government occupied the National University's buildings and detained at least six hundred students. In spite of the oppression, the student protests continued until October 2<sup>nd</sup> – in less than one month there were fifteen people killed (See Aguayo 1998; Meyer 1980; Ortega-Ortiz 2008).

Unlike other protests, the student movement was particularly disturbing for the government because in October 1968 the Olympic Games were to take place in Mexico (Loaeza 2005: 147). While the President sought to portray 'an image of peace and progress to the rest of the world', the students sought the opposite: they wanted to 'organise a strong mobilisation before foreign visitors in the month of October'. According to the secret police reports, the students wanted to 'take advantage of the Olympiad to carry out a labour of proselytism, showing to the world [...] the Mexican government's attitude' (Aguayo 1998: 118; see also Loaeza 2005). In response, the government and its allies in the press propagated the idea that the students were a part of a conspiracy against the country – 'terrorists', 'guerrillas', 'agitators', 'anarchists', 'unpatriotic', 'mercenaries', 'traitors', 'foreigners' or 'outlaws', 'communistoid pseudo-students', 'misled adolescents', and 'bad Mexicans' (Rodríguez Munguía 2007: 69). In

this atmosphere charged with violence, on October 2<sup>nd</sup> the police and the army repressed a student protest congregated in the *Plaza de las Tres Culturas* (The Three Cultures' Square) in Tlatelolco and indiscriminately shot those present. Additionally, according to the report by the DFS's director, Fernando Gutiérrez Barrios, one thousand and forty three people were detained (Ortega-Ortiz 2008: 172).<sup>18</sup>

Meanwhile, the Mexican press concealed the student massacre, misrepresented it or approved it. For instance, *Excelsior*'s main headline was reserved for the forthcoming Olympic Games (Brewster 2002: 183). Other newspapers simply echoed the official story told by the government: 'what happened was justified' (Aguayo 1998: 268). According to this narrative, the student movement was in fact a Communist subversion that sought to destabilise the country or boycott the Olympic Games; students were armed and shot first – the army just repelled the aggression; 'outside agents' were to blame for the violence (Valero 2009).

This is how German journalists Heinrich Jaeneche and Eberhard Seeliger, *Stern* magazine correspondents, reported it on October 20<sup>th</sup> 1968:

The [Mexican] press lied in favour of the government, distorting the meaning of the events. The Mexican newspapers took foreign correspondents who were visiting to cover the Olympic games by surprise, making them accomplices with the fable that they were only guerrilla members, snipers and student restlessness, when it was actually military repression of a civil protest movement (cited by Rodríguez Munguía 2007: 73).

The 1968 student repression received relatively little attention outside Mexico, with the exception of the Argentine writer Jorge Luis Borges, who openly backed the Mexican government in its repressive actions (1968). Only the International PEN Club and a group of French intellectuals, via a telegram, showed their indignation about the

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<sup>18</sup> Notwithstanding its impact on Mexican democratisation, there are no investigations yet which offer an explanation on the reach of the atrocities perpetrated by the state, paramilitary groups, or antigovernment movements in 1968. The number of dead in the 'Tlatelolco massacre' illustrates this problem well. Until 2000, journalists and academics had accounted for the death of between twenty six and eight hundred people. With the opening of the files of the extinct secret police in 2001, recent investigations revealed different numbers – twenty eight or twenty people – and these numbers, in turn, are subject to controversy.

political violence exercised by the PRI regime (PEN Club International 1968). Simone de Beauvoir, Jean-Paul Sartre, and Jean-Luc Godard, among others, urged the Mexican government to condemn 'the police's and Military's violent actions' and urged it to resume the 'dialogue the students ask for' (Beauvoir, et al. 1968). The existentialists requested of the President 'not to destroy forever the image of the country of the [Mexican] Revolution of which it claims to be heir to' (Beauvoir, et al. 1968).

With the exception of these two telegrams, the international community did not condemn the massacre (Sikkink 1993: 428). For Sir Peter Hope, then UK ambassador in Mexico, what happened was 'a conspiracy of silence. All of us at the embassy tried to find out what had happened and failed. The same occurred with the Korean, Japanese, Belgian, and other diplomats' (Aguayo 2010a: 187).

The government's repression ended the student movement. The Olympic Games were carried out without further disturbance. As occurred with other protest movements during the 1960s, the student movement showed the growing existence of social and political pressure for change.<sup>19</sup> It revealed the features of a more complex and pluralistic society, which demanded more opportunities for a political and independent participation, beyond the existing corporations, unions, or the official party. However, unlike other social movements, the brutal repression of these students in 1968 had significant effects on the political stability and legitimacy of the authoritarian regime. So much so that this mobilisation and its repression constituted the origins of the political liberalisation which would end, more than thirty years later, in the triumph of Vicente Fox.

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<sup>19</sup> However, we must remember that within the universities there were also co-opted student groups supported by the regime. The Federation of Students in Guadalajara or the National Federation of Technical Students were affiliated to the government and made use of violence to fiercely repress anti-government student groups. These pro-government student groups enjoyed impunity.

The protest and repression of the 1968 movement unleashed a process of democratic transition in three ways. First, the students stripped the authoritarian regime of its democratic facade. A government that killed people in a peaceful protest could not define itself as democratic. The repression conflicted with the democratic and ‘revolutionary’ credentials of the PRI regime, mainly before the eyes of the international community. Meyer observed that it was not until 1968 that the ‘co-option and repression were seen as an integral part of the Mexican political system’ (Meyer 1991: 370). As a result, from then onwards, the concept of ‘authoritarianism’ – originally put forth by Juan Linz – became popular to explain the reality of the PRI regime (Meyer 1991: 370).

Second, the importance of the 1968 student movement was that it shook one of the pillars upon which the authoritarian regime was founded: political demobilisation and non participation. Before 1968, the ‘revolutionary’ elite had limited political participation, arguing that it generated instability. The student movement showed that, on the contrary, lack of political participation was generating instability (Loaeza 2008a).

Third, state repression of the 1968 student movement led to the radicalisation of some opposition leftist groups (Middlebrook 1986). These groups believed that peaceful political reforms and negotiation with the PRI government were a useless recourse and formed rural and urban guerrillas. Lorenzo Meyer, in a series of academic essays edited in 1977 by the Institute for the Study of Human Issues of Philadelphia, wrote: ‘given the lack of substance in the electoral process, we must conclude that in Mexico today the majority of the population has no political representation. The alternatives are resignation or violence’ (Meyer 1977: 15).

Meyer’s academic predictions proved to be right. During the 1970s, the Mexican government ‘was fighting off attacks from twenty nine scattered leftist groups

numbering about one thousand eight hundred revolutionaries' (Aguayo 2001a: 310; Zarembo 2001). For these organisations 'the main thesis of Che Guevara's revolutionary theory [...] indicated that when the legal channels of the bourgeoisie are closed, the only open road left for transformation is that of armed conflict' (Rojas Delgado 1972).

Faced with this scenario, the authoritarian regime followed a dual strategy. Whilst the army, paramilitary groups, and the secret police brutally repressed dissidents, the president promoted electoral reforms to extend political participation and thus channel discontent against the regime through political parties and the electoral field. Certainly, the authoritarian regime's elite had little interest in political liberalisation. However, the PRI regime had no other alternative than to open a legal space to promote the political participation of dissidents (e.g. students, strikers) within the institutional framework. Electoral reforms were, additionally, a means to bring back into the system those dissatisfied groups that made use of violence, mainly guerrilla members.

### *Electoral reforms*

With the first strategy – moderate modifications to electoral legislation – the PRI sought to maintain the regime's political stability and thus preserve its status quo within the establishment (Loaeza 2000b). By channelling social discontent through electoral reforms, the government was trying not to repeat the disturbing events that occurred in Latin America in the 1970s, characterised by the *coup d'état* against the socialist government of Salvador Allende in Chile in 1973, the defeat of Peronismo in Argentina, the radicalisation of leftist groups, and the rise of military dictatorships. Hence, in 1977



the executive power presented an initiative of reforms to diverse constitutional articles related to political parties (Loaeza 1999: 317; Reyes Heróles 1984).<sup>20</sup>

These modifications made it possible for political parties to be recognised as entities of public interest and, therefore, gave them access to mass media and granted them public subsidies (Loaeza 1999: 320; Ortega-Ortiz 2008: 190). In order to promote participation, these changes in legislation facilitated the requirement for political parties to keep their national registries. However, the PRI regime also imposed conditions on the opposition parties. It demanded that they present candidates in federal elections, as not doing so would result in the loss of their registry. This measure sought to maintain the appearance that electoral processes were genuine in Mexico – to show that several political parties participated in elections, just as in western democracies – and to avoid the PRI's presidential candidate being the only person 'competing' in presidential elections (Eisenstadt 2004: 38).<sup>21</sup> Even though all opposition parties benefitted from the 1977 electoral reform, the PRI regime sought to open a space for legal representation and participation of anti-government leftist groups. The reform legalised leftist parties which had been forbidden before, like the Communist Party (Eisenstadt 2004: 39; Ortega-Ortiz 2008: 190).

These electoral measures were accompanied by an amnesty law, which came into force in 1978, thanks to which some political dissidents left prison. The amnesty law aimed to benefit those people 'against whom penal action had been initiated [...] for the crime of sedition, or because they had invited, instigated or incited to rebellion, or due to conspiracy' (Ley de Amnistía 1978). The law applied only to those who had

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<sup>20</sup> There was a previous electoral reform, in 1973, designed by the government as a response to the discontent of the 1968 young students' movement. The reform reduced the minimum age to become a Congressman, from twenty five to twenty one years old, and for Senators from thirty five to thirty. It also reduced the threshold for small political parties to get a seat in the Lower House (Ortega Ortiz 2008: 182).

<sup>21</sup> In 1976 the PRI was alone in the elections. The PAN doubted whether to participate or not, 'whether to participate in elections (and accept losing even rigged elections) or abstain and punish the PRI by unmasking the regime's elections as uncompetitive shams' (Eisenstadt 2004: 38).

‘been a part of groups’ which acted ‘on political motives’ with the aim of disputing ‘the country’s institutional life’ (Ley de Amnistía 1978). This legal recourse, whose objectives were openly political, has been largely ignored by Mexican historiographers. The effect of this political amnesty, as Mexico City’s Ombudsman, Luis de la Barreda Solórzano (2008: 134), has so openly pointed out, was to concede ‘generous impunity to guerrilla members’.<sup>22</sup>

The electoral reforms that began in the 1970s slowly liberalised the regime. In fact, the PRI remained in power for another twenty three years. This is understandable if we consider that these electoral reforms did not seek to democratise the country but rather to prolong the life of the PRI regime. The reforms aimed supposedly to democratise the authoritarian regime ended up benefitting it for four reasons. First, they made it possible to manipulate the existing opposition. By creating the rules of the electoral game, the regime was able to control the political activities of the opposing political parties that were legally established. Second, the reforms contributed to the creation of artificial ‘window dressing’ opposition parties, whose mere presence legitimised the existing political system’s democratic credentials. Third, the regime silenced criticism from the international public, as the reforms made the authoritarian regime seem a little more democratic. Fourth, in great measure they helped to demobilise radical groups (Eisenstadt 2004).

It was not until 1996, in the midst of an economic crisis and a political crisis originated by the *zapatista* movement, that President Ernesto Zedillo (1994-2000)

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<sup>22</sup> This crude comment on the amnesty law is rather unusual, especially because it comes from a human rights defender. De la Barreda’s declaration makes more sense when we learn that he made it in defence of his father – Captain Luis de la Barreda Moreno – who was investigated and persecuted by the SPO for perpetrating human rights abuses throughout his career in the extinct secret police. By making this statement, De la Barreda involuntarily evidences one of the paradoxes of transitional justice: the difficulty of establishing with certainty the taxonomy of ‘victims’ and ‘perpetrators’ of human rights violations. Some ‘victims’ of the current Mexican transitional justice process (e.g. ex guerrilla members) were ‘perpetrators’ of abuses in the past, but their crimes were erased by a political amnesty granted by the authoritarian state agents that now seek to punish. I will explore this issue further in Chapter Four.

negotiated a new electoral reform. It made a greater democratisation of the political system possible. The reform was significant in that it allowed complete autonomy of electoral institutions, protection of the political rights of voters through an electoral court, the use of diverse measures to increase the credibility of electoral results, and more equality in elections (Eisenstadt 2004: 51). This reform would allow the PAN to win for the first time in history in presidential elections four years later.

### *Repression and political violence*

The regime's second strategy – sustained dissident repression – lasted at least until the mid 1980s. The repression of the 1970s and 1980s is understandable because not all leftist groups viewed positively the electoral reforms promoted by the authoritarian regime. Some dissidents were convinced that the elections would not achieve an authentic change of regime; they thought that by constituting political parties they would end up legitimising an electoral process void of content and characterised by fraud. Not all dissidents were willing to maintain the system's democratic façade. As a result, some of the dissidents who were not part of the recently legalised political parties took up arms.

For example, according to political prisoners at Lecumberri, 'the electoral reforms do not alter the control the government has on the mechanism to appoint public servants'. According to them, 'each election is still a farce' (Declaración de Presos de Lecumberri 1971). A group of dissidents in the city of Juchitán, Oaxaca, warned that elections were simply a 'farce'; therefore, they openly discredited the vote and the electoral system. From their perspective, voting meant becoming 'accomplices to a grotesque clownish stunt' (De Gyves Pineda 1976). For the guerrilla group *Liga Comunista 23 de Septiembre* (September 23<sup>rd</sup> Communist League) 'the proletariat must answer with a multiplicity of political strikes, flash rallies, street combats, guerrilla fight

actions, and spreading Socialist slogans everywhere' (Liga Comunista 23 de Septiembre 1977).

Rural and urban guerrillas de-stabilised the regime through bank robberies, political assassinations and kidnappings. For example, on August 11<sup>th</sup> 1976, the PRI candidate to the Presidency's sister, Margarita López-Portillo, was travelling in her car when a taxi blocked her way. Four guerrilla members – three men and a pregnant woman – started shooting. The car crashed into a pharmacy. The chauffeur threw himself over Margarita thus protecting her with his body from the shots. Margarita's bodyguards – she was travelling in the backseat – opened fire against the guerrilla members, injuring one of them. This failed kidnapping attempt was undoubtedly important because it involved the future President of Mexico, José López-Portillo's (1976-1982) sister. However, as Alex Zarembo (2001) points out, the political violence of the guerrilla members 'was nothing new in 1970s Mexico'. Between January 1974 and June 1976, the guerrilla group *Liga Comunista 23 de Septiembre* killed ninety five policemen and soldiers (Aguayo 2008).

Another example of violence by dissident groups occurred on August 1977 when a guerrilla group kidnapped a bus with forty passengers that had left Mexico City travelling to Manzanillo. The guerrilla members threatened to kill the passengers if the government did not free two political prisoners. When the police tried to rescue the bus, the guerrilla members opened fire, killed the chauffeur and detonated a grenade, killing five passengers and injuring eight others (Aguayo 2010a: 199).

The PRI regime's response to the violence of dissident groups was to brutally repress alleged guerrilla members. Between 1977 and 1978, according to press reports, soldiers, policemen, and paramilitary groups killed three hundred and two peasants (Aguayo 1998: 87). An example that illustrates the regime's violence against dissidents

is the killing of alleged guerrilla members in Acapulco, in 1974. That year, an indeterminate number of people allegedly connected to the guerrilla organisation Lucio Cabañas were detained in Acapulco following instructions of the military zone's commander. Detained illegally and 'incomunicado', the alleged dissidents were interrogated and tortured by state agents. At the end of the questioning, the state agents forced the guerrilla members to drink gasoline, set them on fire, and discarded their bodies in 'solitary places where they would turn up disfigured by the effects of the fire' (Aguayo 2010b: 87).

Another method used to disappear dissidents was that of 'death flights'. The Military Field No.1, in Mexico City, served as a prison for those opposed to the regime. In order to eliminate them, prisoners were transferred in military convoys or helicopters to Air Base No. 1 (BAM) in Santa Lucía, in the State of Mexico, to then be taken in Mexican Air Force airplanes to Military Air Base No. 7 in Pie de la Cuesta, in the State of Guerrero. According to the testimony of ex-military Gustavo Tarín Chávez, a member of Guerrero's Judicial Police during the 1970s, there were at least one thousand five hundred people illegally detained in that state, who were later transferred to the Military Base in Pie de la Cuesta. Once there, all dissidents were shot in the back and then placed in a sack with stones. In order to 'rationalise' this atrocity, the executors dehumanised victims, calling them 'sacked'. The Military would then transport these 'sacked' bodies in special planes to Oaxaca, where they were dumped into the ocean. As this monstrous practice was carried out overnight, executors called it 'going partying' (Cedillo 2008: Chapter Five).

Certainly, even today, there is little information publicly available about the regime's repression against dissidents and guerrilla members in the 1970s and 1980s. As is common to other authoritarian regimes, in Mexico the state documented in minute

detail the activities of anti-government groups. However, foreseeing that they could eventually be responsible for their acts, state security agents were very careful to classify and guard any evidence that could incriminate them in human rights violations.<sup>23</sup>

Only when Vicente Fox came to power did the secret files start to be made public and evidence confirming the atrocities committed during the PRI regime began to emerge. Rather than being exposed by historians, sociologists, and political scientists, the information about the human rights violations committed during the previous regime has been primarily exposed by human rights NGOs. Even though these investigations frequently concentrated only on the most dramatic episodes of violence, for the first time they offered a more or less precise description of the multiple strategies deployed by the PRI to neutralise and annihilate dissidents. Human Rights Watch (2003: 4), for example, after studying the documentation of old secret files, claims that the Mexican government carried out:

Repeated and systematic human rights abuses against political opponents and dissidents in what came to be known as the country's dirty war. Its targets included armed groups and their sympathizers, real or alleged, as well as student activists and other people who participated in protests, but never armed activity. Its methods included torture, extrajudicial execution, and forced disappearance, and often entailed an extreme degree of brutality and wanton disregard for human life.

Similarly, Kate Doyle (2003a; 2003b; 2003c; 2003d), who has carried out the most exhaustive research on the ex-secret police archives, illustrates how at least three Mexican Presidents – Gustavo Díaz Ordaz (1964-1970), Luis Echeverría (1970-1974)

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<sup>23</sup> The absence of analysis on this issue is understandable if we consider that, regardless of the gradual process of political transition, the authoritarian regime persisted until 2000. Hence, the PRI governments guaranteed relative freedom of expression, but it is also true that they intimidated and harassed journalists and critical intellectuals when they considered it necessary. Additionally, the little information on these issues is related to the type of violations and the type of perpetrators who committed them. Torture and forced disappearance – widely used by the regime – are practices that tend to leave no trace. For example, the armed forces detained dissidents, without a trial, in military detention centres, of whose existence there are few records, where prisoners were tortured and eventually disappeared. Furthermore, agents who perpetrated atrocities did not always form a part of the formal structure of the state apparatus, but were rather members of irregular organisations like paramilitary groups or informal groups, which acted informally alongside the judicial police.

and José López Portillo (1974-1982) – maintained repressive policies for almost two decades. ‘In those years’, Doyle demonstrated, ‘hundreds of Mexican citizens – uncounted innocent civilians as well as armed militants – were murdered or “disappeared” by Military and security forces. Thousands more were tortured, illegally detained, and subjected to government harassment and surveillance’ (Doyle 2006a). ‘The use of kidnappings, torture, and assassinations to attack the regime’s opposition’ concludes Doyle (2006b), ‘was not attributable to military units or renegade officers in an isolated fashion. It was an official practice.’

But Mexico’s history of abuses and political violence does not end here. Dissident groups were repressed by the PRI regime even in the 1990s. President Carlos Salinas (1988-1994) arbitrarily removed seventeen state governors, and was responsible for the death of more than four hundred PRD members during his administration (Del Villar 2005: 71; Hernández 2005: 104).

President Salinas was also responsible, notably, for the repression of the *zapatista* movement in 1994. Tim Padgett, *Newsweek* and *Time* correspondent in Mexico, describes the event as follows: ‘the streets were strewn with the bodies of indigenous peasant guerrillas lying in blackberry pools of blood [...]. Inside the market stalls, we found guerrilla sympathisers executed by army troops – who, for some perverse reason, weren’t allowing the Red Cross into the town. So if there’s one thing worse than seeing the dead, it’s having to watch them die’ (Padgett 1996). Padgett said that ‘after a week of walking over the corpses of desperate *campesinos* in Chiapas’ his worst fears about Mexico’s regime were confirmed: ‘while communist and fascist regimes fall all around us, much of Mexico’s one-party totalitarianism still survives, and does so because of its genius for making us think we’re watching a democracy’ (Padgett 1996).

**Presidential elections in 2000: the change of regime***Vicente Fox's electoral triumph*

The electoral reforms that gradually liberalised the authoritarian regime sought to satisfy leftist political demands. However, it was not the left but the right-wing party – PAN – which capitalised on the benefits that the electoral reforms had brought.

Although Fox was the candidate of the conservative party, his victory was possible because it received the support of NGOs and leftist political groups that saw in him a powerful candidate who might oust the PRI. Without resigning from his political party, during his electoral campaign, Fox sought to create a widely based and heterogeneous non-political affiliation coalition, whose object would be to unify all the PRI's opponents behind him (Loaeza 2006). Fox's followers – Foxists – made the presidential election an 'anti-PRI plebiscite'. Soledad Loaeza suggests they 'aspired to put Vicente Fox at the head of an opposition front similar to those that precipitated the collapse of authoritarian regimes in South America and Eastern Europe' (2006: 4).

Fox was able to transcend ideological positions because during the electoral campaign he promised to transform the way in which the country had been ruled: from authoritarian rule to democratic government (Bruhn 2004; Klesner 2004; Rottinghaus and Alberro 2005). In the past, the Mexican electorate division was marked by left and right ideologies. In contrast, during the 2000 elections, Klesner (2004: 110) shows that there had been a clear division between those among the electorate who supported the regime's continuity and those who were against the PRI regime. In this context, Bruhn (2004: 142) demonstrates that Fox opted to dilute his own ideological profile and instead promoted himself as an agent of change. So, in the end, the main element of Fox's campaign was the idea of change. And the idea of change became identified with the idea of change in the regime (from authoritarian to democratic) and the idea of



eliminating the PRI and the political, social, and cultural practices associated with that party.

Certainly Fox's triumph represented a decisive step in the protracted democratisation process, given that the 2000 presidential election was the result of the electoral reforms that preceded it. However, for many observers, Fox's ascendance to power was not the end of transition, but rather a point from which a series of political and social reforms could be carried out to consolidate a democratic regime in Mexico. As Middlebrook points out, 'Fox's victory brought the country into the mainstream of Latin American democratization processes' [...] 'the reform agenda in Mexico parallels that in many other post-transition countries, where the fundamental goal is to make real the formal conditions of political democracy' (2004: 2). This is how Fox understood it. In his first message to the nation as President of Mexico, Fox 'welcomed democracy', but warned that 'July 2<sup>nd</sup> is not the destination. The challenge in fact is just beginning' (Presidencia de la República 2000a).

However, as already indicated in my introduction to this thesis, Vicente Fox did not have an easy task. The PRI was still powerful enough to challenge him in many areas (e.g., tax reform, electric reform, or 'transitional justice') and undermine his chances of success. At the state level, the PRI was still in control of eighteen out of thirty-two states. The former official-party also ruled over almost seventy percent of the municipalities of the country (Merino 2010). Finally, and crucially, PRI dominance in both houses of the Mexican Congress made it clear that Fox would have to find fundamental accommodation with the PRI for his reforms to succeed in the legislature (Hernández 2010: 452).

Immediately after the July 2000 election, in the midst of celebrations over a historic PRI defeat, the team of recently elected President Fox designed and publicised a

series of government programmes oriented towards democratising social justice and human development, economy and public finances, and public security and corruption (Poder Ejecutivo Federal 2001b: 9). The ‘essence’ of Fox’s strategy was to make ‘Mexico respond [...] to the challenges that different transitions in the political, demographic, economic and social arena pose’ (Poder Ejecutivo Federal 2001b: 9). According to Fox, the new political and institutional reforms sought to ‘build a new Mexico’. But, ‘in order to build this new Mexico’, Fox warned, it was necessary to ‘update the country’ in different spheres, amongst which human rights were included. It was necessary for Mexicans to ‘adjust their watches to new times’ (Poder Ejecutivo Federal 2001b: 10). Six months later, on December 1<sup>st</sup> 2000, Fox took over office and began what he and his strategists called the ‘government of change’.

*‘Transitional justice’ in the new regime’s agenda*

Fox and his team took on the task of establishing ‘transitional justice’ with urgency. During his inaugural speech to the nation in Congress, on December 1<sup>st</sup> 2000, Fox stated that in Mexico ‘the political discrepancy with those who hold the power has been a frequent cause for the common citizen to be the victim of the state’s force’ (Presidencia de la República 2000b). Fox asserted that during his administration Mexico would no longer be a ‘reference of discredit in human rights matters’. He promised that his government would protect human rights ‘like never before’, respect them ‘like never before’, in order to consolidate ‘a culture that repudiates any violation and sanctions those guilty’ (Presidencia de la República 2000b).

Fox then insisted on the importance of avoiding the recurrence of state crimes in the future. Fox assured people that it would no longer be ‘valid to use espionage, surveillance and intimidation equipment against other parties, unions, social organizations, political characters or opinion leaders’. For Fox’s government,

‘repression *never again* would be a means to solve political differences’. ‘My government’, he concluded, ‘will not distract the security organs to dissuade its critics or neutralize its opponents’ (Presidencia de la República 2000b). These statements were significant because it was the first time there was official acknowledgement that the state had repressed dissidents in Mexico.

However, this was no regular speech. It was Fox’s inaugural speech in power, in which he informed his listeners about his intentions as a leader of a new democracy. Within the list of urgent institutional changes the new administration sought to implement – important reforms in public education, the health system, national security, and the fiscal system – Fox and his strategists had included the issue of ‘transitional justice’ as a priority. So, in that sense, the ‘transitional justice’ promise was one of the first and foundational acts of the new regime, which would serve to underscore its authority and moral right to rule.

‘Transitional justice’ was thus given priority within Fox’s administration’s agenda over other government issues. It seemed to be part of the foundations of a democratic regime. For the perpetrators of abuses of the past there would be no ‘clean slate’, ‘no pious oblivion for those who committed crimes’ (Presidencia de la República 2000b). Before the Congress and conspicuous political actors of the country and the international community, Fox had made it clear that there would be no policy of forgetting, or amnesties for perpetrators of state crimes, but mechanisms whose end would be to ‘know the truth’ and ‘do justice’.

### *The ‘Mexican solution’*

The apparent urgency of addressing human rights violations did not extend beyond Fox’s inaugural speech. As the months went by, ‘transitional justice’ gradually became less of a priority for the new administration and was no longer highlighted by the press.

The issue was kept alive through the insistence of human rights NGOs, victims' families, scholars, and members of Fox's cabinet. Even so, a year passed before Fox put into practice his promise to reveal the truth and bring about justice.

As we will see in Chapter Three, a significant debate arose around the dilemma of whether or not to face the past in the first place. The PRI members had no interest in taking out of the closet the skeletons they had so carefully guarded for seventy years. As the PAN did not suffer the brutal and sustained repression of the authoritarian regime – as the leftist political parties and their followers did – its members were indifferent to this issue. Furthermore, some of the new administration cabinet's members were openly against any attempt to face the past, fearing that 'transitional justice' could destabilise the yet incipient Mexican democracy. They believed that the Fox government could not aspire to investigate or punish the members of a political party – the PRI – with which they sought to negotiate political reforms to strengthen democracy. Another, no less important, debate centred on the evaluation of the usefulness, efficacy, moral risks, and political benefits of following a restorative or retributive justice model to deal with events of the past.

Hence, as I have argued in the introduction to this thesis, Fox faced a series of transition dilemmas. To test the new regime's democratic viability called for ending an era of impunity, but by punishing the perpetrators of past state crimes, Fox placed at risk the fragile democracy's political stability. In order to bring about the necessary reforms to consolidate democracy, Fox had to negotiate with the old 'official party', which was now in the opposition. And to negotiate with the PRI elite certain reforms in order to democratise the political system involved preserving the old regime's impunity.

The controversy lasted until November 2001, when Fox's government decided to prosecute the perpetrators of human rights violations through a Special Prosecutor's Office for Past Crimes (SPO), which would depend on the Attorney General's Office.

The SPO's main task was to investigate and prosecute 'alleged abuses' perpetrated by federal state agents against individuals related to social and political movements. Yet, mimicking the work of other, previously existing and paradigmatic truth commissions such as those in Chile and South Africa, it would contribute to reconciliation. In order to carry out such a complex mission, the SPO put in place three programmes (SPO 2002). The first was the Programme of Cooperation, Citizens' Participation and Institutional Relations, whose objective was to regulate the way in which human rights NGOs and relatives of the victims could participate in the process. The Programme of Analysis and Information would coordinate the documentary investigation to establish the historic truth. The third and most important programme was the Programme on Prosecutions, which would be in charge of the investigation and prosecution of human rights violations.

Some observers foresaw that the SPO attempted to carry out a very ambitious task and questioned whether it sought truth and justice at the same time. In response, the Special Prosecutor, Ignacio Carrillo-Prieto, argued that this was the 'Mexican solution': 'truth, justice and reparations all go together; we cannot trade truth for justice [...] The Mexican solution is a very appropriate response to impunity, a new model' (Doyle 2003c: 69).

However, the 'Mexican solution' ceased to exist when Fox ended his term on November 30, 2006 (PGR 2007). For Felipe Calderón (2006-2012), the second president in the democratic era, 'transitional justice' has been a practically irrelevant matter. I return to this latter point in my concluding chapter.

The Mexican model of facing the past obtained no results (i.e., truth or justice). No perpetrator of human rights violence ended up in jail. The documents of the old secret archives used by the SPO during five years of judicial investigations are missing. As there are no guilty parties, officially there are no victims of past atrocities either. No victims, no one to grant reparations to, no truth, no justice, no compensation. Even when Mexico's 'transitional justice' process worked according to the law and was framed by the language of human rights (e.g. the right to truth), it did not put an end to impunity, but rather perpetuated it.

### **Conclusions**

This chapter on the background of the Mexican 'transitional justice' process has sketched an outline of the essential characteristics that made the PRI regime an authoritarian one that lasted almost seventy years, outliving the democratising waves that took place in Latin America and Western Europe. It showed that, in spite of maintaining a democratic facade before the international community's eyes, this 'one-party regime' was characterised by its limited political pluralism, and by the state's active intervention to limit social demands and neutralise political mobilisations. Additionally, it showed how the significant centralisation of power in the executive power allowed the presidents to manipulate mass media, censor critical intellectuals, co-opt dissidents, and embezzle public funds with relative impunity, given their lack of accountability to any other institution.

The chapter also demonstrated that the PRI regime was not free from social and political conflict. In contrast with most studies on Mexican authoritarianism, it offered an explanation for the sophisticated 'repressive mechanisms' deployed by the authoritarian regime in order to neutralise dissidents. Moreover, the chapter demonstrated that during the protracted transition towards democracy, the PRI regime

implemented electoral reforms that made more political pluralism gradually possible, but simultaneously intensified the repression of dissidents, at least until the mid-1980s.

Political violence played an important role in the authoritarian regime and the transition to democracy's survival. Torture, kidnapping, forced exile, illegal incarceration, forced disappearance, and murder of dissidents were not isolated practices committed by 'rotten apples' in the army or the police. These abuses were part of an official policy, maintained for decades, which sought to end threats to the regime. If we disregard these events we cannot understand why 'transitional justice' came to be such a relevant issue in Fox's presidential campaign, and to the government of change's official discourse. If we ignore this context we cannot understand why 'transitional justice' was a relevant element in the formation of a new democratic regime. Nor can we understand why, even today, different actors – victims, human rights NGOs, journalists, academics – continue to promote the deployment of strategies designed to deliver the truth about the past or carry out justice for the victims.

## **Chapter Two**

### **Transitional Justice: A Field of Practice and of Knowledge**

The previous chapter presented the historical background necessary for understanding why coming to terms with the past was so important in Mexico's new democracy. It described the emergence and characteristics of Mexico's authoritarian regime and then analysed the country's protracted transition towards democracy. In doing so, it showed that human rights violations took place during the PRI era (1929-2000) and briefly sketched how the new democratic regime proposed to deal with them via 'The Mexican Solution' established in 2001 through strategies that sought to establish the truth about past violence and to dispense justice accordingly.

In this chapter, the discussion turns to what might be termed 'transitional justice literature': the field of enquiry that specifically studies ideas and practices related to the way in which societies face past abuses. If the previous chapter showed why dealing with the past was one of the most significant problems that emerged with the arrival of democracy in Mexico, this chapter seeks to suggest an insightful analytical perspective from which this thesis explores 'The Mexican Solution' to past abuses. To do so, my main purpose in this chapter is to evaluate the relevant literature on transitional justice and then to present my own approach in relation to the existing literature in terms of concepts, analytical tools, and research methods.

It would be too ambitious, however, to attempt to analyse in detail a now large field of enquiry that has engaged both empirical research and normative arguments, and to which scholars from a number of different disciplines such as law, political science, sociology and anthropology, gender studies, and criminology have contributed. This is because, as Paige Arthur (2009: 359) states, 'so far, there is no single theory of



transitional justice’. Thus, the chapter charts the three main strands followed by scholars and practitioners within this field over the last two decades – when transitional justice emerged as a field of practice, and then of enquiry from the mid 1990s onwards – in order to distinguish the main arguments and questions. By critically analysing these three lines of arguments – what I call: (a) ‘restorativist and retributivist approaches’ to past atrocity, (b) ‘broadened approaches’ to transitional justice, and (c) ‘social constructivist’ approaches – this chapter’s second purpose is to situate my thesis (and concerns) within the existing transitional justice debates.

The chapter concludes that any account of the Mexican case must be grounded in an understanding of transitional justice as a site for political deliberations, in which state and non-state actors intervene – deliberations that depend on power relations, historical and social determinants in a given context for its materialisation, and that consequently alter the exercise and distribution of power.

Before I proceed with my analysis, it is worth noting that this is a succinct survey of the literature, and it is neither chronological, nor exact. Yet it serves the purposes of this chapter as follows: to examine the relevant literature on transitional justice and locate my research within this field; to offer an analytical standpoint from which this thesis approaches the Mexican case; and to justify how this theoretical approach helps to both elucidate and respond to the research questions that guide this thesis.

### **Conventional approaches to transitional justice**

Transitional justice as a *concept* appeared during the mid-1990s, reflecting the diverse ways in which at that time specific transitional societies attempted to deal with past abuses (Bell 2009: 7). It emerged with reference to three moments of political transformation: first, transitions toward democracy in a number of post-authoritarian

states in Latin America during the 1980s and early 1990s (e.g. Chile and Argentina); second, the political liberalisation of former communist states in Eastern Europe during the late 1980s (Cohen 1995: 8). Then, in the mid-1990s, the practice reached its apotheosis with the establishment of the Truth and Reconciliation Commission (TRC) in South Africa, which ‘promoted a renewed fascination with previously existing truth commissions’, and inspired ‘new research agendas located within the broader concerns surrounding conflict resolution and democratization processes’ (Moon 2008: 2). At the same time, in 1995, the concept was established and popularised by Neil Kritz in his four volumes on ‘How emerging democracies reckon with former regimes’ (Garton Ash 1998; Kritz 1995).

The term transitional justice originally served to describe the ‘legal, moral and political dilemmas that arise in holding human rights abusers accountable’ for their deeds in societies facing political transitions – from a non-democratic system to a less undemocratic rule; and from political violence, war or civil conflict to peace (Bell, et al. 2004: 305). However, the concept has not achieved a ‘fixed meaning’ (Arthur 2009). During the last decade, it has gradually evolved to encompass not only human rights accountability in democratic transitions, but a wider set of goals beyond accountability and beyond processes of democratisation (Bell 2009: 9). Scholars such as Ruti G. Teitel (2003) or Jon Elster (2004) have used the term to define all kind of efforts (e.g. purges, amnesty, lustration, reparations) to confront the past in any historical period, from the antiquity to our days. Elster (2004), for instance, has explored what he terms transitional justice in ancient Athens and has reinterpreted trials that occurred 2000 years ago through the lens of the contemporary rubric.<sup>24</sup>

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<sup>24</sup> Ruti G. Teitel (2003) does something similar when she mistakenly uses the term a ‘genealogy’ of transitional justice. She locates the inception of transitional justice to the Nuremberg Trials.

Certainly, this evolving concept can create considerable confusion because scholars, experts, and activists use it to describe different efforts in diverse contexts. An ancient Greek tribunal bears little relation to the Canadian Commission that sought to improve policies towards indigenous communities in 1996. Nor is the South African Truth Commission, which sought to investigate the crimes of the apartheid regime similar to a so-called ‘truth commission’ that Mexico seeks to establish in 2012 in order to establish what happened to the twenty thousand ‘disappeared’ and nearly sixty thousand dead during the ‘war on drugs’ initiated by President Felipe Calderón in 2006.

Although the concept has gradually evolved, it usually refers specifically to *actions* (efforts, practices) taken by societies in order to treat past injustices (e.g. *ad hoc* amnesty laws, special tribunals, historical truth commissions, specific judicial reforms, investigatory bodies, reparations programmes). But transitional justice is not only a set of efforts, but a field of enquiry about such efforts. It is, as Christine Bell (2009: 6) suggests, a ‘burgeoning interdisciplinary scholarship constituting unproblematically a distinct field’. It has become an important domain of enquiry that has justified the establishment of research centres, university courses, or institutes, such as the Project in Times of Transition at Harvard University, the Transitional Justice Project at the Notre Dame School of Law, the Institute for Justice and Reconciliation in Cape Town, or the Rabat Transitional Justice Fellowship Programme in Morocco. It also justified the creation of the *International Journal of Transitional Justice* in 2007 (IJTJ 2009). In fact, the Journal claims, transitional justice ‘is considered to be an *academic discipline* in its own right’ (IJTJ 2009, emphasis added).

Moreover, transitional justice came to be a site in which activists work and debate these ideas. So it is not only a so-called ‘discipline’ but a profession. It ‘has fast emerged as a recognised field of policy expertise’ (IJTJ 2009). In this sense, the most

influential NGO within this field is the International Centre of Transitional Justice (ICTJ) instituted in 2001. It works in more than twenty societies ‘emerging from repressive rule or armed conflict’, as well in other societies ‘where legacies of abuses’ – according to such activists and experts – ‘remain unresolved’ (ICTJ 2010b).

Therefore, it is important to underline that this thesis considers that transitional justice comprises both ‘a sphere of practice or activity and a sphere of academic knowledge, with a praxis relationship between the two’ (Bell 2009: 7). It is understood as a set of ideas, a cognitive frame (knowledge), and as actions, an object of policy, control, intervention (power), oriented to ‘face the past’, ‘work through the past’, ‘confront the past’, ‘cope or deal with the past’, or ‘come to terms with it’. So, transitional justice is the field of enquiry that specifically addresses the general topic of study of thesis: Mexico’s process of dealing with past state crimes. But it is also a domain of knowledge that, as I will show later in this thesis, had material effects on Mexico’s transition.

*The first cluster of research on transitional justice: retributive and restorative approaches*

A first generation of studies on transitional justice classified moral and political dilemmas states faced at transitional moments, namely, from conflict to peace, or from authoritarian to more democratic regimes. This literature reflected, at least originally, the two legal narratives informing transitional justice debates and practices: the retributive and the restorative conceptions of justice (Moon 2008). These approaches – the retributive and the restorative – address the question of how to deal with past human rights violations in different ways. In a retributive approach to justice wrongdoers are punished according to the rule of law (Orentlicher 1991). In a reconciliatory or restorative approach to justice a victim’s dignity is restored when they are compensated

for the misdeeds they suffered without the need to identify or punish individual offenders. The restorative model of justice also aims to rehabilitate perpetrators, and to help victims and societies to heal their wounds via truth-telling strategies (Braithwaite 1989; Braithwaite and Mugford 1994; Johnstone 2002; Minow 2000). Both approaches – retributive and restorative – imply the establishment of specific mechanisms or institutional reforms. The former justified the implementation of *ad hoc* tribunals; the latter contributed to the proliferation of truth commissions.

Yet, these legal narratives were often deemed to be incompatible by those scholars and activists who advanced them (e.g. Méndez 1997a: 267; Minow 2000: 236). Framed by this typology, theorists with these views promoted the moral values or legal benefits of deploying one approach over the other in transitional situations.

#### *A. Retributive approaches*

The retributive type of justice in political transitions is rooted in the criminal law model (Aukerman 2002). Its goal is to make perpetrators of past abuses accountable for their deeds whether according to standard (domestic trials) or exceptional (*ad hoc* tribunals) legal procedures. The basic assumption framing this approach is that past atrocity, political crimes or crimes of the state constitute human rights violations and therefore crimes according to international law. Thus, as crimes are prohibited by domestic criminal systems and human rights are proscribed by international human rights laws, emerging democracies have the ‘obligation’ to punish those individuals responsible. In this sense, the retributive justice approach to transitional justice follows the same line of reasoning that frames the prosecution of ordinary crimes in domestic criminal justice systems: punishment is necessary when a person has broken the law. From this perspective the determination of culpability through prosecution is ‘necessary’ to redress criminal actions (Aukerman 2002: 43).

Scholars promoting the value of this vision of justice consider that the prosecution and punishment of perpetrators is the most appropriate method for dealing with past human rights abuses (e.g. Cassel 1996; Méndez 1997a; Orentlicher 1991; Roht-Arriaza 1990; Zalaquett 1989). They see alternative ideas and mechanisms such as truth commissions as an inferior way of doing this. Retribution is preferable to any other way of dealing with past crimes, they argue, because it allows the ‘identification, exposure, condemnation, and proportionate punishment of individuals who violated fundamental norms recognized internationally as crimes, and [...] reparations to their victims, by means of fair investigations and fair trials by an authorized judicial body’ (Aukerman 2002: 41). So, unlike other alternatives to address past atrocity, trials in political transitions are advisable because they serve a dual purpose: by bringing human rights violators to justice, they restore the rule of law and they restore victims’ dignity (Orentlicher 1991: 2543; Zalaquett 1989: 29).

A second justification for retribution in transitional moments is related to the allocation of responsibility for past abuses. Retributivists claim that since human rights violations are perpetrated by identifiable persons, responsibility and culpability must be allocated to those particular individuals found guilty of committing such violations. For José Zalaquett (1989: 35), ‘criminal responsibility is individual and it does not derive solely from the fact of being a member of an institution or group’. In this regard, Juan E. Méndez (1997a: 277) claims that ‘prosecutions are the most effective means of separating collective guilt from individual guilt’. Thus, trials and prosecutions are preferable to other alternatives of facing the past (e.g. truth commissions) because they allow individual wrongdoers to be identified and make them accountable for their actions. This is significant during transitions to democracy, according to these authors, because the identification of individual offenders ‘remove[s] the stigma of historic

misdeeds from the innocent members of communities that are collectively blamed for the atrocities committed on other communities' (Méndez 1997a: 277).

Of course, retribution requires the use of coercive measures because punishment is not voluntary (Cohen 1994: 67). Yet trials and prosecutions of past state crimes during transitions to democracy, retributivists argue, are undertaken according to accepted standards of due process. Thus, a third reason given for retributive mechanisms being preferable to alternative methods of bringing about transitional justice is that they follow internationally established procedural requisites according to the rule of law. Retributivists (e.g. Méndez 1997, Zalaquett 1989, Orentlicher 1991) argue that human rights abusers should appear before a public court, which follows established procedures, so they will have, for instance, the right to counsel and the right to appeal. The use of other ways of bringing about transitional justice – for example through a truth commission – is unlawful and would violate one of the basic principles of human rights: the right to due process (Méndez 1997a: 267-269; Zalaquett 1989: 35). It is worth noting that the application of the rule of law (and human rights principles) is independent of its results. As Méndez (1997a: 264) put it: 'a state fully complies with its duty to punish even if the trial results in acquittal, as long as the prosecution has been conducted in good faith'.

Another reason invoked to justify a retributive style of transitional justice is that it is based on human rights principles. For instance, the International Tribunals for Yugoslavia in 1993 and for Rwanda in 1994 were informed by international human rights laws (see Akhavan 1996 and 2001; Cassel 1996; Meron 1995; Rodley 1999; Wilson 1999). Two particular rights have served to justify transitional justice practices: the 'right of the victim to see justice done' and the 'right to know the truth' (Méndez

1997a: 261).<sup>25</sup> Yet these are not ‘rights’ that pre-exist transitional justice, but have been the offshoot of it.<sup>26</sup>

The origin of these rights aside, the ‘right to justice’ has implied the state’s ‘duty to prosecute and punish’ past grave violations of human rights during transitional moments – genocide, torture, extra-legal executions, disappearances – as they are codified in international law, human rights law, criminal law treaties, human rights treaties, UN resolutions, UN covenants, and so on (Mallinder 2007: 212; Méndez 1997a: 261; Orentlicher 1991: 2562; Roht-Arriaza 1990: 462).

A final justification is that retributive justice mechanisms are a superior solution to past injustice because of their, arguably, non-political nature. Promoters of this approach recognise that emerging democracies may not be able to endure the ‘destabilizing effects’ of ‘politically charged trials’ or any other transitional justice device that can be seen as a strategy for political revanchism (Orentlicher 1991: 2544). In contrast, by being legitimised by human rights norms, trials and prosecutions are less likely to be mistaken with acts of political vengeance – human rights, retributivists claim, help to depoliticise trials of human rights violators (Orentlicher 1991: 2549). Moreover, international law is ‘commonly thought to incorporate the impartiality associated with the rule of law’ (Teitel 2003: 73). Thus, echoing the enthusiasm of human rights activists, retributivists such as Orentlicher (1991) or Roht-Arriaza (1990) assume that their strategies are likely to prosper because they take place in the name of

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<sup>25</sup> In some cases, a third principle has been invoked by participants in this debate: ‘the right to compensations’. The underlying idea of this principle is that states have the duty to ‘redress the damage’ suffered by victims of abuses. Compensations can be monetary or non-monetary (See Moon 2012).

<sup>26</sup> According to retributivists, the most explicit obligations to punish past human rights crimes were established in the Velásquez Rodríguez Case brought by the Inter-American Commission on Human Rights against the government of Honduras for the unresolved disappearance of Manfredo Velásquez in September 1981. The Court established that ‘the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation’. Moreover, and crucially, the Court found that Honduras’ duties under the Convention persisted even though the government in power at the time of its decision was not the same one that had presided over the practice of disappearances whose victims included Manfredo Velásquez.



universal principles accepted by the ‘international community’ – far away from material or political interests. Therefore, this literature suggests, retributive mechanisms’ ‘depoliticised’ nature allows them to transcend normal political divisions in transitional moments, and overcome opponents of strategies requiring prosecutions.

But the list of accounts offered by this literature to justify retributive justice does not end here. Beyond retribution *per se*, advocates of this type of justice have presented other moral arguments favouring prosecutions. This set of justifications follows a purely utilitarian way of thinking that sees retribution in terms of its moral ‘benefits’ or ‘functions’ in transitional moments.

A first justification of retributive justice is that trials have a deterrent effect because they prevent the recurrence of those abuses exposed and punished. Prosecutions and trials serve an educative purpose on perpetrators and society. They ensure that crimes are not forgotten. Prosecutions preserve, Zalaquett (1992: 1428) claims, ‘the collective memory and build up an effective deterrent’. Moreover, by stigmatising ‘criminal conduct’, trials deter potential wrongdoers of committing future abuses (Akhavan 2001: 7). In contrast, a policy of impunity (e.g. amnesty laws) results in more human rights violations in the future (Méndez 1997b: 3).

Second, these authors claim that prosecutions can strengthen a new democratic regime (Borneman 1997). Retributive justice mechanisms undermine the influence of ‘delinquent leaders’ from the previous system who still retain some power, allowing the consolidation of the new democratic elite (Akhavan 2001: 7). Moreover, trials have a symbolic effect over transitions because they serve to draw a ‘thick line’ between the current and the previous regime. As Malamud-Goti (1989: 81) suggests, the official condemnation and punishment of human rights violations committed in the past underlines the discontinuity between the previous system and the transitional

government. This is why, according to these authors, ‘retrospective justice is an urgent task of democratisation, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person’ (Méndez 1997b: 1).

A third assumption shared by these authors is that retributive justice mechanisms foster respect for democratic institutions and the rule of law in the new regime. For instance, in his study of accountability in the former East Germany, John Borneman argues that punishment strengthens legal institutions, faith in them, and is thus crucial to underscoring the authority and legitimacy of new democratic orders. Thus, Borneman concludes, settling accounts via retributive justice is absolutely necessary both to re-establish the dignity of victims and as a ‘key index’ of state legitimacy (Borneman 1997). In addition, by establishing trials and prosecutions of past state crimes, emerging democracies show that nobody is above the law. As prosecutions and trials follow standard – ‘depoliticised’ – legal procedures, they promote the idea that the rule of law is an integral part of the new democratic regime (Malamud-Goti 1989: 79).

A final claim invoked by this cluster of scholars is related to the search for knowledge about what exactly happened in the past. These authors consider that transitional justice mechanisms, beyond merely uncovering factual evidence, should serve to confront the knowledge of what took place in the past, to face the facts, to come to terms with them. And this happens when this knowledge, the truth of what happened, enters the public sphere and is officially acknowledged. In this sense, trials are indeed preferable to truth commissions in promoting the truth. Trials follow an ‘adversarial format, with the ability to compete with equal arms in the establishment of the truth and to confront and cross-examine the opponent’s evidence’, which ‘results in a verdict that is harder to contest’. (Méndez 1997a: 278). Unlike a truth commission, Méndez (1997a:

279) claims, a court ‘strictly observes due process guarantees and restrict[s] its analysis to the principles of criminal law’. Therefore, what retributive mechanisms do – ‘the most to which the human rights movement can aspire’ – ‘is to get the facts right, so that arguments can go on about their meaning for as long as necessary’ (Méndez 1997a: 279).

### *B. Restorative approaches*

Restorative justice emerged in domestic criminal contexts in Australia, Canada, the United States, and the United Kingdom during the 1970s as an alternative, or at least supplementary to, the criminal justice system – as the ‘spectre of failure haunts modern criminology and penology’ (Braithwaite and Mugford 1994: 139; Dignan 1999; Marshall 1996). To rectify the ‘shortcomings’ of the penal model, which does ‘not always work’, restorative justice has advanced two radical changes. The first is related to the way societies deal with offenders: a change from retribution – often seen as ‘revenge’ – to reintegration. The second is a shift of focus: from perpetrators to victims of abuses (Cohen 1985: 77).

From this perspective, restorative justice ‘is about healing (restoration) rather than hurting. Responding to the hurt of crime with the hurt of punishment is rejected, along with its corresponding value of proportionality – punishment that is proportionate to the wrong that has been done’ (Strang and Braithwaite 2001: 1). Moreover, rather than seeing crime simply as the violation of legal rules, it is considered a harm produced over individuals by another person or group. Thus the damage caused to victims is not only about ‘abstract rights’ that victims possess, but about their suffering. Advocates of restorative justice claim that victims experience emotional damages (traumas) that need to be restored (Johnstone 2002: 65).

In the context of political transitions, to address present suffering that follows past human rights abuses, restorative justice has emerged as an alternative way of rectifying what trials and prosecutions have failed to achieve. As its retributive counterpart, restorative justice is a cognitive grid used to talk about, and to act upon, past atrocity in transitions. In various permutations, the model has entailed the implementation of truth-telling and truth-seeking strategies in which both victims and perpetrators can participate and narrate their experiences. Such efforts have found institutional expression in truth commissions, which are official bodies that investigate and report on past atrocity in a specific country over a delimited period of time (Hayner 2002: 14; Teitel 2003: 78). These institutions' main objective has been to reveal 'the truth' about what happened in the past.

Scholars exploring the restorative dimensions of transitional justice have suggested that the implementation of a truth commission is in the hands of the state. Some truth commissions have been instituted by non-state actors such as in Brazil or Uruguay (Weschler 1998). However, according to Minow (2008: 50), these investigatory bodies cannot be considered truth commissions. She argues that the institution of a truth commission is an indication that the new democratic state is committed to human rights, and able to overcome the difficulties of transitional moments (e.g. people in power opposing transitional justice mechanisms). Therefore investigatory bodies created by non-state actors demonstrate that the new regime has not met the challenges of transition.

Promoters of restorative justice claim that it is 'clear that there are a whole range of needs' arising out of transitional moments that 'cannot be satisfied by action in the courts' (Hayner 2002: 11). For Minow (2000: 236), for instance, trials and prosecutions 'miss another collection of purposes that are at least of equal importance for individuals

and societies emerging after large-scale violence and brutality. These purposes', she claims, 'center on rectifying the damage of human dignity that so often endures even for those who survive violence and on healing societies torn by hatred and brutality.' As a result, restorativists have offered various reasons to justify why restorative justice is preferable to retribution.

The first argument invoked is that the harm suffered by victims is not always redressed by the penal system, which focuses on the punishment of perpetrators. For restorativists, 'the need for restitution or reparation of harm to victims' should prevail 'over demand for the punishment (or treatment) of offenders' (Johnstone 2002: 13). They argue that restorative justice is a better way to heal the wounds of crime, as it is 'successful' in satisfying victims who really feel that justice has been done.

A second claim made by those who advocate restorative justice is that it shifts the way in which society deals with offenders. Restorative justice is an inclusionary rather than an exclusionary way of dealing with offenders, and this model allows perpetrators to be somehow reintegrated into society. Certainly, this entails a profound change in the presumption in retributive justice that the perpetrator is basically different from us, a deviant; those who believe in restorative justice think that perpetrators are, like us, members of our society. Deviants are with us: they also weave the community's social fabric. To exclude them could render them more threatening as they become more alien to their communities (Braithwaite 1989: 18).

A third justification of restorative justice is that, unlike retribution, it 'helps' to change perpetrators. For restorativists, offenders should be confronted with their victims in order to understand the actual harm they caused; perpetrators should know about the suffering of victims in order to grasp the effect and extent of their acts. Thus, restorativists claim, by working together with their victims and communities, offenders

will become aware of the consequences of their misdeeds and be ashamed of what they did (See Braithwaite and Mugford 1994). Perpetrators will express remorse and, by doing so, show that they remain part of the law-abiding community. Moreover, offenders will understand that they should repair the damage and, therefore, will contribute to appeasing the indignation of victims and communities. So once this somewhat causal process comes to an end, offenders are likely to be reintegrated within society.

Another argument is related to the allocation of responsibility. As we have seen, retribution focuses on abuses committed by individual perpetrators. The problem with this approach, according to restorativists, is that the structural conditions that allowed the occurrence of abuses remain intact. For restorative justice, in contrast, there is no need to produce an identified offender. Blame is somehow shared or not even allocated. Reconciliatory justice is rather concerned with disclosing a pattern of events that made abuses possible. As Teitel (2003: 79) puts it, ‘the appeal of the model is its ability to offer a broader historical perspective, rather than mere judgements in isolated cases’. For example, this is what the Truth and Reconciliation Commission in South Africa sought to achieve: to establish ‘as complete a picture as possible of the causes, nature and extent of the gross violations of human rights’ (TRC 1998: 60). In a similar way, the Chilean Commission on Truth and Reconciliation considered that ‘the judgement of individual cases to establish criminal responsibility, to individualise guilt, is the exclusive attribution of the tribunals’. Therefore, it sought ‘to establish as complete a picture as possible of the most serious human rights violations’ (Comisión Nacional de Verdad y Reconciliación 1990).

An additional, and crucial, justification for preferring restorative to retributive justice is related to the way this model seeks to establish the truth about past violence.

Restorative justice theorists and practitioners question whether trials and prosecutions are at all helpful in uncovering these truths. They doubt whether the retributive model really translates private knowledge into public acknowledgment. For restorativists, legal truths cannot generate a 'shared' or 'full' knowledge of 'what really happened'. And this is more evident when political rather than individual issues are addressed in legal events, and when such issues happened in the past, rather than the present. In contrast, restorativists suggest, truth commissions can actually offer the 'full truth', 'the whole picture'. This certainly entails the recovering of past records, the uncovering of factual evidence about violations, and listening to victims' testimonies of suffering. But beyond merely gathering data and declarations, truth commissions also seek to come to terms with past abuses by officially recognising what was officially denied.

Hence, it is argued that truth commissions are crucial in transitions not only because they produce knowledge about relevant facts on past crimes, but because they 'lift the lid of silence and denial from a contentious and painful period of history' (Hayner 2002: 25). By formally acknowledging past atrocity, truth commissions restore victims' dignity as they bring into the public domain private, denied or repressed stories of suffering (Du Toit 2000: 132-39). The term 'acknowledgement' here implies that the state has admitted its misdeeds and recognises that it was wrong. Weschler's work on past state crimes in Brazil and Uruguay captures the importance that knowing and officially recognising the truth has for restorative justice studies:

Fragile, tentative democracies time and again hurl themselves towards an abyss, struggling over this issue of truth. It's a mysteriously powerful, almost magical notion, because often everyone already knows the truth – everyone knows who the torturers were and what they did, the torturers know that everyone knows, and everyone knows that they know. Why, then, this need to risk everything to render that knowledge explicit? The participants at the Aspen Institute conference worried this question around the table several times – the distinctions here seemed particularly slippery and elusive – until Thomas Nagel, a professor of philosophy and law at New York University, almost stumbled upon an answer. "It's the difference", Nagel said haltingly, "between knowledge and acknowledgment. It's what happens and can only happen to knowledge

when it becomes officially sanctioned, when it is made part of the public cognitive scene.”(1998: 4).

Another argument shared by these scholars is that truth commissions help victims and societies to heal old wounds. Mimicking some assumptions from psychotherapy, these authors claim that victims need instances in which they can tell their stories of suffering and how crime has affected them. Restorativists believe that allowing victims and survivors (‘wounded souls’) to narrate what they suffered has cathartic effects. Moreover, these authors claim, this process gives victims a voice and thus makes them feel empowered. So once victims meet these needs, they can recover from trauma. For Minow (2000: 243) ‘the restorative power of truth telling, of being heard by sympathetic listeners and forging a relationship with them, and of establishing potentially affirmative roles for bystanders and perpetrators are key elements of the recovery for trauma survivors’ – ‘know the truth and it will set you free; expose the terrible secrets of a sick society and heal that society’.

Advocates of restorative justice claim that, by healing old wounds, truth commissions have a therapeutic effect on victims of past abuses. And once victims are healed, they are able to ‘resume normal relationships with others’ (Johnstone 2002: 66). Therefore, an additional justification evoked by restorativists is that as restorative justice heals, it leads to reconciliation. They claim that once truth-telling efforts come to an end, post-traumatic experiences belong to the past, victims can then reconcile, and survivors can then face the work of ‘building the future’ (Minow 2000: 244). This is what Hayner meant when she suggested that ‘societal healing’ might be called – ‘in short’ – ‘reconciliation’ (Hayner 2002: 133). She claimed that truth commissions are indeed essential during transitions because countries ‘need to repair torn relationships



between ethnic, religious, regional, or political groups, between neighbours, and between political parties’.

One more explanation favouring restorative justice is that, like retribution, it has a deterrent effect. Restorativists assert that by being reconciled with their communities, actual perpetrators and potential offenders will be less likely to commit abuses. That is why, they claim, ‘failure to address damage to individual dignity and to the very idea that members of targeted groups are personas with dignity’ is likely to ensure that ‘the consequences of mass violation will persist and may give rise to new rounds of revenge’ (Minow 2000: 236). Thus restorativists assume that exposing past human rights violations should be enough to prevent the conditions that made abuses possible. This moral objective has been captured by the phrase *Nunca Más* (Never again), which has served as title for the final reports of the Brazilian and Argentinean investigatory bodies.

Finally, restorative justice literature also invokes human rights principles to justify the implementation of restorative justice strategies.<sup>27</sup> Truth commissions, like trials and prosecutions, are framed by human rights norms. According to restorativists, there is a ‘right to the truth’ – an ‘inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes’ (Hayner 1996: 176). These scholars suggest that this is the ‘position taken by many international rights advocates’ who ‘prescribe truth-seeking unconditionally’.<sup>28</sup>

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<sup>27</sup> It is worth noting that the discourse of restorative justice has been shaped and manipulated by experts participating within the first and second clusters of literature on transitional justice ex post facto. That is to say, such discourse became commensurate with the institution of the truth commission, rather than truth commissions being developed as a consequence of the rise of restorative values.

<sup>28</sup> For restorativists, the right to truth has been explicitly established by the Inter-American Commission on Human Rights (IACHR): ‘every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future’ (Annual Report of the IACHR 1985-86, OEA/Ser. L/V./II.68, Doc. 8, rev. 1, September 26, 1986, ch. V, p. 205).

*The second cluster of research on transitional justice: broadening and rectifying transitional justice*

Over the last decade a second cluster of literature on transitional justice emerged. In part, its authors draw upon the existing body of work on retributive and restorative justice. And to some extent the first and the second cluster of literature share a common stock of facts and values. Scholars whose work spans both clusters frequently explore the same empirical cases (facts), and claim to be progressive and well meaning (values) – progressive in the sense that transitional justice can always be improved upon. However, this literature (the second cluster) differs from the earlier one described (the first cluster) in four important ways.

(a) Scholars in the second cluster challenge whether transitional justice *ideas* are practical, desirable, or appropriate. (b) They question whether transitional justice *practices* work and seek to explain why practices fall short of the ideal embodied in the literature. (c) They are inspired by a utilitarian vision that sees transitional justice practices in terms of measurable functions and outputs. Finally, (d) they have broadened the field of transitional justice from its original focus on human rights and political transitions to whatever they consider to be a case of present suffering produced by past abuses (e.g. the legacy of colonial rule). That is, scholars in the second cluster have expanded the optic of transitional justice from the first two sets of cases – transitions to democracy and post-conflict transitions – to cases of what Moon calls accounting for ‘historical injustice’ such as those in Australia, Canada and the United States where, often, it is the harm suffered by indigenous peoples or the history of slavery and its iniquitous and persistent consequences that have been under scrutiny (Moon 2008: 21).

*(a) More and better analysis*

Scholars whose work comprises the second cluster of literature have partially challenged the conceptual basis (ideas) upon which many transitional justice practices are based (e.g. ideas about truth, reconciliation, or retribution). Some authors criticise the fact that transitional justice literature (i.e. the first cluster) is ‘highly theorized’, that it is simply an ‘overblown version’ of ordinary legal problems. Transitional justice scholars are basically ‘reinventing the wheel’ (Posner and Vermeule 2004: 764). Others claim, on the contrary, that transitional issues have not been analysed in detail by the first cluster of literature. Transitional justice literature is indeed characterised by ‘knowledge deficits’. Scholars and practitioners within this field still lack a ‘comprehensive theory’; ‘there is still too little knowledge about it’ (Arenhovel 2008: 584) – what is needed is more and better analysis. So, whether transitional justice literature is under-theorized or hyper-theorized, it has to be broadened and improved according to scholars participating within the second cluster.

Unlike the first cluster of literature on transitional justice, which focused on trade-offs and tensions between the restorative and the retributive model, some scholars within the second cluster perceive the goals of these distinctive approaches as mutually reinforcing and complementary (Rotberg 2000). Other scholars, in contrast, propose to explore theoretically the unsolved tension between the restorative and the retributive types of justice. To analyse such ‘inherent’ tensions is useful, they argue, in designing further and superior transitional justice institutions (Leebaw 2008).

The second cluster of literature on transitional justice certainly replicates a number of assumptions fostered by the previous literature in the field. For instance, scholars in this area share the idea that some level of human rights accountability is always ‘necessary’ in transitions – ‘sooner or later the legacy of the former regime has to be addressed’ (Arenhovel 2008: 570; Roehring 2009: 722). They also share the idea

that transitional justice strategies are justified as they are ‘morally acceptable’, and because of their moral benefits in transitional societies (Du Toit 2000). However, the scholars whose work comprises the second cluster of transitional justice literature have been somewhat critical of the premises informing this field (amnesty, truth, justice, reconciliation, healing, deterrence). Points of disagreement remain about the implications of these concepts, and the contexts in which they are used are more complex. Scholars participating in this debate have reviewed these concepts or ideas in order to assess if they have been ‘appropriate’ in dealing with transitional problems, e.g. victims’ suffering, wounded souls, divided societies, post-traumatic stress disorders, historical injustice, impunity, and so on (Gutmann and Thompson 2000). Such assessment is often characterised by an inherent optimism that transitional justice concepts and praxis can always improve. For instance, Quinn (2009: 267) suggested that beyond the acknowledgment of previously denied events, facing the past can contribute to the ‘development of social trust’, ‘civic engagement’, ‘social capital’, and ‘social cohesion’. Similarly, Arenhovel (2008: 576) questions whether retributive justice serves for deterrence. However, he is certain that it may ‘awaken a dormant legal consciousness’, ‘having a perceptible impact on the minds of people’.

Some scholars within the second cluster consider that some ideas worked out and debated by restorativists and retributivists, who originally reflected the interests of practitioners, were untenable and naïve. For them, the evaluation of the whole package of transitional justice assumptions incorporated in the first cluster showed that such assumptions were far from correct, as they were unlikely to provide the alleged benefits predicted by theorists and practitioners. For example, Snyder and Vinjamuri (2003) consider that trials and prosecutions have a negative impact on transitional societies as they can actually increase the probability of future atrocities, exacerbate conflict, and

undermine efforts to build democracy. Accordingly, they praise the use of amnesties, which, they claim, have been highly effective in curbing abuses. There is another illustration of this in the work of Michael Ignatieff (1996: 117). First, Ignatieff confronts the notion of allocation of responsibility, which is invoked by retributivists as one of the most significant functions of trials and prosecutions in transitions. Despite what retributivists claim, Ignatieff considers that ‘trials inevitably fail to apportion all the guilt to all those responsible’. Second, he questions the very essence of restorative justice: the official acknowledgment of past atrocity (coming to terms with the past). Contrary to the belief of many restorativists, Ignatieff claims that it would be unrealistic to expect that ‘when truth is proclaimed by an official commission’ it would be accepted by ‘those against whom it is directed’ (Ignatieff 1996: 113).

Moreover, scholars within the second cluster have constantly sought to advance better definitions of concepts and practices, and to improve theoretical approaches to transitional problems (Borer 2003). For instance, they have attempted to clarify and classify the kind of efforts that ‘really’ qualify as transitional mechanisms, claiming that if we hope to move forward with empirical research, it is necessary first to determine the ‘appropriate’ catalogue of truth commissions and trials (Dancy, et al. 2010: 46; Sikkink and Booth Walling 2007). Posner and Vermeule (2004: 763) propose to redefine what we understand as transitional moments in which transitional justice mechanisms work. For them, transitions can be simply a ‘spate of constitutional amendments’, transitions from one government to another after contested elections, or even ‘quotidian changes in economic and social regulation and taxation’. Unlike the first cluster, which has been ‘dominated’ by legal scholarship, the second cluster has proposed new analytical devices beyond the discipline of law, e.g. a Kantian approach based on the idea of ‘perpetual peace’, the use of comparative analysis, international

relations literature, or a ‘sociological’ approach from ‘the perspective of cosmopolitanism’ (Arenhovel 2008; Nash 2007: 417; Sikkink and Booth Walling 2007; Turner 2008).

*(b) Improving practices and outcomes*

The second cluster of literature has sought to address the correspondence between transitional justice ideas and policies. The assessment of the relationship between theory and reality has allowed scholars to ‘improve’ the social impact of transitional justice mechanisms and overcome their shortcomings. Therefore, scholars writing in this cluster have sought to provide new ideas to address practitioners’ demands, and then elaborate stories and invoke moral justifications to rationalise what they are doing.

Scholars within this cluster have evaluated how trials or truth commissions work and function. Invariably, they have found gaps and deficiencies (Ensalco 1994). Their aim is to assess if transitional justice mechanisms have delivered the goals they claim to reach, to question whether transitional justice interventions were well executed and whether they made a difference in the lives of ‘ordinary people’ (Arriaza and Roht-Arriaza 2008). In doing so, they have found at least three reasons why transitional justice practices fail and, in turn, to advance further attempts to reform their work.

First, for this literature, the ‘success’ of trials and truth commissions is closely related to the moral authority and commitment of specific actors, which vary depending on the author. Some scholars claim that ‘to be successful and to produce legitimate outcomes’, transitional justice mechanisms ‘need a prominent spokesperson with moral authority’ (Arenhovel 2008: 577). Others suggest that ‘the human rights community’, NGOs, or ‘organised civil society’ are crucial to ‘successfully’ reform states practices by ‘convincing’ politicians to ‘adjust their behaviour’ in transitional societies. Thanks to their ‘expertise’, ‘legitimacy’ and ‘moral standing’, NGOs can force state actors to

implement and enforce transitional justice policies based on international treaties that can guarantee domestic stability and therefore international security (Crenzel 2008; Root 2009; Sikkink 1993; Turner 2008). Others suggest that more transnational actors – ‘the international community’ – should be included in the process as they may play the role of ‘facilitators’ (Turner 2008: 149). Some others argue that only the president (the executive power) is the crucial element in efforts to hold the Military accountable (Roehring 2009).

Second, to improve transitional justice efforts, scholars have suggested that transitional societies should take into account local initiatives; and to mix retributive and restorative agendas. Some scholars claim that national-level mechanisms are insufficient to come to terms with past atrocities suffered by victims living in ‘villages, towns and hills’, where experience of suffering may vary from that of people living elsewhere in the country (Arriaza and Roht-Arriaza 2008). Therefore, they have suggested the use of ‘independent initiatives arising from the local level’ – ‘bottom-up local’ mechanisms of transitional justice, such as ‘Mayan methods’ – to address conflict resolution in transitional societies. Other scholars have proposed abandoning behind restorative and retributive trade-offs. They suggest that truth commissions and trials, once considered as advancing conflicting agendas, should be seen as promoting reinforcing goals (Leebaw 2008). Therefore, they have advanced ‘a whole array of methods combining truth-seeking and prosecutorial functions’ (Roht-Arriaza and Mariezcurrena 2006).

Finally, scholars have sought to improve the timing to implement transitional justice policies. Scholars of the first cluster of literature considered that truth bodies and trials had to be created by the state to look into ‘recent events’, ‘usually at the point of a political transition’. So transitional justice policies were in fact viewed as a central

component of a transition from one government to another (Hayner 2002: 17). Certainly, some scholars participating within the second cluster follow the same approach: it is crucial to construct a public truth about the crimes ‘as soon as possible, immediately after the fall of state terrorism regimes’ (Crenzel 2008). But others, in contrast, suggest that trials and truth commissions are more likely to exist later, over time, as the influence of once powerful actors diminishes (Sikkink and Booth Walling 2007: 434).

*(c) Measuring the efficiency of ideas and practices*

Scholars within the second cluster of literature have sought to come up with criteria, indicators, predictors, models, or whatever to measure the achievements or malfunction of transitional justice programmes. Scholars within this field have recently developed a fervent desire to calculate what constitutes success or failure. Certainly, by presenting these methods to quantify the efficiency of transitional justice, scholars have sought to justify what they think is desirable and possible, to legitimate or improve the existing practices, or to propose alternative mechanisms to come to terms with the past.

These scholars have advanced the use of indicators and quantitative measures to examine how good transitional justice intentions went wrong. Wrong in the sense that some transitional justice ideas resulted in projects that failed or could not be implemented during transitional moments (Mallinder 2007; Stahn 2005). By using indicators for success, some scholars have attempted to justify or to amend the existing mechanisms of transitional justice. To do so, the first step has consisted of producing a set of classifications to establish whether an institution created during transitional moments to deal with the past actually qualifies as a transitional justice mechanism. Dancy et al. (2010), for instance, have recently offered the ‘most comprehensive truth



commission database we know to be in existence'. Then, scholars use the data to assess the impact of truth bodies and trials. For instance, Kathryn Sikkink and Carrie Booth Walling (2007) manufactured a 'new dataset' in order to demonstrate that transitional justice mechanisms have a 'favourable impact' over transitional societies. Using 'averages of the Political Terror Scale (PTS) as a measure', Sikkink and Booth Wallis compare the human rights conditions before and after trials in Latin America. Whatever these byzantine scales might mean, these scholars 'discovered' that Mexico had a pre-trial PTS of 3.2 and a post-trial PTS of 3.4, which allowed them to conclude that human rights trials had a negative impact in the country as the change in PTS average was -2. Whatever we might think of the results, we do not really get much sense of what happened in Mexico. And certainly we do not need this baroque method to understand how transitional justice had a negative impact in Mexico's transition to democracy. I will return to this point in the following section.

*(d) Broadening the field*

Finally, studies within this strand have linked transitional justice ideas and practices to other goals beyond transitions and beyond human rights. They have made transitional justice coterminous with a host of social and political developments: from gender rights to poverty and development. As a result, more areas of social and political life are becoming colonised by transitional justice expertise and practice. Thus, transitional justice comes to be about not only human rights accountability, but also 'collective identities', 'cosmopolitanism', 'NGO networks', 'domestic governance', 'social capital', 'international security', 'global citizenship', 'civic virtues', or whatever (Arenhovel 2008; Nash 2007; Quinn 2009; Roniger and Sznajder 1997; Root 2009; Turner 2008).

The second cluster of literature has paid particular attention to gender issues. Ashnie Padarath (1998: 65), for instance, has emphasised that women during the TRC hearings spoke mainly about men's experiences of violence rather than their own. In doing so, she claims, the hearings distorted the reality, which was that women too were (direct and indirect) victims of extended abuses. Therefore, some scholars suggest there should be a gender-based approach to transitional justice processes (Meintjes, et al. 2001; Pillay 2001).

An increasing number of transitional justice studies have also paid attention to the link between economic growth and transitional justice. Authors such as Goldblatt (1998), Meintjes (2001), and Sideris (2001) have claimed, for instance, that the TRC ignored that for decades whole communities were uprooted from their land and were 'dumped in inhospitable environments [...] without adequate infrastructure' where individuals – women in particular – 'found themselves in a less secure position than men in relation to opportunities for employment, security of land or farm tenure, and access to housing' (Goldblatt and Meintjes 1998: 30). These scholars claim that transitional justice has failed to make a difference in the lives of ordinary people because of the lack of economic and social justice (Arriaza and Roht-Arriaza 2008: 153). From this perspective, 'the more well to do a nation is, the greater the chances it will be equipped for transitional justice measures' (Arenhovel 2008: 584). Therefore, they claim, transitional justice might include issues related to poverty alleviation, economic and social development, social justice, and sustainability.

Moreover, transitional justice is no longer confined to transitions to democracy. As Moon suggests, scholars within the second cluster of literature broadened the scope of transitional justice by analysing a 'broad range of reflective junctures and reparatory gestures in the life of the nation that have been designated to deal with "historical

injustice”, frequently towards indigenous populations such as in the U.S., Canada and Australia’ (Moon 2008: 21). The second cluster of literature reflects what Stan Cohen terms ‘political times for instant virtual apology’ in which countries are busy apologising for everything – ‘countries which did not even pay lip-service to democracy a decade ago are [...] adopting the rhetoric of accountability for past abuses. And more stable democracies are being pushed to acknowledge their own historical victims’ (Cohen 2005: 246). While Tony Blair apologised for the Irish potato famine, Jacques Chirac apologised for the role played by France in the persecution of Jews under German occupation; and the U.S. for the eradication of Native Americans, slavery, and medical experiments on black, male, syphilis sufferers.

In fact, some scholars suggest that transitional justice mechanisms should exist also within ‘conflicted democracies’ or even in ‘consolidated democracies’ (Ni Aolain and Campbell 2005; Posner and Vermeule 2004). For example, in democratic regimes every election creates transitional justice problems as new presidents want to reward supporters with official posts and punish enemies with the loss of office. In consequence, the optimal transitional justice policy in such cases would be a ‘targeted lustration scheme’, which can serve to eliminate an important layer of the old regime’s officials. From this perspective, transitional justice mechanisms should be understood as just another regulatory scheme in any given country at any time – past state crimes are like ‘ordinary’ crimes, therefore transitional justice efforts should be like any other ordinary governmental policies, so reparations programmes for victims of past abuses should be ‘like the Endangered Species Act’ (Posner and Vermeule 2004: 786).

**The limits of the arguments made in the first and second clusters of literature on transitional justice**

The varied rationales worked out by transitional justice scholars, even if they sometimes conflict with each other, seek to advance particular ways of thinking about, and acting upon, transitional societies. They have created a specific language to represent transitional problems, and to justify the kind of strategies through which certain authorities might rule transitional justice processes. Despite their differences, theorists writing in the two clusters share similar values, the underlying principle being that transitional justice is ‘good’ insofar as it works to achieve the following benefits: reconciliation, peace, democracy, forgiveness, and societal healing. These scholars are clearly progressive and optimistic. So, even if ideas and practices go wrong, they offer as a solution to ‘do more of the same’ under the guise of novelty, or to accomplish the same end by better means, e.g. interdisciplinary approaches, mixed models, ‘bottom-up local’ strategies, or Kantian variants of transitional justice.

Whether or not we agree with these visions of transitional justice, I think these views present three shortcomings. First, most academics proposing these sophisticated theories often provide little evidence to support their claims. Second, these studies often lack a historical perspective sensitive to contingent historical determinants of transitional justice processes. Centred on the evaluation of predetermined normative frameworks, both clusters tend to ignore the way in which ideas and practices of transitional justice were brought into existence; and how they were shaped by social events, political forces, and structures of power. They frequently bypass the fact that transitional justice outcomes are the result of negotiations and political deliberations in which multiple actors intervene. Third, focused on the important role played by state actors, these theorists have paid less attention to the way in which non-state actors –

including transitional justice scholars – intervene, exercise power, and affect transitional justice processes.

*Lack of empirical evidence*

Proponents of the first and second clusters of literature on transitional justice have mainly focused on making up its normative positions, theoretical claims, moral foundations, and supposed benefits. They have produced the organising concepts – truths – that allow us to talk about transitional justice. They claim, for instance, that prosecutions and trials strengthen the judiciary, and ensure that crimes are not forgotten; that retribution undermines the power of former delinquents; and that trials produce a shared memory, which in turn leads to a shared identity, which in turn leads to reconciliation. They also claim that the process of collecting and exposing publicly factual evidence about past atrocity via a truth commission leads to its official and public recognition; that establishing the truth promotes healing; that healing leads to reconciliation because once truth-telling practices end, traumatic experiences belong to the past, and victims can then be reconciled.

But how did these claims achieve a self-evident status? These claims are always invoked, but evidence of them is hardly ever given. David Mendeloff (2004), for instance, has demonstrated that popular and scholarly claims about peace-promoting benefits of formal truth-seeking mechanisms have not been established empirically. For Mendeloff, ‘despite claims of truth-telling advocates, we actually know very little about the impact of truth-telling [...] on peace’. Transitional justice assumptions ‘rest far more on faith than on sound logic or empirical evidence’ (Mendeloff 2004: 354).

Thus, transitional justice scholars have produced truth claims that are bolstered by theoretical formulations, but rarely empirically addressed. Theorists of the first and second clusters of literature offer diverse rationales to welcome transitional justice, but

provide little evidence to support their arguments. These claims are, in Ignatieff's (1996) words, 'articles of faith'.

*Lack of an historical approach*

Scholarship in this field lacks an historical perspective: it pays little attention to the contingent historical factors that allow the emergence of transitional justice; and it does not take into account the fact that transitional justice is shaped by political interests and alters the balance of power in political relations. This shortcoming is reflected in three ways by the literature.

First, theorists writing in both clusters of literature produce a sense of inevitability; they have a tendency to represent transitional justice as an unavoidable, 'intrinsic' condition in transitional societies. They often claim that trials, truth commissions, reconciliation, reparations, and so on are 'expected responses' in transitions, which lead to the transformation of institutions, the consolidation national unity, and the establishment of a 'true democracy' (Du Toit 2000: 125; Zalaquett 1989: 30). These mechanisms are portrayed as a 'necessary' effort that 'can make the difference between success and failure' (Garton Ash 2002: xii). In particular, as Hirsch (2007) has demonstrated, members of the transitional justice 'epistemic community' are currently propagating the notion that reconciliation via the public procedure of truth commissions is 'an indispensable' stage in states' transition to democracy.

However, I argue, transitional justice is anything but indispensable. Transitional justice is the outcome of political bargains. Since there are no historical cases of total regime change, as Cohen (1995: 15) argues, trials and truth commissions engage with former structures of power in order to preserve a certain degree of stability and legitimacy; and their achievements are often compromised by the fact that many people in power in the democratic regime 'were involved in crimes of the past or (more

commonly) colluded in them by their silence'. For instance, in South Africa, political amnesty was the foundational agreement upon which transitional justice was built. The use of political amnesties – which granted impunity to perpetrators – served the purpose of maintaining the political stability of the post-apartheid regime. In Mexico transitional justice was understood – and materialised – in a different way as it served other political purposes: it sought to legitimate Vicente Fox's democratic credentials. So it led to the creation of the SPO – a retributive mechanism – as the 'fight against impunity' was one of the most widespread demands for the consolidation of democracy (I will return to this point in Chapter Three). Hence transitional justice is made to seem as natural and inevitable, as an effort that is not an effect of power. But it is in fact the outcome of a constellation of elite forces that produce the political compromises that are, intrinsically, conditional of transitional justice.

Second, the lack of a more historical perspective leads to an incomplete understanding of human rights as a means through which power is exercised. Scholars from both clusters consider that the 'right to see justice done' and the 'right to know the truth' are moral, legal, universal, neutral, and depoliticised imperatives, which states are 'obliged' to observe (Cassel 1996: 207; Hayner 2002: 31; Méndez 1997a: 255). But human rights are not free-standing norms. They are discussed, adapted, contested, and changed by different authorities. Although these set of 'duties' or 'obligations' to face past atrocity are established by international laws, their use during transitional moments has not always been 'immediately obvious' or self-evident (Orentlicher 1991: 2551). Diana Orentlicher, who participated in the Aspen Institute Conference, which led to the emergence of transitional justice as we know it, recognised that during that meeting her colleagues were not so clear about what kind of international human rights principles were indeed required to justify their claims (Orentlicher 2007: 12). So they just made

them up: they arbitrarily selected and adapted the kind of principles and international laws that, according to them, could serve to justify and legitimise the existence of mechanisms to deal with past abuses. In so doing, they connected transitional justice policies to a particular kind of new regime – that of western liberal democracy – and they linked it exclusively to civil and political rights. Thus, instead of coming to terms with historical problems, as one might expect in an effort to ‘face the past’, transitional justice was simply presented as related only to the violation of civil rights, which can be addressed only by legal institutions operated by the state.

Moreover, these scholars treat these particular human rights principles as the direct cause of transitional justice practices – they see an unequivocal causal relationship between these principles and the implementation of truth commissions and trials. However, I argue (alongside other scholars in the field – the third cluster), the adoption of human rights norms is conditioned by political determinants (McEvoy 2007; Moon 2008; Short 2007). Only certain rights are invoked, they are only applied to specific people or situations, and their enforcement is discretionary. As Ainley (2008: 29) notes, ‘all acts of atrocity are not prosecuted: the decision over whether to hold a trial in any given situation is highly politically loaded’. In Argentina, Uruguay, South Africa, and Mexico, the materialisation of these extra-political legal rules was possible only when such rights were adapted to the local context, when they did not interfere directly with other political interests, and when they did not put at risk those in power. In Mexico, for instance, the universally recognised concept of genocide was tailored by the SPO to describe the alleged killing of twenty five students in 1971. The strategy led to impunity, granting a *de facto* amnesty to perpetrators – of course, in the name of human rights. (I will return to the ‘genocide case’ in Chapter Five.) Thus, here, these human rights norms are understood as a site of political negotiations.



The third way in which the theorists of the first and second clusters of literature demonstrate a lack of historical approach is the way in which they analyse transitional justice strategies as if they were frozen in time, isolated from their institutional and social milieus. Scholars in this field tend to focus in just one point in time, and see trials and truth commissions as immutable entities. Therefore, their explanations are normally incomplete. Transitional justice processes, like any other political process, are far more complex and evolve through time, often unpredictably. Transitional justice institutions change during their operation and their performance is shaped by institutional crises or extra-legal political interventions. Sometimes, for instance, transitional justice mechanisms are affected by the implementation of conflicting human rights (McEvoy 2011: 377).

#### *The problem of agency*

An additional problem with the literature on transitional justice is the way it addresses the intervention of different actors in transitional justice processes. These studies claim that transitional justice derives its legitimacy from universal, neutral, depoliticised, human rights principles (the ‘right to see justice done’ and the ‘right to know the truth’). These moral imperatives are normally worked out, debated, fostered, and monitored by scholars, human rights activists, experts, civil society, transnational organisations, and so on. Yet transitional justice efforts are (or should be) put into practice by the state and its agents.

Therefore, when reading this literature, one gets the feeling that the actors intervening in transitional justice processes are acting in different spheres. Human rights activists, scholars, and experts are acting in the field of principles and values, away from the sphere of state politics and political interests. They offer a set of extra-political legal rules and institutions to deal with past atrocity. By doing so, they are supposed to

play a counter-hegemonic role against the state over which they ‘impose’ their principles and ideals. But it is the state and its agents, acting in the field of politics, which have the power to materialise and conduct such transitional justice practices (Méndez 1997a: 255; Méndez 1997b: 1; Zalaquett 1989: 27). Thus, the materialisation of transitional justice mechanisms is restricted only to the state, which these same scholars and activists restlessly criticise.

However, this thesis suggests, these divisions between state and non-state actors, between morals and politics, do not seem to be clear. In fact, the problem of agency becomes even more complex if we consider that some human rights activists participating in this field are also scholars, some of whom even work in governmental agencies. Hirsch (2007) and Arthur (2009), for instance, have demonstrated that transitional justice is formed by a specific network of academic scholars and legal experts that advances and instigates the international spread of particular transitional justice mechanisms. But these scholars and experts tend to be practitioners as they have ‘first-hand learning experience of participating in and learning the lessons’ of truth-seeking processes and trials (Hirsch 2007: 190). What happened is that these practitioners gradually became recognised experts and authorities in the ‘newfangled’ domain of transitional justice (Hirsch 2007).

Nicolas Guilhot (2005: 11) has also demonstrated that the actors who contributed the most to constructing and expanding the field of promoting democracy are those who were able ‘to play on different levels, to occupy pivotal positions at the junction of academe, national and international institutions, activists movements, and to mobilize the diversified resources of all these fields’. Hence the distinction between state and non-state actors acting in different fields inspired by different goals is no longer operational.

To illustrate this point, I now consider some of the authors cited above in order to show the way they have multiple affiliations. They have simultaneous allegiances to different state and non-state institutions – they are, at the same time, university professors, consultants for transnational organisations, activists in well-known NGOs, and state agents. At the time of writing this chapter (autumn 2011), Méndez is the ‘past president’ of the ICTJ. Zalaquett, who participated in Chile’s National Commission on Truth and Reconciliation, is currently a member of the ICTJ’s Board of Directors (ICTJ 2010a). Both are in charge of the Latin American Transitional Justice Fellowship Programme in Chile. Hayner is a cofounder of the ICTJ, and is currently the Director of the ICTJ Geneva Office and Peace and Justice Programme (ICTJ 2010a). In March 2008, Hayner served as human rights adviser for the Kenyan National Dialogue and Reconciliation. Akhavan is associate professor of the Faculty of Law at McGill University, but he was the first legal adviser to the Prosecutor’s Office of the International Criminal Tribunals for Former Yugoslavia and Rwanda and is a UN adviser on transitional justice issues (McGill 2010). Cassel, currently director of the Centre for Civil and Human Rights at Notre Dame Law School, was the legal adviser of the UN Commission on the Truth for El Salvador (KI 2010). Minow is a professor of law at Harvard Law School, but she also serves on committees of the Project Justice in Time of Transitions, which ‘assists leader in divided societies struggling with conflict’, from which Zalaquett is part of the advisory board (PJTT 2010). Even Arthur – whose genealogical study on transitional justice is quoted in this chapter – is currently Deputy Director of Institutional Development at the ICTJ, leading ‘ICTJ’s initiatives in evaluating its impact, improving the effectiveness of its work, and knowledge management’ (ICTJ 2010a).

Transitional justice scholars who take for granted the clear-cut division between state and non-state fields offer incomplete explanations about the role played by transitional justice in political transitions. Moreover, they bypass the role that they themselves play within a constellation of power relations – by constituting objects of inquiry; by the way they endow themselves with the authority to speak about the past (or by the way their authority is endowed by association with powerful institutions and organisations); and by producing the concepts that rule transitional justice mechanisms. This is relevant because transitional justice ideas debated and fostered by these scholars have material effects and so affect people in transitional moments.

**The third cluster of research on transitional justice: a social constructivist approach**

More recently, a third cluster of literature emerged as a critique of transitional justice ideas and practices: critique in the sense that it breaches self-evidence (Owen 1995). This third approach might be called ‘social constructivist’ because it seeks to ‘raise consciousness’ about transitional justice (ideas and practices) (Bourdieu 1986 and 2004; Hacking 2000). That is, scholars participating within this cluster – e.g. Claire Moon (2008), Kieran McEvoy (2007), Kirsten Ainley (2011), Damien Short (2007) or Richard Wilson (2001) – are critical to the status quo enjoyed by transitional justice. They seek to strip transitional justice of its false authority. And they do so in three ways.

First, they hold that transitional justice ideas and practices are not inevitable. This approach seeks ‘to show that things “weren’t” as necessary as all that’ (Foucault 1991c: 76). For them transitional justice ideas and practices were brought into existence by social events (Bourdieu 1986; Hacking 2002c). Second, scholars of the third cluster of literature have demonstrated that transitional justice is shaped by social factors, and

institutional contexts (McEvoy 2007; Moon 2008 and 2009; Wilson 2001). It is an historically informed approach.

In this sense, proponents of the third cluster of literature assume that important areas of transitional justice – e.g. ‘truth’, ‘reconciliation’, ‘healing’, ‘individual agency’ or ‘responsibility’ – are not self-evident or pre-given (e.g. Ainley 2011; Short 2007). Indeed they consider that such issues are constituted, debated, and replaced by different actors, within or beyond the state, in specific historical moments. These scholars show how ‘experts’ became so essential to transitional justice, as they claim to know what the problems in transitional situations are and what to do with them (Arthur 2009; Guilhot 2005; Hirsch 2007; Moon 2008 and 2009). Therefore, unlike scholars of the first and second clusters, these theorists take into account the problem of agency, and the relationship between experts (knowledge) and practices (power).

Third, these authors hold that transitional justice is not apolitical. Sceptical of the ‘articles of faith’ of transitional justice, these theorists have exposed their contingent character and have examined how instead of seeking ‘moral’ benefits, transitional justice practices have served to reconcile political interests in conflict (Ainley 2008; Moon 2008).

This thesis follows the social-constructivist research agendas of this cluster of writers (Ainley 2008; McEvoy 2007; Moon 2009; Short 2007; Wilson 2001). From a theoretical perspective, these theorists appear to confront the feeling of inevitability that encompasses transitional justice ideas. By doing so, they challenge the ‘articles of faith’ upheld devotedly by those who wrote the first and second clusters of literature. From an empirical perspective, the most relevant implication of these scholars is that they open the door to investigate transitional justice practices as *processes* that far from being ‘inherent’ to transitional moments have been instrumental to the legitimacy of new

democracies. By using the term *process* I suggest that transitional justice mechanisms do not just happen, but rather occur in a series of steps (as I explained in my Introduction to this thesis). As Short suggests, the institutionalisation of human rights (e.g. the right to truth or the right to see justice done) should be analysed as ‘social processes’ that involve power and that are not necessarily beneficial (Short 2007: 859).

This thesis shares the spirit of critique in which these social constructivists scholars have engaged, and draws upon some of the same analytic devices that they have sought to advance (e.g. transitional justice is not inevitable; it was brought into being by social events; it is shaped by its historical context; it is a site for political deliberations). The next section lays the theoretical foundation that frames how I shall answer the key research questions guiding this thesis in the ensuing chapters.

#### *Transitional justice as ‘knowledge’*

As discussed, the first and second clusters of literature on transitional justice produce a sense of inevitability: (a) transitional justice is ‘intrinsic’ and ‘necessary’ during transitions; (b) transitional justice is ‘good’ because of the benefits it brings with it, e.g. peace, justice, truth; and (c) ‘All good things go together’, e.g. truth has a cathartic effect, which leads to healing, which leads to reconciliation, which leads to peace or whatever.

In contrast, the third cluster (based on social constructivist approaches) investigates: how such statements become self-evident truths through quite specific historical processes (Ainley 2008; Moon 2009); where such ideas came from, how they perform, and what purpose they serve (McEvoy 2007; Moon 2006; Wilson 2001); how such ideas and assumptions came into being as objects of knowledge (Christodoulidis and Veitch 2001; McEvoy 2007; Veitch 2001).

The third cluster of literature is useful to this thesis as it shows how transitional justice ideas and assumptions are formed and transformed within a particular social

setting (Moon 2008; Short 2007). Arthur (2009) traces the emergence of the field of transitional justice to the Aspen Institute Conference in 1988, which brought together human rights activists, philosophers, legal experts, and political scientists to debate on the moral and political dilemmas faced by new democracies: claims for justice and claims for political stability. The conference was the site in which the now self-evident claims on transitional justice emerged. It was the turning point that made it possible to ‘clarify and solidify a conceptual framework’ for this field of knowledge (Arthur 2009: 326). Since then transitional justice has gradually become the field of enquiry that systematised knowledge deemed useful to deal with the past.

But the Aspen Institute Conference was informed by another major project that shaped the way we understand transitions towards democracy: the Woodrow Wilson project on democratisations. Between 1979 and 1981 the Latin American Programme of the Woodrow Wilson International Center for Scholars funded several conferences on ‘regime change’, to analyse how and why a particular state turned toward democracy (Bermeo 1990). The working paper series resulting from the conference was published in 1986 within the collection *Transitions from Authoritarian Rule*, edited by Guillermo O’Donnell, Philippe Schmitter, and Laurence Whitehead (See Middlebrook 1986; O’Donnell 1986; O’Donnell and Schmitter 1986; O’Donnell, et al. 1986a; O’Donnell, et al. 1986b; Przeworski 1986; Schmitter 1986; Stepan 1990). This collection offered theoretical frameworks, classifications, and concepts to frame understandings of democracies, authoritarian regimes, and typologies of transitions, and to make recommendations on the appropriate steps that authoritarian countries should follow to consolidate a specific kind of democratic rule – liberal democracy.<sup>29</sup>

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<sup>29</sup> The idea of ‘authoritarian countries’ was constructed during the late 1970s by Juan J. Linz (1975), who later participated in Kritz’s volumes on transitional justice in 1995. See Juan Linz (1995).

The Woodrow Wilson project questioned the idea that democratic change was primarily based on structural conditions. O'Donnell and his colleagues called into question the idea that democratisations depended on structural socioeconomic development (Przeworski 1986). Rather, O'Donnell suggested that transitions to liberal democracy succeed because of the choices taken by political elites who know how to govern (O'Donnell, et al. 1986b: 37). Since then, transitions towards democracy have been understood as a 'negotiated, orderly and, ultimately, manageable political change, kept distinct and separate from socioeconomic transformations' (Guilhot 2005: 135).

Thus the Woodrow Wilson Project identified transitions (moderate, nonviolent, pact-based) specific to a certain kind of democracy (liberal democracy). This particular way of classifying transitions had a significant effect: it contributed to protecting the existing structures of power. By promoting a gradual approach to political change, Guilhot (2005: 148) claims, this literature left intact the power of authoritarian political elites – 'by focusing on democratic agents within authoritarian coalitions', the Woodrow Wilson Project 'located within the state the principles of its own transformation'. As a result, 'a lot of new democrats, it may be expected, will be retooled autocrats' (Guilhot 2005: 146).

In examining the Woodrow Wilson Project and the literature on transitions that it produced, my intention is to show the particular kind of ideas about transitions to democracy that affected the Aspen Conference and in turn helped to shape the emergence of transitional justice as an idea and practice. State crimes and the distinctive mechanisms deployed by new regimes to address them, as Elster (2004) and Teitel (2003) have shown, have existed for a long time. However, it is from the 1990s that ideas about transitional justice came to be related to a specific type of transition. In fact, as Arthur (2009: 333) puts it, 'instead of "coming to terms" with historical complexities



(as one might expect in an effort to deal with “the past”), transitional justice was presented as deeply enmeshed with political problems that were legal-institutional and, relatively, short term in nature. So short-term, in fact, that they could be dealt with specifically during a “transitional period”.<sup>30</sup> Additionally, it is since then that transitional justice practices are seen ‘as having an underlying, determined connection related to the normative goal of promoting democracy’ (Arthur 2009: 334). Moreover, and crucially, it is from the 1990s that transitional justice ideas and practices are justified by the language of human rights, as human rights are the principles from which democracies derive their legitimacy (Guilhot 2005: 1). So, transitional justice came to be, as Arthur (2009: 326) suggests, ‘a device to signal a new sort of human rights activity’, a ‘response to concrete political dilemmas human rights activists faced in what they understood to be “transitional” contexts’.

Additionally, the third cluster of research on transitional justice makes another important and distinctive contribution because, unlike the first and second clusters, it sees the field of enquiry on transitional justice as a system of ‘knowledge’: knowledge that claims a status of truth; and knowledge that makes aspects of reality thinkable and amenable to interventions (power) (e.g. Bourdieu 1986; Foucault 2008; Latour 2010; Moon 2009). Here, knowledge is used to describe the collection of scholars, theories, and research techniques that produce and organise the particular concepts that allow us to talk about transitional justice, and includes the set of rules that determine what kind of claims can be made, authoritatively, about past atrocity and how it might best be ‘dealt with’.<sup>30</sup>

Finally, this approach is significant, this thesis suggests, because it destabilises self-evident transitional justice assumptions not by refuting them, but by exposing the

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<sup>30</sup> On the concept of knowledge understood in this sense, see Miller and Rose (2008: 14); Rose and Miller (1992: 178).

purposes they serve. Paraphrasing Ian Hacking (2000: 20), the third cluster ‘unmasks’ transitional justice concepts by disclosing its alleged authority (McEvoy 2007; Moon 2004; Veitch 2001). This is crucial because, as Hacking (2000: 58) explains, the point of unmasking is to show that categories of knowledge are used in power relations. This can be illustrated using Moon’s (2004; 2008) and Wilson’s (2001) investigations, which have contributed to demystifying transitional justice efforts in South Africa. They have demonstrated how truth claims on ‘truth’ and ‘reconciliation’ were in fact constructed and presented as a legitimate way of thinking and intervening in the post-apartheid regime. In this research, this approach is important to understanding how – and to what effect – particular assumptions on ‘transitional justice’ (e.g. about ‘truth’, ‘justice’, compensations, transparency) emerged in Mexico’s transitional moment and acquired the status of self-evident truths.

#### *Knowledge and material effects*

The third cluster of research on transitional justice is useful because, unlike the first and second clusters, it connects the concepts that come into existence with their subsequent use and effects (Du Bois 2001; McEvoy 2007; Moon 2008; Veitch 2001). Scholars whose work falls inside this cluster argue that transitional justice classifications and concepts do not exist only in the literature – in language – but in institutions, practices, material interactions, and so on. Transitional justice literature is not only related to ways of representing reality (knowledge): it is also a matter of intervention (power). By making up concepts, experts delimit the kind of practices and institutions that come into being; they determine the relevant problems during transitions and the legitimate actors who can act upon them (Short 2007). For example, by examining how truth claims were constructed in South Africa’s transitional moment, Moon (2008) has exposed the material and political effects that resulted from such construction: the establishment of a

particular kind of truth commission, which closed off the possibility of retributive responses to past abuses; of redeeming those who benefited from the apartheid order without committing human rights violations themselves; of leaving unacknowledged the everyday suffering of many under apartheid.

This is why the work of Bourdieu (1984), Latour (2010), Hacking (2000) and Shapin (1998) is relevant to this research as these scholars see ‘knowledge’ not only as the set of ideas, concepts, or research techniques that determine what it is possible to say, but believe that language, labels, concepts, have material consequences. Hence, by analysing how transitional justice claims were constructed in Mexico’s transitional period, I seek to show how such construction had important political effects: the establishment of a retributive mechanism – the SPO – whose work depended on the existing structures of power (laws and institutions influenced by members of the previous authoritarian regime).

### *Historical approach*

The third cluster of research on transitional justice is relevant to this thesis as it is historical in character. Scholars whose work falls within this cluster consider that transitional justice efforts are shaped by social and institutional contexts (McEvoy 2011; Moon 2008; Wilson 1997a and 1997b). They believe no iron law of historical inevitability has determined which of these alternatives to face the past have been chosen at any particular time, nor is there any method to foresee future choices.

Apart from showing that far from being ‘inevitable’ transitional justice efforts are shaped by specific historical events, the third cluster of literature is relevant for two reasons. First, by being historical in character, it considers the way in which transitional justice efforts are constrained by political bargains (Ainley 2008: 30). Scholars participating in this cluster have analysed how transitional justice transforms the

balance of power during transitional moments. They also examine how, as groups participating in the previous regime do not disappear, transitional justice practices are compromised by political arrangements between members of the authoritarian elite and the elite of a new democratic regime. Therefore, it allows one to understand how, although transitional justice mechanisms aim to transform transitional societies, they are closely linked to inherited institutions, traditions, and structures of power in order to maintain a degree of stability (Short 2007; Wilson 2001).

Second, this historical approach shows that transitional justice institutions change. Unlike previous approaches, which see transitional justice mechanisms as frozen in time, the third cluster makes it possible to examine how such institutions are adapted throughout time due to institutional crises, to serve bureaucratic mandates or political interests. Therefore, what this approach offers is a complete account of the construction and evolution of transitional justice processes, which occur in steps, where the later steps are built upon the product of earlier steps. So it allows for the examination of how such processes are built and with what consequences. This is important as the way these mechanisms are transformed favours some outcomes over others (Moon 2008; Wilson 2001).

### *The language of human rights*

This social-constructivist approach is relevant because it raises concerns about the increasing significance of the language of human rights during transitions. It challenges the authority of human rights discourses, which have become a crucial feature of the governance of particular transitional moments (Ainley 2008: 29; McEvoy 2007: 418; Moon 2008: 4). Scholars participating in this debate have examined how, and to what ends, trials and truth commissions gradually came to 'represent the sites of

materialisation of a meta human rights narrative of progress that today is one of the key drivers of political transitions and democratization processes' (Moon 2008: 19).

As explained before, scholars whose work comprises the first and second clusters of literature on transitional justice ignore the role played by human rights as a means through which power is exercised. They believe that trials and truth commissions are built upon moral, legal, universal, neutral, and depoliticised imperatives, which states are 'obliged' to observe. Scholars participating within the first and second clusters of literature believe, as Ainley (2008: 9) says, that human rights law is 'objective and neutral', 'entirely separate[d] from politics (which is subjective, arbitrary and value-laden)'. Thus scholars in both clusters follow a variant of what Cohen (2005) and McEvoy (2007) have termed 'magical legalism'; transitional justice theorists think that things (reality) can exist simply because they are prescribed by law. This is an example of this 'magical syllogism': human rights laws are universal, extra-political, neutral, eternal rules; transitional justice mechanisms are based on such laws (e.g. the right to truth, the right to justice); therefore transitional justice mechanisms are universal, extra-political, and neutral in nature. The problem is that this 'magical legalism', as McEvoy (2007: 418; 2011: 377) has demonstrated, denies 'the quintessentially political nature of its argumentation'. And certainly it also ignores the way in which the materialisation of this language is compromised by political arrangements.

In contrast, scholars whose work comprises the third cluster of research on transitional justice examine the trajectory of human rights in transitional societies in a way that 'goes beyond the formal, legalistic dimensions of such rights, where [...] they will always be a "good thing" (Short 2007: 859).' These social constructivist approaches take a 'broad sociological approach' that explores how the construction and institutionalisation of human rights are social processes bound by existing structures of

power and ‘intertwined with power, elites [...] and the actions, intentions and interests of the social actors involved’ (Short 2007: 859). The third cluster of literature sees the language of human rights as the set of ‘prescriptive norms that emerge from and guide social forms and practices’ around the idea of individuals and collectivities with human rights (Evans 2005: 1049; Fields and Narr 1992: 9). They consider that human rights talk is ‘created, re-created, and instantiated by human actors in particular socio-historical settings and conditions’ (Stammers 1999: 981). Therefore, by following this approach, by the language of human rights (human rights discourse or human rights talk) this thesis refers to a set of assumptions, concepts, categories, classifications and ideas on human rights, which are codified mainly through international law vocabulary (Ainley 2011), and that generates institutions, practices, strategies, and efforts for its implementation and government (rule, control, policing). This language includes ideas and practices (knowledge/power) on knowing about, and accounting for, past atrocity (Arthur 2009; Moon 2008; Wilson 2001).

In this sense, the third cluster of literature on transitional justice is useful to this thesis as its proponents do not assume that human rights are free-standing ideas. On the contrary, they are concerned with classifications: they attend to the way in which human rights categories are constructed and adapted in particular transitional societies – e.g. ‘gross violations of human rights’, ‘the right to truth’ (Ainley 2008; Christodoulidis 1999; Moon 2009; Short 2007). In examining how human rights concepts are constructed, scholars in this cluster investigate the way in which such concepts are put to work via trials, truth bodies, in *ad hoc* laws, special legislation, new practices, or research centres; or incorporated in new professions – e.g. social workers, psychologists, NGOs of human rights, transitional justice experts, ‘transitologists’, retributivists, and restorativists.

From this perspective, this social-constructivist approach is relevant to this thesis because it challenges the authority of human rights discourses in political transitions. In so doing, different authors take different critical positions on the language of human rights. Their critiques vary in intensity and in their ‘grades of commitment’ (Hacking 2000: 19). The first grade, following Hacking’s classification, is ‘historical’. This can be illustrated by Moon’s study on South Africa’s transitional justice process. Moon suggests that, far from being inevitable, human rights categories are the contingent outcome of historical events. Moon does not show whether this is a bad or a good thing. What Moon does is to demonstrate that human rights categories are not-self evident or necessary – they were constructed in a particular historical context.

Other scholars take an ‘ironic’ attitude: the irony is that even if we recognize that something (e.g. human rights law) is highly contingent, the product of social history and forces, we are forced to leave things as they are (Hacking 2000: 20). In her study on individual agency and responsibility for atrocity, Kirsten Ainley (2008) raises concerns about the increase in the amount of international human rights law which is concerned with identifying and prosecuting individual offenders in transitional justice processes. According to Ainley this approach to past atrocity has ‘insidious effects’: e.g. ‘it ignores the enormous influence of socials and environmental factors upon human actors’; it ‘means that many of those people who enabled atrocities by creating the socials conditions which made them possible will escape unpunished at they cannot be shown to have intended particular harms’; it ignores instances of great suffering which cannot be framed by international human rights law (Ainley 2008: 2 & 23). Yet, she does not really suggest how to change this approach and so leaves it much as it is.

Others take a ‘reformist constructionism’ perspective (Hacking 2000: 20). According to Hacking, having in mind that ideas and practices that are socially

constructed (e.g. transitional justice) are not inevitable, some social-constructivists scholars seek to reform some aspects of such ideas and practices. In her study on the limits of international human rights law during transitional processes, Ainley (2011) criticises the unprecedented individualisation and criminalisation of responsibility for past atrocity through ad hoc tribunals during political transitions. Ainley claims that the responsibility for past state crimes lies not with individual perpetrators alone but also in significant measure with collectives and with those individuals who did not commit crimes but did contribute to harm. Thus, in response to the limits of international human rights law, Ainley (2011: 428) suggests to ‘support not just trials as responses to atrocity but also mandate such mechanisms as responsibility and truth commissions to establish political responsibility’. This reform would require large number of culpable (but not necessarily guilty) actors to take responsibility for their actions and inactions (Ainley 2011).

Another position taken by scholars participating in this cluster is that ‘unmasking constructivism’ (Hacking 2000: 20). According to Hacking, some social-constructivists do not seek to ‘refute ideas but to undermine them by exposing the function they serve’. There is an illustration of this in the work of Wilson (2001). Wilson exposes how – and to what effects – human rights discourses are used by new regimes: to manufacture legitimacy for key state institutions such as the criminal justice system; to ‘construct the present moment as post-authoritarian when it includes many elements of the past’ (Wilson 2001: xvi).

Grades of commitment aside, this social-constructivist approach is also relevant as these scholars emphasise the significant role played by the language of human rights in the formation of new political regimes. Rights discourses have in fact led to the establishment of transitional justice mechanisms which have facilitated complicated



political transitions. In some transitional societies (e.g. South Africa, Argentina, and Mexico), human rights legal devices have been explicitly used to challenge conventional legal operations and reasoning in order to preserve the political stability of the new system. Through amnesty laws, for example, truth commissions have forced law to be ‘merciful rather than just in the conventional sense’ (Christodoulidis and Veitch 2001: x). In this sense, these third cluster scholars claim, law is actually ‘stretched’ in order to comprehend a set of political desires (Veitch 2001: 34). For instance, law is being forced to incorporate elements of forgiveness (e.g. amnesties) in the service of peaceable futures (Christodoulidis 1999; Veitch 2001). Moreover, by not addressing the cultural or social contexts that produced violence in the first place, the language of human rights attempts to transcend political divisions, and fails to challenge the previous structures of power that made abuses possible (Ainley 2011; Moon 2008).

In Mexico’s ‘transitional justice’ process, the analysis of the language of human rights is particularly relevant for two reasons. First, because as I will show in Chapter Four, particular human rights categories (e.g. forced disappearance) led to the establishment of the SPO and framed its investigations. This is important because such human rights categories were in fact constructed in such a way as to actually maintain the impunity enjoyed by perpetrators. That is what Moon meant when she claimed that transitional justice processes, framed by human rights discourses, can mediate complicated transitions because they do not, ostensibly, threaten the power elite. Second, because as I explore in Chapters Three and Five, human rights discourses were used by Fox’s administration as a language of political legitimation. As Moon (2008) suggests, the deployment of the language of human rights in transitional moments can be instrumental to state legitimacy – that is, it is put in the service of state power –

rather than being a fundamental priority in its own right. The Mexican case provides a particularly powerful empirical demonstration of this insight.

### *Agency*

The third cluster of literature on transitional justice does not assume that this form of justice is a domain reserved to the state and its agents. Proponents consider that transitional justice processes are constituted mainly, but not exclusively, as an effect of the centralised power of the state. Hence they take the state as their main, but not exclusive, empirical focus. This approach is relevant to this thesis as it shows how transitional justice is a field in which non-state actors (e.g. activists and scholars) and state agents intervene and negotiate agendas. Non-state actors exercise power by making up the appropriate definitions related to transitional justice that later have to be adopted, instituted, and controlled by state institutions (McEvoy 2011). State and non-state actors share, paradoxically, the same language: the language of human rights.

Therefore, this approach can help increase our understanding about the role played by a growing epistemic community of transitional justice practitioners (Hirsch 2007). At least in Mexico, the emergence and rule of the ‘transitional justice’ process entailed a close relationship between state and non-state actors. The official establishment of Mexico’s ‘transitional justice’ mechanism – a Special Prosecutor’s Office – was certainly an act of the state. Yet (a) this act of the state was framed within the human rights framework advanced by civil society (see Chapter Four); (b) the official institution of these mechanisms was preceded by political deliberations in which NGOs, scholars, and human rights activists intervened and prescribed the appropriate ways to deal with past atrocity (see Chapter Three); (c) activists and scholars, who claim to represent civil society, were indeed working within these institutions; and (d) the entire process was constantly scrutinised by a multiplicity of non-state actors who

persistently promoted reforms in order to rectify the way in which these mechanisms were working (see Chapter Five).

### *Policing the past*

The third cluster of literature on transitional justice is useful to this investigation because it provides the basis for analysing the relationship between the way in which transitional justice is constructed and policed. A useful concept that captures the relationship between the emergence of particular transitional justice ideas, the way in which those ideas are secured, put into practice, controlled – and, crucially, the purposes that this control serves – is that of ‘policing the past’. The concept was originally developed by Cohen in 1995, in a seminal article on diverse strategies to deal with state crimes of previous regimes. Cohen’s (1995: 10) concept ‘meant to convey no more than a loose analogy’ between the way transitional societies confront previous state crimes ‘and the more familiar ways in which all societies confront their “ordinary” crime problems’ (See also: Cohen 1994). Recently, McEvoy’s critical analysis on transitional justice suggests a similar analogy in what he terms ‘a criminological understanding of transitional justice’. For McEvoy (2007: 433) criminology is useful to transitional justice because it provides ‘a better aetiology of crime and the ways in which crime is a socially and politically constructed phenomenon’.

However, Cohen briefly explores the concept ‘policing the past’ in a different sense: as the way in which states control the past through transitional justice strategies in order to meet the political agenda of the present – control by opening, control by closing, recovery of memory or its eradication, selective remembering, or forgetting. This is the sense in which this thesis understands this concept, which is relevant here for three reasons.

In his study on social control, Cohen (1985: 174) suggests that the language used by those in the ‘helping professions’, in which the human rights movement is clearly involved, defines people’s status. These professionals (e.g. human rights activists) use particular terms to categorise their ‘clients’ (e.g. victims of past abuses, offenders), and such terms justify the way that clients are regulated. And this, Cohen (1985: 174) claims, reveals ‘the essentially political function of language’. Consequently, he concludes, ‘language creates multiple realities and, in particular, the bifurcatory reality of who is worthy and who is not’. Similarly, Hacking (2002b: 40) argues that ‘we make up the categories we use to describe the world’ [...] ‘we may generate kinds of people and kinds of action as we devise new classifications and categories’.

Therefore, following this line of reasoning, the term ‘policing the past’ is useful to illustrate how, in transitional societies, the language of human rights allows for the conceptualisation, legitimacy, and policing of transitional justice mechanisms. This language frames the discourses and practices of transitional justice processes: the kind of human rights violations that qualify for investigation and, hence, the type of victims that are counted in the process, and concomitantly the perpetrators of certain crimes who would be subject to prosecution. That is to say, the crimes and protagonists of the past are socially and politically constructed in such a way as to permit certain forms of action in relation to the past (policing), to bring certain authorities, laws and institutions into being, and to proscribe or permit certain forms of action – namely prosecution. Certainly, the very same language tacitly determines the kind of abuses which would be excluded, the suffering that would be forgotten, and the perpetrators who would be forgiven or ignored. (This is the subject of Chapter Four.)

Second, the concept ‘policing the past’ captures the political determinants that lead to variation in transitional justice efforts, e.g. trials, *ad hoc* laws, special prosecutions, investigatory bodies, truth commissions. States and societies control the past not only by opening it to scrutiny, but by closing it. As Cohen (1995: 47) argues, all societies use both strategies: ‘particular societies, at particular times, slip into one or the other mode – control by opening, control by closing. And both opening and closing are, of course, highly selective.’ As Ainley notes, not all state crimes are prosecuted or investigated: the decision over whether to investigate particular crimes or criminals is political. ‘Power can prevent certain atrocities ever being tried’ (Ainley 2008: 30). This is relevant because incipient democracies define the kind of events that can be scrutinised and the specific way to do it in order not to threaten the survival of the regime, its political stability, or the process of democratisation.

In this regard, the concept serves to illustrate the powerful political symbolism imposed by transitional justice processes: they transform the relationship between what has gone before (during the previous regime) and what currently exists (in the new democratic system). By ‘policing the past’ through diverse transitional justice practices new democratic regimes seek to ‘assert discontinuity between past and present’ (Cohen 1995: 49). Such mechanisms imprint a sense of ending to the political transition – a sense of ‘closure’ in Moon’s (2006) terms – in both symbolic and material ways. Although those responsible for the worst oppression are incorporated within the new system, and even if the structures that made abuses possible remain intact, transitional justice efforts are supposed to mark the end of transitions; by instigating transitional justice practices the new government is demonstrating it has met the challenges of transition – these practices symbolise the beginning of a new peaceful and democratic era: ‘history was ruptured; something happened; it no longer happens; there is no point

in talking about it too much for too long' (Cohen 1995: 49). (I deal with this issue in Chapter Three.)

Third, the policing of the past is also possible by the control of memory of past atrocity. Memory, as Cohen (1995: 45) suggests, 'is a social product – a product that reflects the agenda and social location of those who invoke it and the political struggle to suppress or resurrect what has been or what potentially might be forgotten'. By eliminating special elements of the past and preserving others, transitional justice processes allow new democracies to adjust the past to the present political agenda in order to establish a version of history that legitimates current policy. In this sense, Martin Innes and Alan Clarke (2009: 548) suggest that transitional justice can serve to fix the past. For them, 'fixing the past involves repairing previous errors or mistakes'. But also, they argue, fixing 'equates to the production of an unchanging and stabilized narrative account that explains as far as possible "who did what to whom and why"'. In her research on South Africa's transitional justice process, Moon illustrates this point. Moon (2008) examined how the TRC sought to unify disparate and conflicting perspectives on the past; and how the TRC's narration produced 'the nation' as its central subject – a subject that, according to this narrative, would evolve automatically from past violence to future reconciliation. (I will return to this point in Chapter Five.)

### *States of denial*

Finally, this thesis draws on Cohen's sociology of denial. In his book *States of Denial*, Cohen (2005) examines how people, organisations, governments or societies deny, repress, or reinterpret information that is too disturbing or threatening to be openly acknowledged. Cohen identifies three forms of denial. Literal denial: the assertion that something did not happen (Cohen 2005: 7). Interpretive denial: when facts are not denied, but given a different meaning from what seems apparent to others ('what

happened was something else’). Implicatory denial: facts are not denied – what are denied are the moral or political implications of such facts (‘what happened was justified’; ‘it’s worse elsewhere’) (Cohen 2005: 8).

Cohen’s sociology of denial is particularly useful to transitional justice studies as transitional justice practices attempt to overcome official denial: i.e., to acknowledge what was known, but officially disavowed. As Cohen suggests, the entire rhetoric of government responses to allegations about atrocities consists of denials: *literal denial*: ‘there was no massacre; no one was tortured; people like us don’t do things like that’; *interpretive denial*: ‘there was a “transfer of population,” not genocide; “collateral damage,” not killing civilians; “moderate physical pressure,” not torture; “an isolated incident,” not a systematic pattern’; *implicatory denial*: ‘we acted for morally good, even noble reasons: in defence of national security, part of the war against terrorism, for the revolution, to protect democracy’ (Cohen 1995: 15). Hence the establishment of truth commissions, tribunals, or lustrations systems implies – at least tacitly – the official acknowledgment that ‘something’ happened in the past.

In the previous chapter (Chapter One), Cohen’s insights proved relevant in understanding how the PRI regime systematically denied the occurrence of human rights violations during decades. This is important because if we ignore the authoritarian regime’s official rhetoric of denial concerning state crimes we cannot understand why the PRI survived for seven decades. In the following chapters, Cohen’s insights are valuable as they help us to make sense of the way in which the Fox administration established a transitional justice process that did not deliver anything. The rhetoric of denial used during the PRI era was incorporated into the new democratic regime to justify how prosecutorial strategies were leading nowhere (‘you can’t call this genocide’, ‘the category of forced disappearance is not included in Mexico’s legal

framework’, ‘this is a human right violation, but not exactly a crime’); why most victims of past abuses were ousted from the transitional justice process (‘there are not official documents to confirm what the victims’ relatives testified’, ‘what victims suffered was not exactly forced disappearance, but something else’, ‘there is not enough evidence to be certain that a person in fact disappeared’); and why perpetrators were granted a *de facto* amnesty (‘I am not legally authorized to give the name of perpetrators’, ‘the statute of limitations for such crime has run out’, ‘this looks like forced disappearance, but the General Attorney should keep investigating’). As I will show throughout this thesis, ‘The Mexican solution’ is a preeminent exercise in political denial.

### **Methodological considerations**

As explained in the introduction to this thesis, this work is based on a detailed empirical analysis of the official documents published by the Mexican government between 2000 and 2009 to institute, police, and bring to an end Mexico’s ‘transitional justice’ process. Also, based on exhaustive documentary research of private and public archives to which I had privileged access, this thesis is supported by the scrupulous inspection of texts generated by local and international human rights NGOs, as well as the main Mexican newspapers (e.g. *Reforma*, *El Universal*). Therefore, this research’s great strength is that it offers a thorough ‘empirical snapshot’ of the different factors that facilitated the establishment of ‘transitional justice’ mechanisms that were, ostensibly, designed to deliver justice without placing the Fox administration’s relationship with the previous authoritarian regime at risk.

This section sets out my methodological considerations in accessing, collecting, and interpreting the selected empirical evidence. It gives an overview of the research process, explains the research techniques I used to pull together the corpus of material



analysed in this thesis, and describes the methodological problems I encountered during this research.

### *The corpus of material*

This thesis is based on documentary evidence – the written evidence produced and published by Mexican state officials (e.g. presidential decrees, congressional debates); national and international NGOs of human rights (e.g. International Centre of Transitional Justice), experts and activists intervening in this process; and the national press. These texts are visible, open to the public, and easily accessible – i.e., the data I used throughout this thesis is fully available for independent inspection. So readers interested in this research can review the evidence that led to my conclusions directly.

By official documents I refer here to all those relevant texts produced by the state or by actors working as state officials for state institutions related to Mexico's 'transitional justice' process. This corpus of material includes texts published by institutions within any of the three branches of the federal government. First, the executive branch – mainly, the Presidency, the Minister of Interior, the National Human Rights Commission (NHRC), and the Attorney General's Office – produced the texts that mandated the creation and determined the powers of the 'transitional justice' mechanisms (e.g. the Special Prosecutor's Office mandate, its *Regulatory Procedures*, *Statements of Accounts*, and *Final Historical Report*). Second, the legislative branch (the Senate and the House of Representatives) created or modified laws that affected the process (e.g. the reform that established that prisoners above seventy years old must serve their sentence under house arrest, which undoubtedly benefited most of the perpetrators under investigation as they were above this age. I return to this issue in Chapter Five). Third, the judicial branch decided over the cases under investigation by the SPO (e.g. Mexico's Supreme Court's rulings on the massacre of students in 1968).

The official texts setting out the creation and policing of Mexico's 'transitional justice' mechanisms appeared to provide objective, neutral rules. For instance, the presidential decree that officially established a 'Special Prosecutor's Office for the Attention of Matters Allegedly Related to Federal Crimes Committed Directly or Indirectly by Public Servants Against Persons Linked to Social or Political Movements of the Past' was never officially debated. The decree was presented as a *fait accompli*; as something fixed whose legitimacy was unquestionable (I return to this issue in Chapter Three). Once published in the *Federation's Official Gazette* or in the *Parliamentary Gazette*, 'transitional justice' norms existed as final products – self-evident truths. These legal texts were also impersonal: 'transitional justice' rules seemed to be created somehow by an unspecified agent. Law, as Bruno Latour (2010: xi) suggests in his study on the Conseil D'Etat, seems to 'have no possible individual or personalised site: it had to speak from nowhere as the Voice of the Law'. However, these neutral, objective, impersonal, final legal products were in fact preceded by controversy. Ideas on 'transitional justice' were out there in public. Assumptions and rules about 'truth', 'reconciliation', and 'reparations' were proposed, secured, challenged, and adapted by state officials, transitional justice theorists, experts, and activists. Therefore, as this thesis is concerned with the way in which 'transitional justice' came into being, I also collected texts that make it possible to offer an account of how these rules were constructed, the way in which legal reasoning was knitted, allowing 'transitional justice' practices to be established, e.g. parliamentary debates, legal interpretations contained in Mexican Courts' decisions, and transcripts of public speeches made by the President, its ministers, or the Special Prosecutor.

By NGO documents I refer to the significant texts reflecting both the NGOs' and activists' perspectives and proposals about the suggested mechanisms for dealing with

past abuses in Mexico. This set of texts includes those published by national organisations formed by victims of past abuses or their relatives, e.g. Asociación de Familiares de Detenidos Desaparecidos y Víctimas de Violaciones a Derechos Humanos en México (AFADEM), Fundación Diego Lucero, Comité de Madres de Presos Políticos y Desaparecidos de Chihuahua, Comité 68 Pro Libertades Democráticas, Nacidas en la Tempestad, Asociación de Familiares de Detenidos, and Desaparecidos y Víctimas de Violaciones a los Derechos Humanos en México. Additionally, it incorporates those significant texts produced by national or international organisations of human rights that had specific programmes about Mexico's 'transitional justice', e.g. Amnesty International, Human Rights Watch, the International Center for Transitional Justice, Miguel Agustín Pro-Juárez Centre for Human Rights, Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, and Red Nacional de Organismos Civiles de Derechos Humanos 'Todos los Derechos para Todas y Todos'.

The corpus of material includes texts published in the form of 'public letters', press releases, sub-sections within NGOs' annual reports, or as reports specifically addressing 'transitional justice' matters. An example of the latter is Human Rights Watch's (2003) report *Justice in Jeopardy: Why Mexico's First Real Effort to Address Past Abuses Risks Becoming Its Latest Failure*.

Human rights NGOs also announced their positions through press conferences or brief press releases. But they were not the only ones. Press texts are important because they make it possible to identify the experts' opinion on the matter. To the best of my knowledge, apart from Mariclaire Acosta's (2006) and Louis Bickford's (2005) journal articles, there has been no academic work on Mexico's reckoning with past abuses. Experts and scholars published their work in the press, so Mexico's newspapers

became the forum in which experts debated how to deal with the past, whether discussing moral considerations or through political analysis. So, newspapers accounts were excellent sources for providing contextual information (Yin 2003: 88).

Consequently, I collected all the relevant articles that referred to the process of facing past atrocity published in Mexico's leading newspapers and magazines from 2000 to 2009: *Reforma*, *La Jornada*, *Milenio*, *El Universal*, and *Proceso Magazine*. These are Mexico's most influential newspapers and they tend to show diversity in news coverage (between the government and the oppositional forces), and they reflect some ideological differences. Therefore, these newspapers chosen for this thesis 'represent the range of variations of news production in Mexico' (Hughes 2006: 13). Together, they reach more than sixty five percent of newspaper readers in Mexico City, the country's largest and most influential media market (Hughes 2006).

The texts analysed in this thesis were published between July 2000 and June 2009. Although the 'transitional justice' mechanisms were officially instituted in November 2001, controversies over how to address past political crimes can be traced to Vicente Fox's electoral triumph in July 2000 (This is the subject of Chapter Three). And although the Special Prosecutor's Office came to an end in November 2006, state officials, NGOs, transnational organisations (e.g. Human Rights Council of the United Nations), and experts (e.g. Juan Méndez from the ICTJ) have continued their debates on how to reactivate and rectify Mexico's 'transitional' mechanisms up to now (October 2011). I decided to end this research in June 2009 because that was the month when the last significant effort to re-establish Mexico's 'transitional justice' mechanisms during the Universal Periodic Review of the United Nations was made.<sup>31</sup>

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<sup>31</sup> The Universal Periodic Review is a mechanism in which the Human Rights Council of the United Nations assesses the human rights records of the UN member states.

*How the material was interpreted*

Essential to any account about methodological considerations is an explanation of how to read the material – the empirical data – in order to answer the research questions posed. As previously explained in this chapter, this thesis builds upon the third cluster of literature on transitional justice – a social-constructivist approach. Accordingly, the content analysis of the texts used in this investigation was shaped by Foucault's (1986; 1991b; 1991c) genealogical methods.<sup>32</sup>

Foucault provided two key methodological pointers. First, analysis must begin with a systematic scepticism towards universals. Thus, one must research what conditions make it possible for societies, using a set of rules regarding true and false statements, to recognise a subject, or a universal (Payne 2010; Reubi 2009). As Foucault (1991c: 76) suggested, a genealogical method is to write a story that makes 'visible a singularity at places where there is a temptation to invoke a historical constant [...] or an obviousness which imposes itself uniformly on all'.

Second, analysis needs to address practices. Thus, one needs to understand what was constituted as real by those who sought to manage reality and constitute themselves as subjects capable of knowing, analysing, and ultimately altering reality (Payne 2010). It is an approach that rediscovers 'the connections, encounters, supports, blockages, plays of forces, strategies and so on which at a given moment establish what subsequently counts as being self-evident, universal and necessary' (Foucault 1991c: 76).

In this sense, when analysing the empirical data, this investigation looked at the conceptualisations within texts that determined how the past was to be recovered

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<sup>32</sup> Certainly, in using a genealogical approach, this research builds on an increasingly important literature that has addressed how particular issues (e.g. crime, schooling, memory, and trauma) have been constituted and then ruled (e.g. Barron 1996; Greco 1993; Hacking 1995; Moon 2009; Osborne and Rose 1999; Owen 1995; Reubi 2009 and 2010; Valverde 1997).

organised, and adjudicated. In so doing, I explored how particular claims around past crimes acquired authority during Vicente Fox's administration. Therefore, I focused on how particular practices and institutions (e.g. the SPO) were brought into being as a result of those claims. Finally, I considered the set of rules that proscribed which actors (e.g. the Attorney General, Mexico's ombudsman) were authorised to intervene in Mexico's 'transitional justice' process (Hall 2003: 45).

This is an insightful analytical approach that makes it possible to examine how human rights rules on knowledge and accountability for past atrocity emerged; and how such rules appeared to be valid simply because of their normative quality – although the elaboration of human rights norms, and its deployment, were always mixed with extra-legal processes and affected by political interests. The method used to analyse the empirical data seeks to bring to the reader's attention the way in which the language of human rights became the vehicle that allowed different actors to establish and rule Mexico's 'transitional justice' process.

But, importantly, 'Foucault's stories', Hacking (2002a: 74, 75) argues, 'are dramatic. He presents a reordering of events that we had not perceived before'. 'Foucault's genius', Hacking goes on, 'is to go down to the little dramas, dress them in facts hardly anyone else had noticed, and turn these stage settings into clues to a hitherto unthought series of confrontations out of which [...] the orderly structure of society is composed.' Therefore, to construct this critical story of Mexico's 'transitional justice' process, I have had to move beyond the official documents and NGO reports. So I have relied on the press. Texts published by the Mexican press on this process allowed me to further contextualise the country's efforts to deal with past atrocity. Certainly, when analysing these data, I bring to the reader's attention the significant

contingent events, and the ‘little dramas’ out of which Mexico’s ‘transitional justice’ emerged.

Before explaining the way I collected the documentary evidence used in this thesis, it is important to clarify that the analytical tools developed in Foucault-inspired studies are flexible and open-ended (Rose, et al. 2006: 101). They are in fact compatible with many other methods, and they are not hardwired to any political perspective. For Nikolas Rose and his colleagues, ‘what is worth retaining above all from this approach is its creativity’. Therefore, the significance of using this method is that it offers a ‘certain ethos of investigation, a way of asking questions, a focus not upon why certain things happened, but how they happened and the difference that that made in relation to what had gone before’ (Rose, et al. 2006: 101).

### *Data collection*

Central to any discussion of method is an explanation for the selection of documentary evidence. The texts on which this thesis is based were collected from October 2004 to June 2009. This section explains the methodological decisions made to access these documents, and the process of data collection. It also validates the quality of the evidence analysed in this thesis.

To validate the material collected, this thesis follows John Scott’s (1990: Chapter Two) criteria on the assessment of documentary sources. Thus, this section demonstrates that the texts analysed are genuine and reliable; and that they are representative of the totality of relevant documents. Moreover, it renders visible the ‘authorship’ and ‘accessibility’ of my documentary data. By ‘authorship’ I mean the origin of the documents – whether these documents belong to the official or civil society spheres (Scott 1990: 14). By ‘access’ I mean the availability of the documents –

whether these documents were public and easy to find or if their availability was limited and restricted (Scott 1990: 14).

*NGOs texts and the press*

To collect the significant texts on Mexico's 'transitional justice' process generated by national and international NGOs and the press, I followed the 'method for composing our world' established by Bruno Latour (1988: 3-13) in his study on pasteurisation on France and adopted by David Reubi (2009: Chapter Two) in his genealogy of bioethical governance. According to Latour (1988: 9), this 'method does not require us to decide in advance on a list of actors and possible actions. If we open the [...] literature of the time', he argues, 'we find stories that define for us who are the main actors, what happens to them, what trials they undergo.' Thus, as Reubi (2009: Chapter Two) argues, 'the identification of a governmental logic's key moments, actors, ideas and issues is best left to those who developed the logic themselves'.

In this thesis, using this technique I started at one point and traced what human rights activists, scholars, and experts wrote about 'transitional justice' in Mexico. As Latour (1988: 10) suggests:

the fact that we do not know in advance what the world is made up of is not a reason for refusing to make a start, because other storytellers seem to know and are constantly defining the actors that surround them – what they want, what causes them, and the ways in which they can be weakened or linked together. These storytellers attribute causes, date events, endow entities with qualities, classify actors... The analyst does not know more than they; he has only to begin at any point, by recording what each actor says of the others.

This technique proved deeply appropriate to this study. For instance, the first major investigation on Mexico's 'transitional justice' was carried out by Human Rights Watch in 2003. HRW's report on the investigation sought to 'answer the question' of why the SPO's had produced 'few significant results' and to urge strategies to remedy



its ‘failure’. According to this report, Human Rights Watch ‘conducted a research mission’ in Mexico, where the organisation:

interviewed dozens of victims and relatives who have been working with the Special Prosecutor’s Office – and in some cases have been struggling for years on their own – to advance investigations into their cases. We interviewed local human rights advocates who expressed deep frustration with the slow progress of the work of the Special Prosecutor’s Office, but appeared ready to collaborate with it to bring about results.

Thus, this HRW report allowed me to identify the main actors, beyond the state, that were intervening in Mexico’s ‘transitional justice’ process – experts, activists, and other organisations of human rights.

Moreover, my professional background allowed me quickly to identify the various actors involved in the process, and the dynamics of their relationship with each other. I arrived at this research project from my professional background working both as a consultant to the United Nations High Commissioner for Human Rights Office in Mexico and as a research assistant to Professor Sergio Aguayo, who pioneered the study of past state crimes and guerrilla movements in Mexico. Thus, as a result of that work, I had a fairly clear notion of the relevant organisations and scholars actively intervening in the process of ‘transitional justice’.

Most NGOs published their reports online. On occasion, activists and organisations make public statements about the ‘transitional justice’ process, particularly when reacting to critical events, e.g. the arrest of a former president accused of genocide, or a Supreme Court’s controversial decision on the cases under investigation. However, once the urgency that provoked the press release ceased, these documents were removed from the NGOs’ websites. So, with the exception of Human Rights Watch or Amnesty International, which have a complete online database, domestic NGOs’ documents removed from the website are commonly lost. To overcome this problem, the organisation Strategic Human Rights Litigation (*Litigio*

*Estratégico en Derechos Humanos*, IDHEAS), a leading nongovernmental organisation that monitors, researches, and advocates in relation to human rights litigation in Mexico, gave me access to its archive where many of the NGOs' reports related to 'transitional justice' are held.

I have found most press texts with contextual information online. With the exception of *Proceso Magazine*, all the newspapers analysed in this thesis have databases available on their websites. Therefore, it was fairly easy to make a complete survey of the journalistic articles and op-ed sections related to 'transitional justice' between 2000 and 2009. *Proceso Magazine*, separately, gave me access to its archive held in its offices in Mexico City.

### *Official texts*

This thesis used three supplementary research strategies in order to collect official documents. First, inspired by Latour's (1988) 'method for composing our world', I started gathering official texts related to Mexico's 'transitional justice' process in October 2004. My emphasis was on the Special Prosecutor's Office because it had the leading role in the process. At that time, the SPO was an integral part of Fox administration. Dependent on the Attorney General's Office, the SPO had a specific budget, offices, and a public website. And as any other bureaucratic institution in Mexico it was regulated by the Federal Public Administration Act (*Ley Orgánica de la Administración Pública Federal*). This simplified the process of gathering official information because all the relevant governmental texts on Mexico's 'transitional justice' process were public and available on the Internet. A good illustration of such texts is the *Agreement on Certain Measures to Do Justice for Abuses Committed Against Persons Linked with Social and Political Movements in the Past* (Acuerdo Por El Que Se Disponen Diversas Medidas Para la Procuración de Justicia Por Delitos

Cometidos Contra Personas Vinculadas con Movimientos Sociales y Políticos del Pasado), which delimited the way in which the problem of past atrocity would be ruled by the state in collaboration with non-state actors through diverse institutional mechanisms and legal dispositions. Another example of this is the SPO's working plan. This included the *Programme on Legal Investigations*, which determined the SPO's prosecutorial strategies (the SPO's programmes have been already mentioned in Chapter One).

But the SPO was suddenly dismantled on November 30, 2006 (PGR 2007). Consequently, its Internet site was no longer available and the official documents posted there were no longer accessible to the public. As a result my documentary sources did not meet the basic criteria suggested by Scott (1990: Chapter Two) to assess the quality of documentary sources. As the official institution that generated the official evidence used in this thesis no longer existed, it was impossible to validate the authenticity, representativeness, or credibility of the material. Moreover, the texts were not easily available for the reader any more.

As a result, I had to re-trace all the relevant official texts that I had gathered online related to the SPO. To do so, I conducted archival work at the Daniel Cosío Villegas Library, at El Colegio de México, in Mexico City. There, I confirmed the documentary sources used in this research in the *Federation's Official Gazette*, in which rules and regulations of the three branches of the federal government are published daily.

My second supplementary research strategy was to request official texts related to the 'transitional justice' process using Mexico's 'transparency law'. This law – the *Federal Law of Transparency and Access to Government Public Information* – was created by Vicente Fox in order to end the secrecy that characterised the previous

authoritarian regime (IFAI 2004). According to this law, individuals ('petitioners') have the right to request any document containing public information from any federal institution.

I requested official texts via the transparency law because of an incident that occurred while carrying out this research. In 2005, Professor Sergio Aguayo, from the Centre for International Studies at El Colegio de Mexico, invited me to co-author a brief journalistic article about the SPO. We evaluated the SPO's work and published our results in *Proceso Magazine* on November 13 (Aguayo and Trevino-Rangel 2005). Two weeks later, the Special Prosecutor's Office responded to our article by publishing a press release in the same magazine. The SPO considered our article as 'fiction' derived from 'sociological analysis' (SPO 2005). According to the press released published by the Special Prosecutor, Ignacio Carrillo-Prieto, we had conducted a 'premature' and 'unfortunate assessment of the activities carried out by SPO' (SPO 2005).

The significance of this press release lies – apart from attempting to disqualifying our investigation – in its conceptualisation of the SPO's moral foundations; it justified the rules governing Mexico's 'transitional justice'. Invoking the language of human rights, the press release sought to legitimise Mexico's 'official response' to past abuses and explicitly banned other ways of dealing with the past (e.g. a truth commission, political amnesty). According to this press release, the SPO was the only appropriate mechanism to 'strengthen democracy and the rule of law' (SPO 2005). Consequently, other alternatives to past injustice, such as a truth commission, were simply 'good intentions paving the road to hell, delaying the consolidation of the democratic regime' (SPO 2005).

This unexpected official response published in *Proceso Magazine* suggested that state agents were also producing knowledge about Mexico's 'transitional justice'

process through the press. So, using the transparency law, through the request number 0001700066106, I requested all the ‘press releases’ or ‘letters to the editor’ published by the SPO in Mexican newspapers during its almost five years of existence. What I found was surprising. The SPO had published several press releases in which it delimited its conception of ‘transitional justice’, whilst justifying what it claimed had to be ‘done’ about past crimes. The significance of these official texts in the production of knowledge about Mexico’s ‘transitional justice’ can be illustrated by taking the year 2006 in which the SPO published fifty four press releases (more than one per week!).

This incident was relevant for another reason. The response given by the SPO was published in a well-known magazine. As in any other magazine of this type, responses, comments, or critiques to the authors are published free of charge in a section normally called ‘letters to the editor’. In *Proceso Magazine* this section was placed at the end of the publication. However, instead of using the space devoted to clarify opinions in the ‘letters to the editor’ section, the SPO paid almost eight thousand pounds (one hundred and sixty thousand pesos) in order to publish its response on the first page of the magazine. Thus the official position about the process of facing past atrocity was deemed to be so important that it could not be published at the end of the magazine. The response had to be seen and known, so it was worth paying the expensive cost of its publication. The importance of my methodological decision to collect this type of official text in this thesis is that it makes it possible to analyse how legal reasoning was constructed and publicised in such a way that it was accessible to a bigger audience, via the press.

My third supplementary research strategy was to conduct archival research at Adolfo Aguilar Zinser’s private collection. During its first year in office, Vicente Fox determined institutional reforms in order to democratise and improve Mexico’s public

administration (Poder Ejecutivo Federal 2001b: viii). As a result, Vicente Fox instituted the Commissioner of Order and Respect, and appointed Adolfo Aguilar Zinser to head this office (Benítez Manaut 2008a: 188; Rodríguez Sumano 2008: 155). Among other tasks, Fox instructed Aguilar Zinser to create a ‘body charged with the public investigation of human rights abuses’ (Acosta and Ennelin 2006: 100). Up to November 2001 – when the SPO was officially instituted – Aguilar Zinser kept records of his communications, meetings, and personal correspondence with President Fox, the Minister of Interior (Santiago Creel), ‘experts’, and human rights organisations. (Chapter Three is based on the information gathered in this archive.)

Early in 2005, I was granted exclusive access to Aguilar Zinser’s private archive. The significance of these texts is that they make it possible to analyse the way in which Mexico’s ‘transitional justice’ process was ‘in the making’. This archive offers a rich site through which to explore the thinking of a distinct group of experts, scholars, and state officials as they sought to deal with ‘transitional justice’. One month after I visited the archive, in April 2005, Aguilar Zinser died in a car accident, but in 2009 his family donated his personal archive to the Daniel Cosío Villegas Library, at El Colegio de Mexico.

### *Challenges*

In carrying out this research, I encountered the following challenges.

#### *Translating legal reasoning*

Translating texts for this thesis has not always been an easy endeavour. Transitional justice is about domestic and international legal responses to past atrocity framed by the language of human rights. Yet the language of human rights, and the international norms from which it derives, were adapted and reframed within Mexico’s legal system (and were affected by political decisions). Therefore, the legal reasoning framing

Mexico's 'transitional justice' process was sometimes uttered in a very local and technical way – so technical that at times its meaning was incomprehensible for me since I am not a lawyer. Some legal concepts and technical terms were at times as unusual to me or any other Mexican as they would be to an English-speaking reader.

Therefore, informed by Latour's (2010: vii-viii) methodological considerations in his study about the making of law in France, instead of constantly citing technical terms in the 'local tongue', I selected words that can have a meaning for an English-speaking reader. Thus I approached the process of translation, as Kate Maclean (2007: 786) suggests, as a relationship between the original (Spanish) and target (English) languages, which takes into account the contextual import of words, as well as the interconnection of the original terms with other words and clusters in the same language. While translating elusive concepts or sentences in the texts, I imagined what an English speaker in a parallel position and situation would say.

Moreover, and crucially, also informed by Latour's (2010: vii) approach to the study of the construction of law, when writing this thesis I assumed that the reader does not need to be familiar with Mexico's legal system. Rather, the reader will learn about the particular legal reasoning that facilitated Mexico's 'transitional justice' mechanisms. As a consequence, this thesis provides contextual information in order to render visible the events (the 'little dramas') that gave rise to such kinds of legal reasoning.

### *Secrecy according to the law*

It was not easy to access governmental information 'using' the transparency law. Although I had collected a large number of official documents on Mexico's 'transitional justice', I requested additional information to find out what the state and its agents were saying they were doing during the SPO's years of functioning (e.g. via press releases published by the Special Prosecutor). I was not necessarily interested in the veracity of

official accounts, but in obtaining official documents in order to explore how the state represented, talked about, and problematised past state crimes. However, the process of getting this information – which by law should be public and easily available – was sometimes troubling as state institutions did not allow me to access it.

Certainly, official responses denying me access to information related to the process of ‘transitional justice’ were revealing. The General Attorney’s Office prevented me obtaining this information in three ways. First, by saying that what I was requesting never existed or that the institution in charge was not responsible: ‘It is not within our institutional purview to keep a register of the Programmes that the SPO ran’; ‘The SPO is technically autonomous’; or, ‘This administrative unit does not possess in its archives any document containing the information requested’. Second, the state denied me access to information on – *ad hoc* – legal grounds: ‘The information committee deeply regrets that it cannot respond to your request for information due to its classification as confidential’; and, ‘The applicant has not demonstrated the express, written consent of the information’s owners’. Finally, there were cases where the state denied me access to information by reinterpreting my request in a way that it was incorrect. According to their responses, I did not know what I wanted to know, but they did: ‘The appellant [that is, myself] is attempting to confuse the Honourable Plenary of the IFAI’; and, ‘If what the applicant wants is to know how much the SPO has spent, this information should be requested via a separate form’ (Trevino-Rangel 2007).

## **Conclusions**

This chapter surveyed the literature on transitional justice – the field of enquiry that specifically studies ideas and practices related to the way in which societies face past abuses. The chapter’s main purpose was to examine the relevant literature in this field and then present the concepts, research approach, and methodological considerations of



this thesis. To do so, the chapter charted the three main clusters of research on transitional justice by scholars (experts and activists) within this field over the last two decades in order to discern their main arguments and concerns. Also, by critically analysing these three clusters of literature, this chapter's second purpose was to locate this thesis within a third, and critical stream of transitional justice investigations.

The chapter began by offering a critical survey of the first and second cluster of transitional justice literature. Most of the conventional accounts or justifications about this field can be accommodated within any of them. The first cluster focuses on specific strategies to settle past accounts (retributive and restorative senses of justice) and presents sophisticated explanations about their alleged virtues. For retributivists and restorativists, transitional justice ideas and practices have an inherent utility within transitional societies, e.g. transformation of criminals, deterrence of atrocities in the future, consolidation of democratic institutions, cathartic effects, healing of post-traumatic experiences, reconciliation of groups in conflict, and so on. The second cluster evaluates whether transitional justice strategies succeed or fail; and attempts to advance new strategies that seek to rectify the alleged shortcomings – to do more of the same, to accomplish the same ends by better means.

This chapter then considered the theoretical and empirical shortcomings of both clusters: lack of empirical evidence, lack of historical perspective, and overlooking the ways in which transitional justice is a field for political deliberations in which state and non-state actors intervene. By doing this the thesis provides an original contribution to the way we see conventional accounts on transitional justice.

In any event, this thesis only shares the topic of interest with these transitional justice studies. Unlike the first and second clusters of literature, this investigation does not seek to advance the 'merits' of restorative or retributive legal responses to past

abuses. In fact, this research does not presume that the ‘benefits’ of transitional justice are clear-cut at all; nor does this thesis seek to assess or rectify transitional justice ideas or practices, or assume that transitional justice claims are self-evident, or its practices inevitable.

This thesis is rather framed by a third cluster of literature on transitional justice, which explores how claims and ideas about transitional justice are constituted, and how these ideas affect the implementation of institutions and policies. This is a distinctive and critical body of literature that seeks to understand the contextual factors that allow the emergence and policing of transitional justice knowledge and actions. This social-constructivist approach is important as it considers how transitional justice efforts are constrained by political bargains, and raises concerns about the increasing significance of the language of human rights during transitions. In particular, this thesis takes up Moon’s argument that the deployment of transitional justice claims and practices can be instrumental to state legitimacy because they can mediate complicated political transitions as they do not seriously threaten the power elite. The chapter ends by offering a brief account of the analytical devices that have informed my work methodologically.

In sum, this chapter justifies my decision in this thesis to use the third cluster of literature on transitional justice to analyse Mexico’s process of ‘coming to terms with the past’; and shows how a social constructivist approach frames the key research questions that guide my overall analysis.

### **Chapter Three**

## **Neither Inevitable, Nor Necessary: The Emergence of Mexico's 'Transitional Justice' Process**

The background chapter (Chapter One) introduced the reader to 'the Mexican solution'. It explained how, after Fox's electoral triumph in July 2000, 'transitional justice' seemed urgent for the new democratic regime. It described how Fox sought to materialise 'transitional justice' ideas via a retributive mechanism in November 2001: the Special Prosecutor's Office (SPO).

The authors of the few scholarly articles on Mexico's 'transitional justice', and the vast number of press and non-governmental organisation (NGO) reports about it, begin their analysis by describing the SPO, taking for granted its alleged benefits, and then explain how things went wrong: lack of political will, money, and lawyers.<sup>33</sup> However, as explained in the introduction of this thesis and in the theoretical chapter (Chapter Two), my research follows a different approach, and seeks to answer a different set of questions: what factors facilitated the emergence of Mexico's 'transitional justice' process? And how did these same factors lead to its results – namely, impunity? Thus, unlike previous investigations of Mexico's 'transitional justice', I am concerned here with the way in which the country's process of facing the past came into being. The chapter shows that 'transitional justice' was contingent (Moon 2008; Short 2007; Wilson 2001). This chapter is, hence, central to understanding why there was a process of 'transitional justice' during Fox's administration in the first place.

In particular, this chapter seeks to answer the first key research question posed in the introduction of this thesis: why did Fox venture to establish a 'transitional justice'

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<sup>33</sup> The literature on Mexico's transitional justice has been described in the introduction to this thesis.

process that would put at risk the new regime's stability, and why did the authoritarian elite allow it? To do so, the chapter goes back to Fox's first months in office, before the 'transitional justice' mechanisms existed, in order to show three things. First, the contingency of the events that led to the establishment of this particular process to come to terms with the past. Second, how 'the Mexican solution' was constrained by political bargains between members of the new democratic regime and members of the previous authoritarian system, who sought to protect the impunity they enjoyed in the past. Third, how, by creating the 'rules of the game', Fox sought to (a) regulate the participation of other actors involved through the existing structures of power; (b) legitimise key political institutions still working under authoritarian premises; and (c) validate his administration's democratic credentials.

In concordance with my theoretical and methodological approach (drawing on Ainley 2011; Foucault 1986; Hacking 2000; McEvoy 2007; Moon 2008; Short 2007; Wilson 2001), I do not follow a chronological order through the chapter. Rather, I reorganise the sequence of events in order to rethink the sense of inevitability and familiarity that characterises Mexico's 'transitional justice' process. The point, as Hacking suggests, is 'to go down the little dramas' out of which Mexico's 'transitional justice' mechanisms emerged (Hacking 2002a: 74). Therefore, instead of starting with Fox's electoral victory in July 2000 and concluding in November 2001 when he instituted the SPO, I approach this the other way around. The chapter begins with the sudden establishment of the SPO in November 2001; then examines the (historically contingent) events that gave way to such establishment (October 2001); then offers an account of the various options available to Fox (June 2000 to April 2001). Finally, I return to November 2001 in order to explore the political purposes served by facing the past in this way.

**The Black Palace (November 2001)**

On November 27, 2001, more than one year after Fox's electoral triumph, an impressive public ceremony to institute 'transitional justice' mechanisms took place at El Archivo General de la Nación (National Archives, AGN). Mexico's political elite, human rights activists, non-governmental human rights organisations, victims of past atrocity, and their families were present, listening to what President Fox had to say about how his administration would come to terms with the past (Granados Chapa 2001). Ironically, the National Archives building was the former Palacio de Lecumberri, where political prisoners were interned (isolated and tortured) during the PRI era. The prisoners here were members of the guerrilla movement, student protestors (e.g. in 1968), academics (e.g. Adolfo Gilly), dissident political leaders (e.g. Demetrio Vallejo), and labour organizers (e.g. the railroad workers, the navista movement, and the doctors' movement) 'who dared to operate outside the tight strictures for dissent established by the government' (Doyle 2003c) – all of which have been addressed in Chapter One.

Also known as El Palacio Negro (The Black Palace), the AGN edifice follows the *panopticon* principle described by Foucault (1991a: 200): 'at the periphery an annular building; at the centre, a tower [...] with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells'. It was a structure designed, as Doyle (2003c) suggests, 'to permit total surveillance and control of the prison population' by the PRI regime: 'simply by pacing the tower's small circular room, a guard could watch any prisoner, day or night, moving about in his exposed cage'.

However, since 1982, the Black Palace has been the site of Mexico's national archives, where millions of files of the country's documentary heritage are preserved for public consultation. And, since June 2002, the AGN also stores sixty thousand newly

opened files related to state-sponsored terror from the 1960s to the 1980s. Prison cells became repositories of Mexico's history of abuses.

Strangely enough, the event in which Fox officially established the country's 'transitional justice' mechanisms was not formally organised by him or his cabinet, but by the Comisión Nacional de Derechos Humanos (National Human Rights Commission, NHRC), which is the state institution in charge of monitoring human rights practices of state agencies, as well as of promoting human rights in Mexico. It is the country's ombudsman, which was established since 1990. In addition, the ceremony was not planned – at least formally – to inaugurate Fox's 'transitional justice' strategies, but to announce the NHRC's 'special' investigation on forced disappearances perpetrated between 1970 and 1980, and its recommendations to Fox concerning the steps he should take to redress them (i.e. 'Special Report on the Complaints Related to Forced Disappearances that took place in the 1970s and early 1980s' – hereafter referred to as the Special Report – and 'Recommendation 26/2001').<sup>34</sup> Finally, the event was atypical because the NHRC's *recomendaciones* (recommendations) are hardly ever presented in high profile public events and are rarely attended by the President or any other senior state official. Therefore, this unusual ceremony, charged with symbolism, seemed important.

'Knowing the truth and doing justice', declared Dr. José Luis Soberanes, President of the NHRC, was a 'fundamental task' for President Fox if he truly sought to adjust the rule of law to the new 'reality that our country lives today' – Mexico was, after all, a new democracy (CNDH 2001c).<sup>35</sup> Then, through Recommendation 26/2001,

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<sup>34</sup> This is the CNDH's 'modus operandi': the ombudsman documents human rights abuses that are published in a 'special report', and then issues a '*recomendación*' that indicates the necessary steps that other state institutions (e.g. the army or the police) should take in order to redress the damage (DOF 1992: article 6; 2009: article 102). I will return to this point in the following chapter (Chapter Four).

<sup>35</sup> José Luis Soberanes spoke with the authority of an expert who creates and surveys the law. According to the rules that regulate the functions of the NHRC, the President of the Commission must have

Dr. Soberanes demanded that President Fox should instruct the Republic's General Attorney to name a special prosecutor to investigate and prosecute the forced disappearance cases from '1970s and beginning of the 1980s' (CNDH 2001a; CNDH 2001d: 38). (The origin and implications of this recommendation are the subject of the following chapter.)

Immediately after the NHRC's presentation of its Special Report and Recommendation 26/2001, Fox gave an unprecedented speech to the nation. Fox said that the presentation of the NHRC's special report was a 'transcendental event in the country's political life', which 'helps us to think on our recent history', and 'about the nation we want to build' (Presidencia de la República 2001b: leaf 1).<sup>36</sup> 'Today', Fox declared, 'my administration reaffirms' its 'absolute respect for human rights [...]'. Since the presidential campaign I have paid attention to the Mexican society's justified demands to eradicate impunity in every sphere of our national life.' Accordingly, Fox promised that his administration was 'committed to the General Assembly of the United Nations to act forcefully in the promotion of human rights and democracy, at all times, and everywhere' (Presidencia de la República 2001b: 1).

To prove that his commitment to human rights and democracy was real, Fox invoked the power conferred on him by the Constitution and issued, by presidential decree, the 'Agreement on Certain Measures to Do Justice for Abuses Committed Against Persons Linked with Social and Political Movements in the Past' (Poder Ejecutivo Federal 2001a). Then, Fox clarified that such 'measures' would be setting up

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'preferably a Juris Doctor in Law' and enjoy 'reputable public fame' (DOF 1992: article 9). Soberanes held a J.D. and a J.S.D. (Doctor of Science of Law). In this regard, as a jurist, Soberanes was an agent 'invested with a competence, inseparably social and technique, consisting essentially of the capacity, socially recognized, of interpreting [...] a corpus of texts containing the legitimate vision, right, of the social world' (Bourdieu 1986: 4).

<sup>36</sup> Manuscripts do not have page numbering. So the numbering is my own. In these cases I state 'leaf' rather than 'page' in order to indicate that I am not citing any form of published or 'official' pagination.

a Special Prosecutor's Office. So, peculiar as it was, this was the official establishment of Mexico's 'transitional justice' process.

The next day, every national newspaper carried a leading report on the subject. The headlines are self-explanatory: 'A Special Prosecutor's Office will prosecute those state agents who committed forced disappearances' (*La Jornada*) and 'Fox promises to punish all those responsible of committing forced disappearances' (*Reforma*). International coverage was extensive throughout. For example, *The New York Times* covered the event in detail. The description is worth quoting at length (Thompson 2001b):

The Mexican government was responsible for detaining and torturing hundreds of men and women who have been missing since the 1970's, says a report released today by the National Human Rights Commission. [...]. The 3,000-page government report is based largely on information from top-secret intelligence archives [...]. The release of the report, in a ceremony at the National Archives, marks the first time the Mexican government has acknowledged a role in the disappearances of hundreds of leftists and paints a harrowing account of a government fighting terrorism with terror [...]. The desaparecidos's fate had become the focus of national and international human rights protests [...]. In response, Mr. Fox – who was flanked by soldiers as he released the report – announced today that he would appoint a new special prosecutor to investigate the disappearances as well as other reported incidents of abuse, including massacres in the conflict-ravaged states of Chiapas and Guerrero. The new office would prosecute those held responsible for the abuses and arrange for reparations to the victims.

The story of how the 'transitional process' was staged at the Black Palace is important because the setting had symbolic consequences that helped Fox to assert discontinuity between past and present. At the Black Palace, Fox sought to draw a thick line between his democratic administration and the previous authoritarian era. In contrast with his predecessors, the newly elected President was committed to human rights principles – digging out the past in order to see justice done. This was a new epoch: politics was to be an orderly and democratic business. The mass media reflected this message.



But the ceremony was also significant because it produced, following Hacking (2000: 58; 2002c: 21), what might be termed a sense of inevitability. That is to say, during the ceremony, reflecting the enthusiasm of transitional justice practitioners, Fox presented the ‘transitional justice’ process as something that simply had to happen – as inescapable – and as a good thing because of the benefits it would bring with it. Additionally, and crucially, Fox presented the ‘transitional justice’ mechanisms as the only lawful approach to address past human rights violations – thus they would be the ‘only way’ to deal with the past during his administration. In other words, after the ceremony at the AGN, Fox’s ‘transitional justice’ mechanisms were presented as a *fait accompli* – as something that was already there, planned, established, and irreversible. These mechanisms actually seemed to be anticipated ‘since the inauguration of the administration’ because Fox had always had a ‘firm commitment to defend and promote human rights and combat impunity’ (Poder Ejecutivo Federal 2001a: leaf 1). In this sense, ‘transitional justice’ was, in Fox’s words, ‘inescapable’ and ‘necessary’ (Poder Ejecutivo Federal 2001a: leaf 1). Moreover, it was a good thing, according to Fox, as it was supposed to ‘heal old wounds’ and bring about ‘national reconciliation’, and it was a ‘fundamental requirement for strengthening our institutions, the rule of law, and democracy’ (Poder Ejecutivo Federal 2001a: leaf 1).

At El Palacio de Lecumberri Fox said that ‘without any doubt, the past should be unearthed’, but only through the specific ‘transitional justice’ mechanisms established by his administration (i.e. the SPO). That day, Fox claimed that he was ‘demonstrating’ that it was ‘a mistake’ to face past human rights abuses through any other transitional justice mechanism, as any other alternative would ‘abandon the rule of law’ (Presidencia de la República 2001b: leaf 4). Since then, Fox incessantly repeated that another transitional justice approach, such as a truth commission or amnesty process,

would be inappropriate because it would be anti-institutional, and illegal. Neither Mexico's legal system, nor the Constitution, 'confers power to the President to create extra-institutional bodies' such as a truth commission (Poder Ejecutivo Federal 2001a: leaf 1). Other transitional justice mechanisms would be 'above the law', Fox warned, as they are not able to 'qualify an act as a crime or as a human rights abuse' (Poder Ejecutivo Federal 2001a). As a result, Fox argued, in Mexico 'we have to go beyond the idea of a truth commission'; we 'aspire' not only to know what happened in the past, but to make perpetrators accountable for their deeds (Presidencia de la República 2001b: leaf 3).<sup>37</sup>

These arguments are important because they would become a mantra during the Fox administration. These very same arguments would be repeated, for example, in an official ceremony just one month later, after the Christmas holidays. On January 4, 2002, as instructed by the NHRC, the General Attorney's Office appointed a special prosecutor in order to address 'social demands' to 'clarify past events' and 'do justice' regarding the 'alleged disappeared political dissidents' (Macedo de la Concha 2002: leaf 1). During that event, Rafael Macedo de la Concha, the Attorney General, confirmed that the SPO was 'the *only way* to restore old wounds and consolidate national unity' (Macedo de la Concha 2002: leaf 1, emphasis added).

Dr. Ignacio Carrillo Prieto, the newly elected special prosecutor, 'inspired by the spirit of justice', warned that other transitional justice strategies, such as 'establishing institutional responsibilities' – rather than individual responsibility – simply 'do not fit in our legal system' (Carrillo Prieto 2002: leaf 1). Indeed, the special prosecutor claimed that the SPO was 'an *unequivocal response* from the authority to establish the

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<sup>37</sup> These arguments deployed by Fox's administration were in fact in line with human rights standards. The Inter-American Commission established in *Garay Hermosilla et al. v. Chile* that truth commissions are 'not sufficient to guarantee respect for human rights of the petitioners [...] as long as they are denied the right to justice' (See Mallinder: 2005: 216).

truth, heal old wounds, and start a new deal for justice and public morality' (Carrillo Prieto 2002: leaf 1, emphasis added).

Again, every national newspaper published a detailed report on the subject the morning following the appointment of Dr. Carrillo Prieto. In doing so, the media repeated faithfully the same stock of ideas about 'transitional justice' uttered by Fox and his strategists. For instance, *El Universal* claimed that the special prosecutor would 'achieve national reconciliation', 'reveal exactly what happened in the past', 'heal old wounds', and foster 'national unity' (Gómez and Alcántara 2002). Similarly, *La Jornada* captured the kind of assumptions shared back then by the Mexican press: the SPO was supposed to be the only lawful way to face the past, which sought to 'disclose the truth', 'heal wounds', 'achieve reconciliation', and 'build a better future' for the country (Castillo 2002). This is relevant because this was the way in which Mexico's 'transitional justice' mechanisms were presented by Fox's administration and then interpreted by the press; and, crucially, these claims framed the broader transmission of information about the issue.

It is also worth noting that by insisting that the SPO would 'heal wounds' and promote reconciliation, Fox sought to justify his decision not to establish a truth commission. That is, Fox elaborated (and promoted) a peculiar syllogism: truth commissions are argued to achieve reconciliation within an entire society but are unlawful according to Mexico's Constitution; the SPO seeks to promote reconciliation in Mexico and it is lawful; hence, there is no point in establishing a truth commission in the country as the SPO would achieve the same goals according to the law. This sophisticated excuse was important because, as I will show later in this chapter, Mexican political parties (the PRD), international and domestic NGOs, scholars and human rights activists openly demanded the creation of a truth commission – such as

those in Argentina (1984), Chile (1990), El Salvador (1992), or South Africa (1996). However, Fox insisted that the lawfulness, merits, and desirability of the SPO was a firm response to the proponents of the truth commission method. This is understandable because, as Moon (2008: 4) has demonstrated, ‘the truth commission become the most important institutional location of reconciliation since the early 1980s, and in particular over the last decade’. During the time the SPO was in existence (2001-2006), at least thirteen truth commissions were set up in other countries to investigate the past: Panama (2001), Grenada (2001), Federal Republic of Yugoslavia, (2001), Ghana (2002), Serbia and Montenegro (2002), Timor-Leste (2002), Sierra Leone (2002), Paraguay (2003), Democratic Republic of Congo (2003), Morocco (2004), Indonesia (2004), and Liberia (2006).

The ceremony and the press aside, we might want to ask, how can a prosecutor’s office foster a new spirit of reconciliation while exposing and prosecuting former state officials who retained some power or who maintained power within the new political system? As demonstrated by Choi and David (2012: 1195) in their study on ‘Lustration systems’ in the Czech Republic, Hungary, and Poland: the exposure of tainted officials associated with the former regime ‘inadvertently creates a shaming ritual that stigmatizes tainted officials in the eyes of the public’ (Choi and David 2012: 1173). Hence, these authors conclude, ‘this findings runs contrary to theories of restorative justice and their extensions of transitional political contexts, which maintain that truth [the exposure of past wrongdoers] can lead to reconciliation’ (Choi and David 2012: 1195).

Moreover, it is relevant to note that it was never clear what Fox meant by the term reconciliation. The concept was often used in public, but never explained on any official document. Fox and his strategists, as I will show later in this chapter, simply

repeated the assumptions shared by restorativists (scholars and practitioners): truth heals and leads to reconciliation (Hayner 2002; Minow 2000). However, the term reconciliation, as Moon (2004) argues, evokes the idea of ‘return’, ‘a return to an originary, unified harmonious social and political formation’. But what if, as Moon suggests, there is nothing to return to, no preceding situation one would wish to restore? In Mexico, as examined in Chapter One, the authoritarian system began in 1929 – and before that there had been ten years of Mexican Revolution (1910-1920), and before that there had been thirty five years of Porfirio Diaz’s dictatorship (1876-1910). Where did Fox want to go back to? This is what Moon meant when she suggested that ‘reconciliation’ is an ‘authoritative trope governing transitional justice’, which serves ‘to shape the political imagination of transition, governing the “moral reordering” of national communities in the wake of conflict’. This insight bears particular fruit in an examination of the discourse of reconciliation deployed by Fox and his political strategists.

Whatever reconciliation meant to Fox, the point is that when announcing Mexico’s SPO, he repeated the most diverse reasons invoked by transitional justice theorists and practitioners to justify retributive and restorative models of justice. At the Black Palace, the ‘Mexican solution’ appeared as an inevitable choice, an inescapable condition for democracy. And it acquired its own explanatory potential – it came to be identified with the following ideas: inevitability, lawfulness, reconciliation, truth, and justice. As stated in Chapter Two, transitional justice, as a field of knowledge, served to justify state practices to confront the past in Mexico’s transition.

The problem is that the ‘Mexican solution’ was not, in fact, as inevitable as the political declarations seem to suggest. As the PRI was still powerful enough to challenge the stability of the new democratic regime, Fox could have articulated a

policy of oblivion similar to the Spanish ‘pacto del olvido’ (pact of forgetting: the deliberate, but largely tacit, agreement to forget the repressive legacy of Francoism) (Davis 2005: 864). For the sake of the stability of the new democracy, he could have openly refused to come to terms with the past. Alternatively, as the truth commission method was so popular, President Fox could have established a Mexican truth commission. As public servants associated with the former regime were often viewed by the public as corrupt and loyal to the previous regime, Fox could have deployed a lustration system based on ‘dismissal’ such as in Czechoslovakia in 1991 where high-ranking communist cadres, members of the secret police, and their collaborators were disqualified from senior posts in the new administration and security forces and barred from returning (Choi and David 2012), but he did not.

Therefore, one must understand the reasons why President Fox opted to come to terms with the past more than one year after he took office, the factors that led Fox to establish this particular ‘transitional justice’ mechanism – the SPO – in November 2001. These are the questions taken up in the following section. The clue can be found in the very same speech Fox gave to announce the establishment of the ‘Mexican solution’: ‘I follow with attention and concern’, Fox said at El Palacio de Lecumberri, ‘the investigation into the killing of Digna Ochoa, exemplary defender of human rights in Mexico.’ ‘We have to get to the bottom of this case, we have to find those allegedly guilty’, Fox warned, because ‘this is one of the most sensitive topics in the international field’ (Presidencia de la República 2001b: leaf 1). Fox’s remark was reported by *The New York Times*: ‘in recent weeks, after the assassination of a prominent human rights lawyer, the calls for a thorough investigation into the past seemed deafening’ (Thompson 2001b). But, who was Digna Ochoa and what was her significance in relation to Mexico’s transitional efforts?

**The story of Digna Ochoa's death (October 2001)**

In October 19, 2001, a distinguished human rights activist, Digna Ochoa y Plácido, was found dead in her office. She worked in the legal department of the Miguel Agustín Pro Juárez Centre for Human Rights (PRODH) – a leading non-governmental organisation of human rights in Mexico City. Ochoa was shot twice, once in her leg and once in her head, and an anonymous note was left by her side threatening further attacks against human rights defenders: ‘Bastards. If you carry on like this you will also be touched. This is a warning, not a trick’ (Tuckman 2001).

During Mexico's transitional moment, Digna Ochoa's death became a disturbing ‘accident’ in a Machiavellian sense: it was an unexpected political event, over which authorities appeared to have had no control at all, and that was impossible or difficult to foresee by Vicente Fox's administration. Yet, as a Machiavellian ‘accident’, Fox and his strategists sought to deal with it at an appropriate time in order to preserve the stability of the new democratic regime (see McCormick 1993).<sup>38</sup>

This event had a destabilising effect in Mexico's transitional moment because the commission of political crimes, as Ochoa's death seemed to be, was identified with the previous authoritarian system, a system from which the Fox's administration – the so-called ‘government of change’ – was ostensibly trying to differentiate itself. The impact of her death can be understood because, as Wilson (1997b: 138) suggests, ‘narratives on murder [...] serve to crystallise social relations and feed off perceived tensions and discordance. As in the television murder mystery genre, the message is usually that, despite apparently calm external appearances, something is rotten in Denmark.’ So Mexico's peaceful transition was altered by the death of a notable human rights activist as it showed that authoritarian forces were still alive within the new

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<sup>38</sup> The term ‘accident’ does not assess if an event was good or bad. Rather, its importance lies on its unexpected quality. In this respect, see McCormick's (1993) article on political exceptions.

democratic order that was inaugurated by Fox's electoral triumph fifteen months before, during the July 2000 presidential election. Ochoa's case showed that the 'arrival of democracy in Mexico had not brought real change' (Thompson 2001a). As a result, this 'political accident' – or 'little drama' – had important political consequences that conditioned how Mexico came to terms with past human rights violations.

The immediate problem was that of NGO protests. Organisations of human rights called into question the new democratic regime's commitment to human rights. Amnesty International made public its concerns 'that impunity for human rights violations continue to be rampant in Mexico despite commitments from President Fox's administration to bring in a new era of human rights protection' (AI 2002b).

The widespread publicity of Digna Ochoa's death in domestic and international human rights reports had political effects in Mexico's incipient democracy because, as Wilson (1997b: 140) demonstrated, 'the mere appearance the murder on a human rights report' indicated that 'it was not a "common crime" but that it was somehow related to the political process'. This incident challenged Fox's administration fragile legitimacy during its first year in office because, activists argued, it showed that 'nothing had improved after the election' in the field of human rights (Thompson 2001a). NGO reports suggested that the new regime, which promoted itself as an era of radical democratic change, allowed the use of old politics: the repression, torture, and killing of dissidents and human rights activists.

Reports in the press were no better. An influential article in *The New York Times* one week after Ochoa's deaths stated, 'Her murder shocked the international human rights community, and sobered a nation still celebrating the promise of its first democratic government' (Thompson 2001a). 'Her murder', declared Jo Tuckman (2001) in the *Guardian*, 'is embarrassing for President Vicente Fox's government,



which took office last December pledging a new era of democracy and respect for human rights in the wake of seventy one years of one-party rule.’<sup>39</sup>

Domestic and international human rights organisations, independent activists of human rights, and the leftist Party of the Democratic Revolution (PRD) readily articulated Ochoa’s death as a political crime and assumed state culpability. Although diverse versions and rumours spread about her death, they blamed Fox’s administration for being involved, at least tacitly, in her ‘assassination’ (Tuckman 2001).<sup>40</sup> Ochoa had been investigating highly publicized cases of torture perpetrated by the Military and the police against two peasant farmers – Rodolfo Montiel and Teodoro Cabrera – involved in environmental protests in their communities. Both farmers, illegally detained by PRI-state agents in 1992, were widely known by environmental organisations because they were recipients of international environmental awards in 2000 and 2001 – awards they received while in prison. Victims of military torture, the peasants were also known by local and international human rights organisations. Given that Ochoa brought charges of torture against the soldiers who interrogated them, suspicion about her ‘assassination’ fell on the Mexican state, particularly on the army (Untouchable? 2001). Moreover, conspiracy theories circulated everywhere about her case because she had received several death threats. Thus, even if Fox’s administration was not directly involved in Ochoa’s alleged murder, human rights organisations still accused it of being responsible for her death because it failed to take death threats against human rights activists seriously (McKinley 2005; Thompson 2001a).

As a result, through a national and international mass media campaign, human rights organisations, activists, experts, and the PRD requested president Fox to

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<sup>39</sup> According to the Mexican Constitution, although elected in July 2000, the President should assume the duties of office on December 1, 2000, for a term of six years.

<sup>40</sup> According to Jo Tuckman (2001) there were at least eighty-two national and international organisations of human rights publicly questioning Vicente Fox’s commitment to human rights.

intervene in this particular case. Moreover, and more importantly, they demanded the implementation of human rights policies in order to evidence the new regime's democratic credentials. As I explained in Chapter One, the rhetoric of human rights was manifestly present in Fox's electoral campaign and in his inaugural agenda once in office. However, it was Ochoa's death that, as Acosta and Ennelin put it, 'forced President Fox to take his responsibilities in the field of human rights more seriously' (Acosta and Ennelin 2006: 100). The deployment of human rights policies became a crucial feature in the legitimacy of the new regime because 'people across Mexico', Ginger Thompson (2001a) claimed, 'wonder[ed] whether the democratic government being led by President Fox ha[d] the political will to transform a culture of impunity into a system of law and order'.

The increasing pressure drove Fox's administration rapidly to take two political actions – of course, in the name of human rights. First, to demonstrate that his democratic administration had nothing to conceal, Fox instructed the creation of a 'special commission', formed by 'prominent' members of the civil society, to follow the official investigation on Ochoa's death. By doing so, ironically, Fox tacitly recognised the lack of confidence in Mexico's judicial processes. Second, to avoid greater criticism from the international community, Fox ordered the immediate release of the environmental peasants defended by Digna Ochoa. Mimicking shows of authority characteristic of the authoritarian regime, Fox ordered the instant release of both prisoners by 'exercising the legal powers invested in the President of the Republic' to do so. 'As I speak', Fox declared, 'Montiel Flores and Cabrera García are free men' (Presidencia de la República 2001a).

These measures represented, as Fox himself acknowledged, his government's 'interests in this case [...] in response to numerous requests by Mexican and

international human rights organizations’ (Presidencia de la República 2001a). Moreover, Fox’s political decisions regarding this case, he claimed, were justified because they were taken ‘in strict adherence to the principles of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention against Torture, all signed and ratified by Mexico’ (Presidencia de la República 2001a). The irony here is evident. Motivated by political factors, Fox ordered the instantaneous release of the two farmers, ignoring all standard legal procedures, but then justified his deeds invoking human rights principles. These pragmatic responses were defended as a ‘tangible evidence’ of Fox administration’s ‘commitment to the promotion and observance of human rights in Mexico’ (Presidencia de la República 2001a). So Fox’s human rights disposition had a political message: the farmers were in prison; they are no longer there; there is no point in talking about it any more.

But these two measures did not end the story. Ochoa’s ‘murder’ became more relevant as it reactivated demands to face past state crimes. As Ochoa’s death was considered a political crime by her family, activists, and the press, NGOs and experts linked this incident to Fox’s electoral promise to establish a mechanism to do something about human rights abuses perpetrated during the PRI era.<sup>41</sup> For instance, Giles Tremlett and Jo Truckman (2001) claimed in the *Guardian*:

Since taking power Mr Fox has backed away from his campaign promise of a truth commission into past abuses, apparently for fear of antagonising members of the PRI, which remains the biggest single party in parliament. But the murder of the human rights lawyer Digna Ochoa in October renewed the pressure on Mr Fox to address the issue.

In particular, Fox was accused of breaking his electoral ‘promises to create a truth commission to investigate the worst abuses of the long-ruling Institutional

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<sup>41</sup> As Wilson states: ‘the whole concept of human rights violation is constructed around state involvement, in opposition to the category of “common crime”’ (Wilson 1997b: 140).

Revolutionary Party, including a student massacre in 1968 and the disappearances of hundreds of suspected guerrillas during the 1970's' (Thompson 2001a).

The Ochoa affair thus challenged the legitimacy of 'the government of change', which, far from dismantling the previous authoritarian regime, was allowing its survival in the new democratic system, and even adopting its nondemocratic practices. In response, one month after this incident, the Fox administration established the 'Mexican solution'. In Mexico's transitional context, the death of Ochoa, arguably, played a more important role than that of human rights principles or commitments to international human rights legal norms.

Therefore, the case was significant during Mexico's transition for four reasons. First, it rendered visible that institutions working under authoritarian premises (e.g. the army) were incorporated intact in the democratic regime. That is, as several scholars and human rights NGOs have observed, in Mexico's new democracy the army continued working with exactly the same rules, structure, and laws as it did during the authoritarian era (Benítez Manaut 2008a; Piñeyro and Barajas 2008; Rodríguez Sumano 2008). As a result, as HRW has demonstrated, the Fox administration never 'found an adequate way to police the army' (HRW 2001: 3). Under the current system: (a) soldiers have been able to use their policing power to commit serious human rights violations against civilians; (b) the government has failed to investigate and punish such abuses; (c) this failure has exacerbated a climate of fear and distrust that reinforces the impunity of military personnel (HRW 2001). Additionally, particular army officials, responsible for violations, continued in office. Fox never dismissed tainted officials or discredited bureaucrats.

Second, the case provided evidence that the new regime was tolerating the use of repressive strategies (killing and torture) in order to deal with political opponents (such

as the two peasant farmers defended by Ochoa, and Ochoa herself). Third, and in more practical terms, it showed that Fox's administration did not have enough control over Mexican security forces to stop repression. Finally, and crucially, the death of Ochoa was politically relevant because it was this particular 'little drama' – which was political in nature – that led to the official establishment of Mexico's 'transitional justice' mechanisms – mechanisms that, as I have shown in the previous section, were presented as apolitical and inevitable, somehow 'inherent' to transition and 'necessary' to democracy. It also allowed Fox's administration to invoke – selectively and pragmatically – human rights ideals to justify new practices, and political decisions concerning past political violence.

In 2003, a criminal investigation declared that Digna Ochoa had killed herself: first shooting herself in the leg with her right hand, then falling to her knees and shooting herself in the head with her left hand. It was not murder, but suicide according to Mexican prosecutors (AI 2003; International Federation for Human Rights 2005; McKinley 2005). This unconvincing conclusion produced a new wave of criticisms against Fox's administration and its alleged commitment to human rights, which, in turn, reopened new criminal investigations.

Whatever the ending of this case was, Ochoa's case is useful, as McCormick (1993: 889) argues about Machiavellian 'accidents', to draw attention to the 'irregular, non-systematic nature of political reality' and, hence, to increase our understanding of the pragmatic and selective practices implemented to mitigate or redress its consequences. The story of her death is an important demonstration that Mexico's 'transitional justice' mechanism – the SPO – was a pragmatic response to resolve a political conflict, rather than a purely moral endeavour.

**Controversy about how to come to terms with the past (July 2000 to April 2001)**

The Ochoa affair in October 2001 provided the distinctive political juncture at which the policing of past political crimes came to be an urgent problem of government. It was the crisis point – the ‘political accident’ – that drove President Fox to put into effect the ‘Mexican solution’. However, the precise mechanisms through which Mexico was to confront its past were heavily conditioned by numerous bargains between political actors with clear political interests in the process. Before Ochoa’s death, there were a series of confrontations – between state and non-state actors (experts, scholars, victims of past abuses, activists, non-governmental human rights organisations), and between elites of the previous authoritarian regime and members of the Fox administration – out of which the orderly structure of Mexico’s ‘transitional justice’ mechanisms emerged. In what follows, I examine how the controversy on how to deal with past state crimes lasted for nearly one year, before it was settled when the SPO was officially established in November 2001.

Before embarking upon that analysis, it is worth noting that the story of these political bargains prior to the official establishment of the SPO has been rather ignored by academic literature and NGO reports on Mexico’s ‘transitional justice’. This gap is understandable, in part, because most negotiations related to the creation of the ‘transitional justice’ mechanisms took place in private, so information about them was not easily available to the public at the time. On occasions, those involved in the negotiations publicly expressed their views on this issue through press conferences, speeches, or press releases. Thus, only the press reflected the conflicts of interest that existed, at the time, at different levels – e.g. between those who sought to bring perpetrators to justice, and those against any sort accountability. Here, to reconstruct this story, I draw on not only information published on the Mexican press, but also Adolfo Aguilar Zinser’s private archive. As Commissioner of Order and Respect in

charge of the establishment of any ‘transitional justice’ mechanism during Fox’s first year in office, Aguilar Zinser kept records of his communications with most actors involved in the process.<sup>42</sup>

The account of these political deliberations is relevant because it explains the ‘transitional justice’ process (ideas and practices) ‘in the making’. It shows that the particular ‘transitional justice’ mechanisms established by President Fox during the ceremony at the Black Palace were anything but inevitable. Nor were they politically uncompromised or carried out far away from political deliberations. If the first section of this chapter showed how the ‘Mexican solution’ was presented as ‘the only way’ to face the past, this section demonstrates what alternatives Fox had. The previous section showed how ‘the only way’ was a moral discourse deployed to delimit and justify what was ‘right’ to do about the past (to prosecute former human rights abusers via the SPO). In contrast, this section explores the politics behind this moral discourse. This account is important as it illustrates how in the process of debating the specific ‘transitional justice’ mechanisms that would confront the past, disagreements arose between the actors involved regarding the rules, and the political consequences of such mechanisms. The way this controversy was resolved favoured some outcomes over others, and those ‘transitional justice’ mechanisms which appeared to threaten the stability of the new regime (such as a truth commission) were closed off.

#### *A policy of oblivion*

During Fox’s opening months in office, the first and more coordinated strategy to deal with the past was formulated by members of the PRI. The authoritarian elite had not been dismantled, and retained enough power and influence to prevent the past from

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<sup>42</sup> In Chapter Two, I described his collection and the way in which I was granted privileged access to it.

being unearthed, so they advanced a policy of oblivion (Trevino-Rangel 2009: 46). The *priistas* (PRI members) sought to deny what happened by officially organizing what Stan Cohen (1995: 13) terms ‘social amnesia’: organized forgetting, a ‘deliberate cover up’ – control by closing.

For example, to prevent the establishment of any ‘transitional justice’ policy, the *priistas* claimed that a mechanism to confront the past could be ‘manipulated’ by other political parties against them. They considered that ‘transitional justice’ gave the Fox administration an opportunity for political revanchism. So, the members of the defunct ‘perfect dictatorship’ – which for decades imprisoned, tortured, and disappeared political dissidents – were now concerned with the ‘political’ use of justice. They demanded the benefits of an ‘apolitical’, fair, and impartial judicial process, which they had never allowed to their victims. In particular, *priistas* were against a restorative model of justice for the obvious reason that, as Cohen (1995: 15) suggests, ‘revelations might prove politically embarrassing for those with something to hide and open a past too dangerous to acknowledge today’. And, at least initially, they opposed a retributive model of justice as they feared criminal prosecutions.

Shame and criminal punishment aside, members of the PRI had another reason to oppose ‘transitional justice’: electoral costs. Coming to terms with the past could affect the PRI’s popularity. The PRI lost the presidential election in 2000, but most state governors and sub-national political actors (municipal officials, local congresses) were members of the PRI (Cornelius 2000). At the national level, the PRI was a powerful political party – now in the opposition – which sought to preserve its majority in federal Congress during the midterm election in 2003.

Accordingly, in July 2001 the PRI began a major counter-offensive against ‘transitional justice’. The party’s first move was to condemn the condemners, to ‘shoot



the messenger'. The PRI questioned the new administration's intentions to confront the past: Fox could not be trusted as the administration had a political interest in discrediting the PRI. For example, Dulce María Sauri, president of the PRI, argued that 'the society' – a classic euphemism frequently used during the authoritarian era to refer to the PRI – was 'definitely against' 'transitional justice' as it was simply a political strategy based on 'falsehoods' and 'fundamentalist persecutions' (Garduño 2001). Then, the *priistas* attacked the credibility of Fox's administration by revealing the 'real reasons' behind 'transitional justice': according to Sauri, this was just the president's plan to conceal the lack of results of his administration, the failure to live up to his electoral promises. So, according to the PRI, the wrongful political revanchism of the new regime and, particularly, its incompetence were the real issues.

Other members of the PRI adopted a different strategy: they denied all accusations. Anticipating that their crimes could be soon exposed and judged, the *priistas* followed what Cohen (2005: 101) terms 'the classical discourse of official denial': literal denial ('nothing happened'); interpretive denial ('what happened is really something else'); and implicatory denial ('what happened is justified'). A nice example of this comes from Fernando Gutiérrez Barrios (who we met in chapter two as he worked for twenty years at the former secret police – the DFS – and was in charge of the agency from 1964 to 1970). In October 2000, four months after Fox's victory, different ideas about 'transitional justice' strategies were debated in Congress – where Gutiérrez Barrios was then a PRI senator and so enjoyed immunity. Senator Gutiérrez Barrios disapproved any attempt to establish 'transitional justice' mechanisms as the outcome could be 'uncertain'. Uncertain because the 'analysis' of 'such a complex problem' as past crimes – as 'the incident that took place in October 2, 1968' – entails 'different and even conflicting interpretations': so conflicting that 'thirty years later it

has not been possible to know what exactly happened' (Senado de la República 2000a). From this perspective, to know the truth about the past was neither desirable nor possible (literal denial).

Gutiérrez Barrios also denied his responsibility by appealing to authority and obedience (interpretive denial). He was just 'following orders', doing his 'duty'. Head of the DFS during the student's movement in 1968, Gutiérrez Barrios claimed that he simply 'informed the President, in writing and in detail, about the violent incident that took place' – as if the illegal abduction, torture, and killing of students just happened, rather than being caused by him or the office under his charge. He just, diligently, notified his superior 'with accuracy and timeliness, taking into account the situation that existed at the time. I did not conceal anything' (Senado de la República 2000a). So, it seems, Gutiérrez Barrios, as Hannah Arendt said of Adolf Eichmann, 'was perfectly sure that he was not [...] a dirty bastard [...]; he would have had a bad conscience if he had not done what he had been ordered to' (Arendt 1994: 25).

As a final excuse, Gutiérrez Barrios tried to persuade his peers in Congress that the students' massacre in 1968 was justified (implicatory denial). He did not deny the facts, but minimized the implications of the massacre, and denied responsibility by appealing to necessity and self-defence. According to Gutiérrez Barrios the real problem in 1968 was that 'the atmosphere was charged with tension'. In that context, the Mexican government, reluctantly, acted out of necessity: by killing the students, the government simply sought to 'preserve the institutional order'. In a similar way, the Military – which is the 'fundamental institution' responsible for 'preserving the integrity and sovereignty of the nation' – was just doing its duty according to the 'values of discipline and loyalty' (Senado de la República 2000a).

The PRI elite was not alone in its efforts to secure a policy of oblivion. Some conservative scholars advanced the idea that the Fox administration should abandon any attempt to confront the past in favour of the more desirable (to them) goal of stability (literal denial: nothing happened). For example, Soledad Loaeza (2000a; 2001), professor at El Colegio de México, suggested that forgetting was crucial if Mexico was to be reconciled and the transition to democracy was to succeed. In this sense, oblivion was preferable to the recovering of historic memory as a means to political stability, as this had been demonstrated in other successful processes of democratization – such as Spain’s transition to democracy in the late 1970s where the elites refused to come to terms with the Civil War and *Franquismo*.

Loaeza (2000a: 95), a renowned public scholar whose ideas on ‘transitional justice’ were published in the press, also invoked ‘the French referent’. According to her, those who participated with De Gaulle and the French resistance ‘turned a blind eye on those who collaborated’ with the Nazi occupation. Loaeza thus claimed that unearthing the past is ‘driven by resentment and vengeance, rather than by an intent to rebuild the social fabric that has been severely damaged by past conflicts’. Therefore, ‘truth commissions do not guarantee reconciliation’. On the contrary, she argued, ‘transitional justice’ mechanisms are likely to ‘open wounds and delay healing’ (Loaeza 2000a: 96; Loaeza 2001: 49).

The final support for a strategy of forgetting came from within Fox’s own political party (Acosta and Ennelin 2006: 100; Aguayo and Trevino-Rangel 2006b: 58; Aguayo and Trevino-Rangel 2007: 718; Benítez Manaut 2008a: 185-188). In October 2000, speaking on behalf of the PAN before the Congress, Senator Diego Fernández de Cevallos lashed out against ‘transitional justice’ (Senado de la República 2000a). He opposed accountability by appealing to a higher loyalty: that of the Mexican people.

According to Fernández de Cevallos, ‘transitional justice’ was ‘inadmissible’ as it would ‘exploit in a seditious way the pain of a people who never, never, deserved to live that nightmare’ (sic). He also appealed to righteousness: ‘to bring to the present past hatreds and resentments will certainly not be a righteous conduct’ (Senado de la República 2000a). Fernández de Cevallos presented ‘transitional justice’ as a deep ‘wrong’, as an injustice.

*Retributive v. restorative justice?*

While former perpetrators, members of the PAN, and some conservative scholars opposed ‘transitional justice’, Vicente Fox’s strategists, human rights activists, members of the PRD and victims’ families, called for ending an era of impunity and demanded to ‘know the truth of what happened’ and to ‘see justice done’ (Aguayo and Trevino-Rangel 2006b). Yet, echoing the two legal narratives informing transitional justice ideas and practices, a significant debate arose between them on whether a retributive model was preferable to a restorative one to deal with past events. This shows how the debate about the styles of justice is thoroughly predicated on political struggle between the continuation in power of past political (and security) figures, and the moral demands of the present. As a result, two groups grappled to control the ‘transitional justice’ process. One group supported the creation of a prosecutor’s office; the other favoured the establishment of a truth commission. These groups ‘never completely understood one another’, Acosta lamented, ‘thus weakening their respective causes’ (Acosta and Ennelin 2006: 96).

On July 24, 2001, Santiago Creel, Minister of Interior of the ‘government of change’, visited the PRI’s central building in order to announce the Fox administration’s strategies to fight bureaucratic corruption, and to enforce transparency in government activities. Important members of the PRI were there, waiting together to listen to what

Creel would say. They knew the meeting was important: a member of the new regime paid them the courtesy of addressing them in their own domain. However, ignoring the official purpose of the meeting, a member of the Executive National Committee of the PRI, Sabino Bastidas, claimed that the issue that concerned them most was the establishment of a truth commission (Garduño 2001; Sánchez and Herrera 2001). Next, Dulce María Sauri, president of the PRI, spoke briefly on behalf of her party: *priistas* were opposed to the idea of creating a truth commission as it would produce an unacceptable ‘Manichean vision of the PRI administrations’ (Garduño 2001). Again, she sought to deflect the attention from her party’s behaviour to Fox’s intention to investigate: a truth commission would generate a prejudiced interpretation of what really happened – that was the issue.

To justify her party’s opposition to the establishment of a truth commission, Sauri deployed a rhetorical device that Cohen (2005: 114) terms ‘isolation’: when an official discourse acknowledges that ‘the alleged event happened’, but claims ‘it [was] only an isolated event’ – ‘violations arose from individual excesses [...] and are not condoned by the government’. As Sauri put it: during the authoritarian regime ‘those who committed crimes were persons, not institutions’ – there were some identifiable individuals (a few bad apples) who perpetrated abuses, but certainly not the PRI (Garduño 2001).

In response, Santiago Creel reached out reassuringly to the PRI. He gave the *priistas* his word that ‘any illicit conduct committed in the past’ would be ‘processed’ in an ‘institutional way’ (Garduño 2001). By this he meant that past abuses would be investigated and prosecuted through the existing institutions – inherited from the previous regime – according to standard legal procedures (via the public prosecutor’s office, the Attorney General’s Office, and the courts). And to prove he was right, Creel

followed a variant of what Cohen (2005) and McEvoy (2007) term magical legalism (examined in Chapter Two): the ‘institutional way’ was laid down in the Mexican Constitution so it was lawful; by contrast, a truth commission was not already prescribed in any Mexican law, so it could not possibly be correct. As Creel put it, the new regime’s promise was simply ‘to respect the rule of law and the institutions of the Republic’. Therefore, a truth commission would ‘discredit our institutions [...] weaken our legal framework and the rule of law’. Truth commissions are ‘extremely risky’, he warned, because ‘we know, generally speaking, where they begin but not where they end’ (Garduño 2001).

This peculiar incident was registered by the press (Sánchez and Herrera 2001). The message, as reflected by Mexico’s newspapers, was clear: if Fox’s strategists sought to bring about important reforms to consolidate democracy, they had to negotiate with the old ‘official party’, which opposed the establishment of a truth commission. Moreover, by emphasising that crimes were committed by individual offenders, the PRI seemed to foster – at least tacitly – a retributive model of justice to deal with the past. But why, we might want to ask, did former perpetrators seek to advance criminal prosecutions? And why did the Minister of Interior of the new regime readily accepted the PRI’s demands? I will address these questions at the end of this chapter and again in Chapter Five.

Meanwhile, other members of Fox’s cabinet sought to advance a restorative model of justice to deal with the past. Fox’s cabinet was not only formed by members of his political party (the PAN), but by ‘experts’. After his electoral triumph, he began a complex recruitment process to select the right people to staff the ‘government of change’: ‘the new era of Mexican politics required the incorporation of leaders representing various sectors of society’ (Díez 2010: 42). Thus Fox selected individuals

from different career backgrounds and political persuasions – some of whom were human rights activists and experts such as Mariclaire Acosta, Adolfo Aguilar Zinser, or Jorge Castañeda, who were widely esteemed by the human rights community in Mexico and abroad (Acosta and Ennelin 2006; HRW 2002).<sup>43</sup> Together, they openly promoted the creation of a truth commission.

But Castañeda, Acosta, and Aguilar were not alone. The left-wing Party of the Democratic Revolution (PRD) joined them in their efforts. Echoing the enthusiasm of restorativists, members of the PRD offered a set of arguments on the merits of a restorative approach to deal with past atrocity in the country. According to them, the first justification for restorative justice in Mexico was that it would consolidate democratic rule. ‘If we do not face our historic traumas’, said Senator Fernando Chavarría Barrera on October, 2000, ‘our democracy will be weak [...]. If we do not get rid of the ghosts that are oppressing us, they will start blocking our democratic transition’ (Senado de la República 2000b: 16).

A second reason invoked by members of the PRD to prefer restorative justice was that it would have a deterrent effect. ‘On July 2, the Mexican society celebrated its triumph over the state’, said Chavarría before the Congress, but ‘inside today’s victory beats the juvenile heart’ of ‘those who thirty two years ago lived the 1968 student movement’. ‘We cannot cross the threshold of history without settling accounts with the past’, he went on, because ‘our social edifice could collapse; we need to know what

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<sup>43</sup> Before becoming Minister of Foreign Affairs in the new regime, Jorge Castañeda – currently member of the board of HRW – worked at the Carnegie Endowment for International Peace, at the Woodrow Wilson School of Public and International Affairs, and as a Global Distinguished Professor at New York University. Before being appointed by Fox as sub-secretary for Human Rights and Democracy in the Minister of Foreign Affairs, Mariclaire Acosta was the President of Amnesty International in Mexico, and worked at the Centre for International Development and Conflict Management. She later became director of the International Centre for Transitional Justice’s programme on The Americas. Adolfo Aguilar Zinser was appointed Commissioner of Order and Respect at the beginning of Fox’s administration. Before that, he worked at the Centre for Economic and Social Studies of the Third World, where he promoted the human rights of Central America refugees who fled from violence in their homelands during the 1970s and 1980s.

happened’ (Senado de la República 2000a; Senado de la República 2000b: 15). ‘This is the only way to inhibit the authoritarian instincts still embedded in the Mexican state. This is the way to protect our sons from the same criminal fate’ (Senado de la República 2000b: 16).

A final argument was related to the allocation of responsibility. The PRD recognised that, even with the best political will, some criminals would ‘never be punished because they are dead’; or because they ‘hold positions [of] power’. Yet, they justified the establishment of a truth commission as the issue of past abuses was ‘not only a legal problem’, it was also ‘about historical and moral responsibility’ (Senado de la República 2000b: 16). Thus, members of the PRD celebrated ‘the creation of tribunals in the international field to punish crimes against humanity’, and prosecute ‘tyrants’. However, in Mexico, they backed ‘the newly elected President Vicente Fox’s will to create a Truth Commission with public figures from civil society’. ‘Fox’s intention’, they claimed, ‘will surely find support among all political and social forces’ (Senado de la República 2000b: 17).

The PRD’s perspective proved correct. At least some international non-governmental organisations, such as Human Rights Watch (HRW) and Amnesty International (AI), shared the PRD’s enthusiasm and thus supported the creation of a truth commission in Mexico (Aguayo 2001d; AI 2001a; Gilmore 2001; ICTJ 2002: 12; Vivanco 2001). In doing so, these organisations repeated the familiar – yet barely proven – assumptions made by those transitional justice scholars and practitioners supporting a restorative sense of justice: e.g. every society has the inalienable right to know the truth about past events according to international human rights law; exposing past human rights abuses should be enough to prevent repetition of such acts in the future; by knowing the truth of what happened victims and societies heal old wounds;



by healing old wounds, truth commission have a therapeutic effect on victims; revealing the truth can contribute to accountability (all good things go together).

The first reason invoked by HRW and AI was timing. According to Priscilla B. Hayner, conspicuous representative of the first cluster of literature on transitional justice: ‘as a general rule a truth commission should begin as soon as possible after a political transition’ (Hayner 2002: 220). Following Hayner’s line of thought, HRW and AI claimed that 2001 was the right moment to confront the past in Mexico: it was time to ‘turn promises on human rights into actions’ (AI 2001b). HRW warned the president: ‘[W]hen you took office last December [...] you promised that you would take steps to clarify and resolve past abuses. We strongly support your efforts in this regard, and believe that it is now time to put your plans into effect’ (Vivanco 2001).

In addition, HRW and AI argued that to come to terms with the past through a truth commission was simply Mexico’s ‘obligation’ to know the truth – the ‘right to truth’ – according to human rights international law (AI 2002a: 2; Gilmore 2001). ‘Seeking the truth about abuses that occurred under past governments is not a matter of political vengeance or witch hunting’, but ‘a fundamental obligation binding on your [Fox’s] government, regardless of who was in power at the time the abuses were committed’, HRW said (Vivanco 2001). According to this organisation, ‘the international treaties ratified by Mexico [...] require[d] states parties to prevent human rights violations’: consequently, ‘a first step in this process is the systematic investigation and clarification of past abuses’ (Vivanco 2001). A truth commission, HRW concluded, would ‘clarify the many cases that have never been adequately investigated and prosecuted by judicial authorities such as the massacres of Tlatelolco in 1968 and Acteal in 1997’ (Vivanco 2001).<sup>44</sup>

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<sup>44</sup> In 1997, in Acteal, in the state of Chiapas, forty five men, women, and toddlers were killed by paramilitary agents related to the PRI.

A third explanation offered by these human rights organisations was that a Mexican truth commission would have a deterrent effect. As HRW put it: '[E]nding impunity for past abuses is crucial for preventing future ones' (Vivanco 2001). Another justification was that a truth commission in the country would have a therapeutic effect on Mexico's society. According to AI's 'experience in many countries of the world', 'the total or partial concealment of the Truth [...] as the abandonment of victims, leave[s] wounds irremediably open in the social fabric' (AI 2001a).

A final justification was that Mexico's truth commission, rather than displacing 'justice' in courts, would contribute to the accountability of the perpetrators. Hayner, who published the first generic study about truth commissions in 1994, argued that such mechanisms serve as a 'complement to a very weak judicial system, helping to fill the void created by the [...] incompetence, or inability of the courts' (Hayner 2002: 88). This was exactly HRW's argument: '[T]he value of truth commissions as a spur to judicial efforts is especially obvious when legal institutions have failed to administer justice fairly and adequately in the past. This, unfortunately, has been the case in Mexico' (Vivanco 2001). Moreover, HRW reported to Fox:

History has shown that truth commissions do not undermine existing judicial mechanisms, but rather they strengthen them. In Argentina, Chile, and Guatemala, for example, truth commissions have played a crucial role in improving the judiciary's capacity to handle human rights cases. Not only have they presented new evidence necessary for prosecutions, they have also helped these societies to understand and to address the failings of the judicial institutions that allowed these crimes to go unpunished (Vivanco 2001).

Truth commissions, AI said to President Fox, 'are an important supplement to the institutionalisation of the rule of law' (Gilmore 2001). So a truth commission would 'deeply transform [...] structures and entities' that made abuses possible (Gilmore 2001).

However, unlike Mariclaire Acosta, Adolfo Aguilar Zinser, Jorge Castañeda, or the PRD, these human rights organisations considered that the creation of a truth commission did not ‘exonerate’ Fox’s administration from its obligation to prosecute criminals of past abuses (AI 2001a), an obligation that ‘derive[d] from the right of victims to see their abusers brought to justice’ (Vivanco 2001). As HRW put it:

We understand that the proposed truth commission has its critics – even within your administration – who fear that it might undermine the institutions already charged with administering justice in Mexico. Faced with a choice between truth and justice, these critics argue, Mexicans should choose justice. Put this way, who could possibly be against the criminal prosecution of those responsible for egregious human rights abuses? But this is in fact a false choice. Mexicans have the right to truth and justice. And, under international law, your government has an obligation to provide both (Vivanco 2001).

HRW and AI went well beyond simply supporting a restorative conception of justice. They actually advised the president the way to proceed in order to set up Mexico’s truth commission. According to these organisations, a truth commission had to be ‘appropriately constituted, adequately funded, and equipped with the necessary legal powers’ by the Mexican state (Vivanco 2001). Yet, it had to be an ‘independent, non-political body, made up of knowledgeable and distinguished members’ of civil society (Vivanco 2001). AI even suggested it should include UN staff, and offered President Fox a memorandum containing the ‘basic principles for the establishment and operation of a truth commission’ (AI 2001a; Fernández Sánchez 2001).

It was never clear, however, what they meant by ‘independent’. How can an institution created and funded by the state be, simultaneously, ‘independent’ from it? HRW and AI were clearly suspicious of the Mexican state. But, these organisations appeared to suggest that the implementation of a truth commission depended exclusively on the Mexican state. As seen in Chapter Two, according to the first and second clusters of literature on transitional justice, investigatory bodies instituted by non-state actors are not considered to be truth commissions. So, there is a paradox here.

According to these human rights organisations, Mexico's 'independent' truth commission would depend on the state they relentlessly criticised – a state that inherited institutions and structures of power from the previous regime. As I have argued in Chapter Two, human rights organisations represent themselves as playing a counter-hegemonic role against the state over which they seek to 'impose' their 'transitional justice' ideals, but it is the state that has the power to turn such ideals into practices.

Even less clear is what these organisations meant by 'non-political body'. As the third cluster of literature on transitional justice that this thesis endorses has demonstrated, truth commissions are political bodies *par excellence*. HRW and AI seem to believe that truth commissions are built upon moral, legal, universal, neutral, and depoliticised imperatives, which states are 'obliged' to observe. However, as Moon and others have shown, far from being 'non-political' entities, truth commissions have altered the exercise and distribution of power during transitional moments, and have served to mediate complicated political transitions as they do not ostensibly threaten the power elite (Ainley 2008; Moon 2008; Wilson 2001).

These paradoxes aside, it is important to note the way these human rights organisations took part in Mexico's 'transitional justice' process, and how they intervened and negotiated agendas. Human rights organisations present themselves as acting in the field of principles, away from the domain of state politics and political interests. Therefore, when they proposed the establishment of 'non-political bodies' to deal with past atrocity, they followed an extreme version of 'magical legalism' (Cohen 2005; McEvoy 2007): we (the NGOs) are apolitical; human rights laws are extra-political; the 'transitional justice' mechanisms proposed by us are based on such laws; therefore 'transitional justice' mechanisms should be 'non-political' in nature. However, as McEvoy correctly notes, this 'magical legalism' ignores the essentially political

nature of this argumentation. It denies the fact that these human rights organisations exercise power by making up the definitions related to transitional justice, which later have to be instituted and policed by the state. That is why the third cluster of literature on transitional justice proved so useful to this investigation, as it challenges the language of human rights during transitions, as it shows that this language is not only related to free-standing, non-political, ideals and principles, but that it is also a matter of political intervention.

Thus, Fox's mechanisms instituted in November 2001, particularly the SPO, were not self-evident or necessary at all. Different possibilities to come to terms with the past coexisted and were seen as lawful during the first months following Fox's electoral triumph in July 2000. But over the spring of 2001 the truth commission proposed by Mariclaire Acosta, Jorge Castañeda, and Aguilar Zínser took sudden significance.

#### *Truth commissions*

Controversy on how to deal with the past came to an end in April 2001, when Vicente Fox took the decision to create a truth commission. In a private meeting with members of his cabinet, on a small piece of paper, Fox scrawled the following instruction: 'Adolfo [Aguilar Zínser] will be the Coordinator for the Project "Truth Commission" and also will be in charge of the democratisation of the CISEN [Centre for Research and National Security, which is Mexico's intelligence agency]' (Fox 2001).<sup>45</sup> This scribbled text marked the beginning of Mexico's 'transitional justice' process. This was the first semi-official document on the country's process to come to terms with the past. It was handwritten in April, 2001 – seven months before the establishment of the Special

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<sup>45</sup> It is worth noting that, originally, the idea of a transitional justice was closely related to the democratisation of the security apparatus (in particular of the intelligence services). I will return to this issue in the conclusions of this thesis.

Prosecutor's Office at the Black Palace (November 2001). The text officially mandated the creation of a truth commission that would never exist in reality.

The commission would be implemented by 'Adolfo [Aguilar Zinser], Santiago [Creel], Ramón [Muñoz], Rodolfo [Elizondo], M[arta] Sahagún, and the external team (3)' (Fox 2001). All of them were members of the cabinet.<sup>46</sup> By 'external team' the president meant three academics with multiple affiliations – 'double agents' in Nicholas Guilhot's terms: school professors who were, at the same time, human rights experts, consultants, journalists, and activists in well-known NGOs: Dr Sergio Aguayo, Dr José Antonio Crespo, and Clara Jusidman.

The truth commission suddenly became *the* favoured 'transitional justice' mechanism in Mexico's transitional moment. HRW, for instance, eagerly applauded this decision in a public letter addressed to President Fox saying: 'Not only the victims and their families, but Mexican society as a whole benefit from having [...] cases [of past abuses] properly resolved' (Vivanco 2001). HRW's public statements gave the impression that a truth commission would definitely transform a country 'in which impunity had flourished for decades' (Vivanco 2001).

Also, the international mass media carried reports about Mexico's plans to establish a truth commission. This headline of the *Dallas Morning News* in July 2001 is self-descriptive: 'Fox is right to pursue truth commission':

[PRI] party members have made it clear that the prosecution – they consider it persecution – of PRI officials would have a chilling effect on Mr. Fox's legislative agenda for his remaining 5 1/2 years in office. The men and women of the Fox administration take those warnings seriously, and some have advised *el presidente* [the president] to take a 'forgive and forget' approach. Now, Mr. Fox appears ready to do the right and just thing [...]. He would ask Congress to form a 'truth commission' after it reconvenes in September. Concerned that previous attempts to investigate the past

<sup>46</sup> Santiago Creel was Minister of Interior. Ramón Muñoz was the Chief of Staff of the Presidential Office for Governmental Innovation. Rodolfo Elizondo was coordinator of the Presidential Office for the Citizens' Alliance. Marta Sahagún, who later became Fox's controversial wife, was Coordinator General of Social Communication and Spokesperson of the Mexican Presidency. With the exception of the Ministry of Interior, all these offices were created by Fox's strategists. However, in less than one year, most of these newly created offices were dismantled (Loaeza 2006: 13).

have – in Mexico and in other countries – ‘created more problems than they have solved’, Mr. Fox would prefer to limit the power and scope of the inquiry. Whether those limitations are helpful or necessary is for the Mexican people to decide, but the fact that Mr. Fox is ready to convene a truth commission is most encouraging.

Similarly, in May 2001, the BBC covered the meeting between Jacob Zuma, South Africa Deputy President, and Vicente Fox in Mexico City. The BBC reported that Zuma’s discussions with Fox ‘touched on Mexicans’ past experiences, focusing on correcting the legacy of the previous government of seventy-one years’ (BBC 2001). Zuma and Fox, this report said, ‘were keen to take a leaf from South Africa’s experiences of transition from apartheid to a democratically-ruled country’ (BBC 2001). According to the BBC, Zuma stated:

We [South Africa] are seen as a model other countries of the world, including Mexico, could use to transform. I can tell you that there’s even talk here that a structure in the form of our country’s Truth and Reconciliation Commission has been formed [...]. The government here is keen to draw into our experiences in its quest to build a new nation.

These reports on the press are relevant as they show that in Mexico and abroad there was a general belief about the coming existence of a truth commission. Moreover, the press was already justifying a particular course of action (Fox was doing the right thing), and foreseeing the truth commission’s outcomes (if it worked in South Africa, it should work in Mexico too).

In this context, Aguilar Zínser, in charge of establishing this mechanism, began by gathering historical data about different truth commissions that proved to be ‘effective’ in other countries (Morales Avilés n. d.). Based on the information available in his private collection, he was planning to establish a truth commission with legal powers to compel witnesses, and those allegedly involved in cases under investigation, to testify (AI 2001a). Following the South African example, he also sought to make public the results of the investigations (Aguayo 2001c; AI 2001a; Morales Avilés n. d.: leaf 6). In addition, according to his advisers, Mexico’s truth commission should

investigate only ‘gross violations of human rights’ (Aguayo 2001c; Morales Avilés n. d.: leaf 1).

To justify its creation, Aguilar Zínser and his strategists relentlessly repeated some of the assumptions shared by transitional justice practitioners and theorists: the truth commission would have a therapeutic impact, a deterrent effect in Mexico’s society, and a reconciliatory outcome. The truth commission, Aguilar Zínser’s aides argued, was a ‘basic precondition for reconciliation’, which would ‘help society [...] to heal traumas’ (Morales Avilés n. d.: leaf 1 and 3). It would also ‘prevent perpetrators from returning to political life and undermining the rule of law’ (Morales Avilés n. d.: leaf 2). The problem with the latter assumption was that perpetrators were already well embedded within the new regime and, as I will show in the following section, actually prevented the establishment of Mexico’s truth commission.<sup>47</sup>

On June 18, 2001, the project on Mexico’s truth commission was ready to hand over to Fox. The president simply had to approve it. Aguilar Zínser organised a private meeting to introduce the proposal with members of the cabinet and his team (Aguilar Zínser 2001). The next day they all met at Los Pinos, the presidential residence, and learned about the project (AA 2001d).

According to Aguilar Zínser’s proposal, the commission would be composed of three ‘sub-commissions’ or ‘chapters’ (*capítulos*) (AA 2001a; AA 2001b; AA 2001c). The first sub-commission would be in charge of investigating cases of corruption. The second would investigate past human rights abuses. And the third would not be an investigatory body as the former two, but a ‘state commission’ that would have two purposes: to give access to state files, and to serve as a ‘mediator’ between state agents and the two investigatory commissions (AA 2001b: leaf 1).

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<sup>47</sup> Adolfo Aguilar Zínser’s private archive is hereafter cited as AA.



The ideas about reconciliation and deterrence invoked by Aguilar Zínser and his assistants to justify the creation of a truth commission were not reflected at all in the final proposal. On the contrary, paying no attention to human rights principles or transitional justice ideals, throughout the programme presented to Fox and his cabinet, the human rights ‘experts’ offered a series of pragmatic and political arguments on why establishing a truth commission was so relevant for the country. The main issue on the table was not reconciliation or truth, but how to make the truth commission politically acceptable to members of the PRI, on the one hand, and victims’ families and members of the human rights community, on the other (AA 2001b).

In this regard, the first problem was how to select the commissioners. According to Aguilar Zínser’s scheme, each investigatory body would have eight commissioners – sixteen in total – who would be ‘absolutely free’ to undertake their investigations and assemble a final report (AA 2001a: leaf 4). This sought to convey to the victims and their families that the truth commission would be led by people ‘independent from the government, with prestige and social recognition’. However, the commissioners would be cautiously selected and guided by Fox’s administration: first, they would be appointed ‘entirely confidentially’ by the president, ‘taking care not to disclose this debate to the mass media’; and then they would be ‘helped’ by the third sub-commission, composed of members of the government (AA 2001a: leaf 3).

The second problem was how to defend in public the creation of the truth commission before the members of the PRI and those who opposed ‘transitional justice’. According to Aguilar Zínser’s programme, Fox should ‘prepare convincing arguments’ to prove that the commission was not unlawful or ‘unconstitutional’, as it was not prescribed in the Constitution (AA 2001a: leaf 2). This was important as Aguilar Zínser said that declarations on the unlawfulness of restorative justice ‘could be

very persuasive to society'. And to placate the restless PRI, Aguilar Zinser's proposal suggested the president should state that the truth commission's results would not be legally binding: its 'findings would not have legal value' (AA 2001a: leaf 1; AA 2001c: leaf 1). So, the point was to show that the official policy would be to do nothing to those found guilty: because the truth commission's findings were not legally binding, perpetrators had nothing to worry about.

Aguilar Zinser's project sought to stage Mexico's truth sub-commissions in three phases. The first, as he put it, was the 'preliminary stage of consultation', which would start a few weeks after the meeting at Los Pinos. It would last two months, commencing on July 1 and ending on September 1, 2001. Five members of the cabinet – Creel, Elizondo, Muñoz, Sahagún, and Aguilar Zinser – as well as the three academics would be in charge of this step, and their objective was to determine how the truth commission should be implemented without placing at risk the fragile political stability of the new democratic regime. During this 'consultation phase' Aguilar Zinser sought to answer the following fateful questions before setting up the commission: how would Mexican people react to a truth commission? How could the commission meet the expectations of victims' families and the human rights community? What sort of events could be investigated without disturbing the *priistas*? (AA 2001a: leaf 5; AA 2001b: leaf 2).

To assess if the truth commission was seen as a 'risk for the stability of the country' or not, Aguilar Zinser's team would conduct opinion surveys (AA 2001a: leaf 6; AA 2001b: leaf 2). First, they would organise 'focus groups' with 'influential sectors' of Mexico's society – 'reporters, entrepreneurs, members of the different churches, scholars' – in order to find out what their expectations of the commission were. Second, they would conduct a 'comprehensive opinion poll' to determine citizens' attitudes

toward 'transitional justice'. Finally, Aguilar Zinser would interview 'experts on popular culture and psychology of Mexican people' as they should be able to give a 'theoretical framework' to understand how Mexicans would respond to the establishment of the investigatory bodies (AA 2001a: leaf 5; AA 2001b: leaf 2).

But the consultation phase would serve another significant purpose: it would allow President Fox to 'pre-select', secretly and arbitrarily, uncontroversial cases of past abuses that could be investigated without threatening the PRI elite (AA 2001a: leaf 6; AA 2001b: leaf 2). Based on opinion surveys, Fox would evaluate and predict 'the political costs', as well as 'the political instability' that 'every case could generate' (AA 2001c: leaf 3). As Aguilar Zinser's team put it: '[I]nvestigations should combine principles of justice and ethics with pragmatism for the sake of democratic viability and political stability' (AA 2001c: leaf 3). This phase would be absolutely secret.

To 'pre-select' the cases to be investigated by the commission, Aguilar Zinser's team would follow three criteria. First, in order to avoid criticisms, they would 'select' only those cases of past abuses it was unproblematic to 'clarify'. That is, the truth commission would seek to investigate uncontroversial cases that could be easily handled and, hence, that would not put at risk the stability of the new democracy. The criteria to do so were never disclosed. Second, the cases should have a symbolic effect: they should be significant enough to 'restore credibility and public confidence in institutions'. It was never specified, however, what Fox and his strategists meant by 'significant', nor how significance was to be assessed. Finally, Aguilar Zinser's group would avoid tilting 'the weight of evidence excessively' against specific members of perpetrators such as the army (AA 2001a: leaf 8; AA 2001b: leaf 3). They sought to avoid cases that could threaten tainted officials incorporated in the new system. Yet, the methodology to assure this outcome was never revealed.

The second phase would start on September 1, 2001, and come to an end on December 31, 2001. This phase would begin with the official institution of the truth commission and the appointment of its sixteen commissioners. Once in office, the commissioners would organise a ‘public consultation’ to ‘choose’ (again) the cases that they would investigate. But it would be a phoney consultation as the cases had already been ‘pre-selected’, secretly, by the President during the ‘preliminary stage’. In the second phase, the commissioners – ‘independent’ members of society with ‘prestige and social recognition’ – would just be pretending they were doing so. Of course, as this pseudo-consultation could not be so blatant before the public, when pretending to choose the cases, the commissioners would invoke their ‘historic and civic relevance’ – ‘those cases which have deeply hurt society’ (AA 2001a: leaf 7; AA 2001b: leaf 3). Fox’s strategists never unveiled the criteria to do so.

The third phase would last twelve months, from January 1, 2002, to December 31, 2002. Over this period the commissioners would investigate the particular cases of past abuses they had previously ‘pre-selected’ in private and ‘selected’ in public. At the end, the commission would present a final report with its main findings (AA 2001a: leaf 8; AA 2001b: leaf 4). This stage could be extended for another year if the commissioners considered it necessary (AA 2001c: leaf 4). The final report would be made public and would contain recommendations to the executive branch of the state and ‘general recommendations’. The recommendations would not be legally binding (AA 2001a: leaf 2), and the Executive would have the power to reject the recommendations (AA 2001c: leaf 4).

President Fox read the project while the cabinet members and the human rights experts were listening. At the end of the meeting, he said: ‘[W]ell done, in a week everything will be ready to start working’ (Aguayo and Trevino-Rangel 2006b: 60). On

June 19, 2001, the truth commission was formally approved, but weeks passed and no project developed. Five months later, on November 27, Fox suddenly instructed that a Special Prosecutor's Office should be created.

The story of the truth commission that never materialised is important for four reasons. First, it demonstrates there were different available ways of dealing with the past, including a policy of oblivion, which was widely favoured by members of the new democratic system. Second, it shows how the 'transitional justice' process was a site in which non-state actors (scholars, activists, and victims' families) and state agents negotiated agendas: the official establishment of the SPO was preceded by a protracted process of political deliberations, in which NGOs and human rights experts helped to prescribe the appropriate ways of dealing with past atrocity. Third, the story shows how 'transitional justice' assumptions (knowledge) about truth, justice, and reconciliation were constructed, debated, and contested by all actors involved, and the material effects this way of representing reality had (power). Finally, and crucially, it demonstrates that the construction of Mexico's 'transitional justice' was shaped by contingent-historical determinants.

These arguments aside, a significant question remains: why did Fox change his mind? Why, if he was so careful not to threaten the PRI elite with the truth commission, did he establish a prosecutor's office that would, ostensibly, be more intimidating, as it would imply that perpetrators would be brought to justice? This is the subject of Chapters Four and Five.

Mexico's 'transitional justice' thus underwent a drastic change from April to November 2001. We will never know what happened in the five month interval, but we can explore the purposes served by the move from a restorative model, via the institution of a truth commission, to a retributive model based on the prosecution of

those responsible. We can examine the immediate effects this transformation had on Mexico's democratisation. This is the subject I now address and that I will discuss in subsequent chapters.

### **Back to the Black Palace: the SPO and its immediate political effects**

I have already described the two symbolic effects that the establishment of the SPO had on the new regime. First, the ceremony at the Black Palace bolstered the idea that the Fox administration represented not only a 'change of political party' in government, but a 'change of regime', the 'gateway to the twenty-first century' (Fox 2000). Second, as the ceremony was organised by the NHRC and the SPO resulted from its specific recommendations, it showed that the new regime was deeply committed to human rights (the language of human rights as a discourse of political legitimisation). It was an example of the Fox administration's careful cultivation of its pro-human rights image (I will return to this point in the following chapter).

However, the move from a restorative model of justice to a retributive one also served more pragmatic ends. The first was that it channelled the 'transitional justice' process through the existing structures of power which still operated under authoritarian premises. As I have described throughout this chapter, there was a special emphasis on the idea that – unlike a truth commission – a retributive process would be strictly subordinated to the rule of law: the SPO was 'constitutional' and 'lawful', inspired 'by the spirit of justice, but not of revenge' (Poder Ejecutivo Federal 2001a: leaf 2). In a country in which impunity characterised the previous authoritarian era, Fox's manifest respect for the rule of law was a significant indication that things had changed. The problem was that some, significant, things had not changed. The SPO's performance and outcomes depended on other state institutions in which the PRI had significant influence and that experienced no reform, e.g. the General Attorney's Office, the

Military, the Mexican courts (Benítez Manaut 2008a). Hence, by establishing the SPO, Fox allowed Mexico's 'transitional justice' process to be undertaken by the very same institutions that were directly involved in past abuses (the Military), had colluded in them through their silence (the courts), or had done nothing to investigate and prosecute human rights violations in the past (the General Attorney's Office).

A second consequence of establishing the SPO was to avoid an inquiry into the role played by different institutions involved in gross violations of human rights. The SPO would investigate individual offenders, rather than a pattern of past abuses. As I examined in Chapter Two, retributive justice is based on the assumption that since past abuses are committed by identifiable persons, responsibility must be allocated to those specific individuals found guilty of perpetrating such abuses (Zalaquett 1989). That is why, Méndez argues, trials and prosecutions are preferable to truth commissions because they eradicate the stigma of 'historic misdeeds' carried out by 'innocent' institutions or members of society that are collectively blamed for the abuses perpetrated during the previous regime (Méndez 1997b: 277). As Fox put it at the Black Palace: 'for an effective review of the past, we must trust in our institutions', because 'it is the only effective way to combat impunity' (Presidencia de la República 2001b: leaf 3). But how to 'trust' – to look the other way – institutions involved in past human rights violations?

Choi and David (2012) argue that some measure of 'trust' in the political regime contributes to citizens' compliance and ethical reciprocity, therefore helping to sustain democracy. That is why, they have demonstrated, it is so relevant to rebuild citizens' trust in the government after transition (Choi and David 2012: 1174). In Mexico, an investigation of the involvement of different institutions in the commission of past abuses was relevant in the context of the country's 'history of abuses'. As I have

examined in Chapter One, the PRI regime had a sophisticated security apparatus – paramilitary groups, the Military, the secret police, the police – that intimidated, repressed, tortured, and disappeared dissidents. The problem was that some of these institutions had survived democratization and were far from being reformed. Digna Ochoa’s case showed that at least the Military was reintegrated untransformed in the new regime. As said earlier, in Mexico’s new regime the army is still operating under the authoritarian paradigm: the same rules, structure, laws, and staff. So soldiers who commit abuses are allegedly accountable to military authorities, but neither they nor the military court system are accountable to civilians. This has resulted in human rights violations going unpunished (HRW 2001). Another example of institutions implicated in past abuses would be that of the judges and courts, who turned a blind eye to the state criminal deeds. Unlike in the transitional justice processes of South Africa (1996), Chile (1983), and Argentina (1990), in Mexico the role of the judicial system as a whole in tolerating abuses by the authoritarian authorities would be ignored (Hayner 2002: 102). Unlike post-transition Czech Republic where tainted officials were dismissed, in Mexico compromised judges and members of the army retained their posts. Hence, the institutional context that made abuses possible would remain unharmed. In Mexico, contrary to what Méndez suggests, the SPO would not remove the stigma of historic wrongdoings from innocent institutions – it would perpetuate the impunity these institutions enjoyed in the past. As Francisco Panizza has argued, ‘the return to democracy in most Latin American countries has not brought about judicial reform or resulted in a more and independent judiciary’ (Panizza 1995: 183). The Mexican case does not provide an exception to this argument.

The SPO resulted from a particular recommendation issued by the National Human Rights Commission (NHRC) that was not addressed to the Military, the



Attorney General's Office, nor any other state agency that took part in past crimes. The NHRC's recommendations were addressed directly to the President, who had the authority to decide whether to accept and implement them or not. Legitimately, the materialisation and policing of the country's 'transitional justice' mechanisms would derive from a unilateral decision taken by the Executive. Therefore, the third effect of this move from a restorative to a retributive model of justice was that it strengthened Fox's authority for three reasons. First, as shown in the first section of this chapter, it allowed President Fox to take the credit for the creation of the SPO, which would increase his popularity and validate his democratic credentials. Secondly, Fox delegated the right to act upon past atrocity to the SPO. However, the SPO depended on the General Attorney's Office, which in turn depended on the President. Consequently, Fox was simply delegating more power to himself in the name of legality. Thirdly, this operation helped Fox – at least initially – to transfer the political costs of any decision concerning the SPO to the NHRC, as the NHRC recommended its creation: the President was just 'following orders' from the highest authority on human rights in the country.

Another consequence of establishing Mexico's 'transitional justice' mechanisms in this particular way was that Fox did not have to face a plural Congress, which could have opposed the presidential actions. There was no need for Congress to discuss or approve Fox's personal ruling to create the SPO. Had the Congress intervened – e.g. in the selection of the special prosecutor – Fox's proposal may have suffered changes or been blocked.

A final effect of unilaterally imposing the SPO was that Fox could dictate the framework within which the past was to be addressed. This allowed him to instruct controversial policies or take decisions arbitrarily without being challenged. For

instance, it was in his power to select the specific person who would be responsible for the ‘transitional justice’ process. By appointing a polemic member of the PRI era who had clear conflicts of interest in dealing with the past, Fox could protect two crucial institutions involved in the perpetrations of past human rights violations: the Attorney General’s Office and the Military. The Attorney General’s Office – the institution that failed to investigate the abuses in the past – was in charge of conducting the enquiries concerning past abuses during the Fox administration. To do so, as recommended by the NHRC, the Attorney General created a Special Prosecutor’s Office. A problem with this was that the Attorney General, General Rafael Macedo de la Concha, worked during his youth in the Minister of Interior under the orders of Fernando Gutiérrez Barrios who, as explained in Chapter Two, was the former director of the secret police (Aguayo 2003). Therefore, during the authoritarian regime, Macedo de la Concha worked closely with the same perpetrators he was now trying to bring to justice in the new democracy. And, as previously explained in this chapter, Gutiérrez Barrios was still alive, now a powerful senator who enjoyed immunity.

‘We should remember’ that ‘our Armed Forces [...] are the first to honour our institutions [...]. They are the first ‘to recognise that nobody can be above the law’, claimed Vicente Fox at the Black Palace (Presidencia de la República 2001b: leaf 3). Then, to calm the anxiety of the country’s Armed Forces, Fox promised that to face the past would not ‘discredit the Military, which is of the people and for the people’ (Presidencia de la República 2001b: leaf 3). Whatever the message Fox sought to convey, he performed a significant operation in order to protect the Military. As already stated, the Special Prosecutor’s officially depended on the Attorney General’s Office, which bureaucratically depended, in turn, on President Fox. The problem was that the Attorney General, General Macedo de la Concha, was a military member on active duty

(AI 2001c: 10). Hence he was also bureaucratically subordinate to the Minister of Defence. The Attorney General was subject to both the president's orders (a civil) and the Military's approval. But the story of Macedo de la Concha does not end here. He was the former chief military prosecutor during the authoritarian era and according to Amnesty International he had a 'record of failing to prosecute military officials accused of human rights violations' (AI 2002a: 15).

Thus, the obvious question to be asked is: how can a general on active duty investigate and prosecute past crimes perpetrated by members of the Military? I will return to this question in Chapter Five. My point here was simply to show the immediate political purposes the SPO would serve. Inspired by the third and critical cluster of literature on transitional justice, this last section of the chapter sought to demonstrate – at least briefly – that transitional justice knowledge has material and political effects. That is to say, that it is not a straightforwardly normative project, but one that is thoroughly imbued with power, contrary to what much of the earlier literature in the field suggests. In particular, the detailed account of the role played by Attorney General, Rafael Macedo de la Concha, sought to emphasise a crucial factor that the first and second cluster of literature on transitional justice tend to ignore: beyond universal, neutral, and depoliticised transitional justice ideals, transitional justice mechanisms are – to paraphrase Steven Shapin (2010) – implemented and controlled by people with bodies, situated in time, space, culture, and society, and struggling for credibility, and authority.

## **Conclusions**

This chapter sought to answer, in part, the first research question that framed this thesis: why did Fox venture to establish a 'transitional justice' process that would put at risk the new regime's stability, and why did the authoritarian elite allow it? So, to partially

answer this question the chapter reviewed Fox's first months in office, between July 2000 and October 2001, before the 'transitional justice' mechanisms were fully established. In so doing, the chapter examined the contingency of the events – the 'little dramas' or 'political accidents' – that led to the creation of the SPO. And it showed how the 'transitional justice' process was constrained by political negotiations between members of the new regime and members of the PRI era. Thus, the 'transitional justice' mechanisms instituted by Vicente Fox in November 2001 were everything but intrinsic to Mexico's democratisation. They were a practical response to a set of political conflicts, rather than being an indubitable imperative that Fox had claimed.

Consequently, this chapter showed that Vicente Fox dared to come to terms with the past via a retributive model of justice for three main reasons. First, a retributive justice process would have a symbolic effect over the new regime: Fox differentiated his 'regime of change' from the previous regime; validated his administration's democratic credentials; and showed his commitment to human rights. The second reason was strategic: by creating the 'rules of the game', Fox sought to strengthen his authority; impose decisions arbitrarily without being questioned; and regulate the participation of other actors involved in the process (e.g. NGOs, victims' families, the PRD, members of his own cabinet that had divergent opinions on the matter). The third reason was, ironically, to preserve the incipient stability of the new regime. By establishing the SPO, Fox (a) sought to conduct the 'transitional justice' process via the existing structures (the courts, the attorney general); and (b) to legitimise key political institutions still working under authoritarian premises (e.g. the Military).

Clearly, this process did not seem to threaten the previous authoritarian elite, which had been reincorporated into the new democratic system. This is central to an understanding of why the PRI elite did not oppose a retributive justice process. Of

course, during Fox's first months in office, the PRI elite sought to protect the impunity its members had enjoyed in the past. They did not have enough power to fully oppose the establishment of 'transitional justice' mechanisms, but did retain enough power to intervene in their making. The PRI could not prevent the 'transitional justice' process, but was able to neuter its effects.

## **Chapter Four**

### **Making up 'Transitional Justice': Defining, classifying and acting on human rights abuses**

The last chapter showed the reasons why Vicente Fox ventured to establish a 'transitional justice' process that would put at risk the stability of the new democratic regime; and why the PRI elite allowed it. In so doing, it explored Fox's first months in office, from July 2000 to November 2001, before the SPO was officially established. In this chapter, the analysis turns to the human rights 'organising concepts' (Hacking 2002c: 22) through which Mexico's 'transitional justice' process was framed: i.e. the category of 'forced disappearance', which is nested within a broader taxonomy of 'gross violations of human rights'.<sup>48</sup>

This chapter seeks to answer, in particular, the second research question posed in the introduction of this thesis: how was the 'transitional justice' process constructed, and how did this construction frame and proscribe its performance and results? As I described in the previous chapter, on November 27 2001, Fox established the Special Prosecutor's Office (the 'Mexican solution') because the highest authority of human rights in the country – the National Human Rights Commission, NHRC – urged him to do so through 'Recommendation 26/2001'. This recommendation offered the particular category of human rights violation that framed Mexico's 'transitional justice' process: the SPO would investigate the 'forced disappearance' of hundreds of dissidents in the 1970s. However, this chapter argues, this category was constructed (and materialised) in such a way that it actually served to perpetuate the impunity of perpetrators.

Inspired by the third cluster of literature on transitional justice – examined in Chapter Two of this thesis – this chapter shows three things. First, it shows how this

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<sup>48</sup> Following Foucault, Hacking uses the term 'organising concepts' in order to define the notions that allow the existence of 'what it is possible to be or to do' in a certain historical context.

category of human rights (i.e. force disappearance) was not a free-standing idea, but historically contingent, and affected by political arrangements. That is, this chapter does not take human rights categories as givens, but as socially constructed ideas, the consequence of social and political interventions (Short 2007: 858). Second, it shows how the language of human rights framed the investigation into the past: that is to say, the kind of human rights violations that qualified for investigation and, hence, the type of victims that were counted in the process, and the perpetrators of certain crimes who would be subject to prosecution. It shows how the language of human rights shaped the way crimes and protagonists of the past were constructed and, therefore, how such construction permitted certain forms of action in relation to the past (e.g. in bringing certain authorities, laws, and institutions into being). Third, it shows how this particular way of representing (and intervening upon) past atrocity had social, material, and political effects during Mexico's transition towards democracy.

Before embarking upon that analysis, two notes should be added to my argument. First, it is worth noting that the previous chapter examined human rights talk as a language of political legitimisation. As human rights are the principles from which new democracies derive their legitimacy, Fox justified different 'transitional justice' ideas and practices by invoking the language of human rights (e.g. the right to truth, the right to justice) (Arthur 2009; Guilhot 2005). Such language was deployed by Fox's administration to indicate (and legitimise) the discontinuity between the previous authoritarian system and the new democratic era. To contrast with the previous chapter's analysis, this chapter intends to demonstrate how human rights categories (e.g. forced disappearances) framed the SPO's investigations. (This distinction has been explained in Chapter Two.). As said, this is relevant as one of the consequences of deploying such categories is that it makes interventions into past political violence – by

redescribing it as this or that violation – amenable to legal description, intervention and action. It also has a reductive effect in that it extrapolates the *effects* of deeper structural injustices whilst leaving those injustices untouched.

Second, it is also important to emphasise that by exploring how particular human rights 'organising concepts' emerged and framed the process of facing past atrocity, this chapter attends to both the discursive practices and the particular material consequences of the process. Thus, following the third cluster of literature on transitional justice, in this chapter I investigate human rights talk and the 'transitional justice' practices and institutions that this particular talk produced.

The chapter is divided into five parts. The first describes the story of the NHRC and its recommendation that led to the establishment of the SPO. The second addresses the way in which a particular human rights category (forced disappearance) was constructed: i.e., the section explores the 'social life' – in Short's (2007) terms – of the category. The third section explains how such construction was secured: i.e. how the NHRC sought to validate (legitimise, make credible) such construction. The fourth part explains the purposes such construction served: i.e. it shows how the way in which the NHRC constructed the category of forced disappearance perpetuated impunity – the way the category of forced disappearance was constructed granted a *de facto* amnesty to perpetrators. The final section analyses the social and political effects that such construction had in Mexico's transitional moment.

### **(Pre)Transitional (in)justice: the (non-democratic) origins of the National Human Rights Commission's Recommendation 26/2001**

The process of 'transitional justice' in Mexico began, as I described in the last chapter, when the most senior human rights authority in the country (the National Human Rights Commission, NHRC) urged President Vicente Fox to face the abuses perpetrated during



the previous authoritarian regime. In the official ceremony at the Black Palace, on November 27 2001, the NHRC issued Recommendation 26/2001 (González and Jiménez 2001; Granados Chapa 2001; Ruiz and Alcántara 2001; Venegas and Ballinas 2001). Through this Recommendation, Dr. José Luis Soberanes, President of the NHRC, demanded President Fox to establish a Special Prosecutor's Office in order to investigate and prosecute the forced disappearance cases 'in the 1970s and beginning of the 1980s' (CNDH 2001d: 38).

So far this story is well known. What is often ignored is the role played by the NHRC in Mexico's 'transitional justice' process. Why was this human rights institution suddenly so interested in promoting the establishment of the SPO? As I described in the previous chapter, in June 2001, Fox had ordered the creation of a truth commission, but no such project emerged. Instead, five months later, Fox instructed that a Special Prosecutor's Office should be created because the NHRC so recommended. What happened in the five month interval we do not know. However we can explore the purposes the NHRC served in Mexico's transitional moment by 'recommending' this particular way of dealing with the past. Thus, before analysing how the concept of forced disappearance was constructed, let me begin with the story of the controversial institution that constructed such category. This is important because, as Short rightly notes, more analysis is needed on how human rights are socially constructed according to the actions and intentions of social actors, within wider historical constraints of institutionalised power (Short 2007).

The NHRC was created in 1990 by the same regime responsible for the repression of dissidents in the past. President Carlos Salinas (1988-1994) established the NHRC four days before a crucial meeting with the American president, George Bush, in which they were about to announce their intention to begin negotiations for a free trade

agreement between the countries (i.e. North America Free Trade Agreement, NAFTA). As stated in Chapter One, Salinas had been accused of gross violations of human rights: he repressed dissidents, arbitrarily removed seventeen state governors from their posts, was accused of the deaths of more than four hundred PRD members, and was responsible for the massacre of Zapatistas sympathisers (Del Villar 2005: 71; Hernández 2005: 104). Therefore, concerned about the negative publicity on Mexico's history abuses, Salinas created the NHRC because he sought to demonstrate that his government had its human rights problems under control (See Ackerman 2007; Covarrubias Velasco 1999; Gil Villegas Montiel 1996; Keck and Sikkink 1998; Mazza 2000; Trevino-Rangel 2003). This can be understood because, as Wilson suggests, the human rights bureaucracies, such as the NHRC, have served in Latin America 'as a substitute for a government's lack of commitment to the rule of law' (Wilson 2001). The NHRC helped the PRI regime to maintain a democratic façade before the international community. By deflecting criticisms away from the government, the NHRC was an institution that helped to prolong the PRI era (Ackerman 2007).<sup>49</sup> This is important because it means that Mexico's 'transitional justice' process began because a powerful institution from the authoritarian era – the NHRC – pointed out to President Fox the way in which his administration should deal with the past.

But there is an even more ominous – and barely known – side of this story. Recommendation 26/2001 did not originate within the democratic regime. The NHCR investigation on forced disappearances, which led to Recommendation 26/2001, had begun eleven years earlier, during the PRI era. The NHRC had been dealing with cases of forced disappearance since September 18 1990, through the *Special Programme on Alleged Disappearances* (CNDH 2001b). The aim of this 'particular' programme was to

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<sup>49</sup> Recent studies show that the NHRC continued to protect authoritarian enclaves even after the transition, at least until 2008. See HRW (2008), Fundar (2004), and Programa Atalaya (2004).

investigate the accusations of relatives of the victims of forced disappearances or non-governmental human rights organisations related to past abuses (e.g. the Union of Parents of Disappeared Children, the Association of Relatives and Friends of the Disappeared in Mexico and the Committee for the Defence of Prisoners, Persecuted, Disappeared, and Political Exiles in Mexico). However, to carry out its inquiries, the NHCR collected evidence from other state institutions that had participated in the repression, and were still functioning in the 1990s under non-democratic premises – e.g. the Military, the Ministry of Interior, and intelligence services (Benítez Manaut 2008b). The irony is obvious: the NHRC demanded that the perpetrators should incriminate themselves. Not surprisingly, according to the NHRC itself, the result was that the investigations stalled for more than a decade – from September 1990 to November 2001 (CNDH 2001d: 6).

Unexpectedly, in 2000, the NHRC designed 'a work programme geared towards advancing the investigations' (CNDH 2001d: 6). According to this new programme, 'the first lines of action established were driving to maintain contact with the relatives of the victims of the disappearance' (CNDH 2001d: 6). So, the NHCR would contact the victims of abuses a decade later after they – the victims – had filed their complaints.

Why did the NHRC suddenly take up again the investigations on past state crimes that it had abandoned for more than a decade? The reactivation of NHRC's programme on disappearances in 2000 was no coincidence: it was a year of presidential election campaigns. As I explained in Chapter One, during the 2000 electoral campaign, one of Fox's promises was to 'do something' about past human rights abuses (Acosta and Ennelin 2006; Thompson 2001a). In particular, Fox had promised to establish a truth commission. Thus, while Fox campaigned on human rights accountability, the NHRC initiated 'contact' with the victims, NGOs, and human rights activists to promise

them a new 'working programme' that would make it possible to punish those guilty of past abuses (Aguayo 1999).<sup>50</sup> That is, the 'working programme' that gave way to Recommendation 26/2001 was in fact developed in the context of the 2000 presidential electoral campaigns: while Fox promoted the establishment of a truth commission, a tainted institution (the NHRC) promoted the establishment of the SPO. Once in office, Vicente Fox changed his mind – he abandoned the idea of a truth commission – and adopted the NHRC's approach. Again, we will never know why he did it. But we can explore the effects that this transformation – from a restorative to a retributive sense of justice – had on Mexico's transition. As I will show in what follows, the human rights categories (e.g. forced disappearance) that framed Mexico's 'transitional justice' process were constructed in such a way as to allow the impunity that those who violated human rights in the past enjoyed to be perpetuated.

### **The constitution of past human rights violations<sup>51</sup>**

#### *The (original) object of knowledge: forced disappearances of persons*

The original purpose of the NHRC's investigations and recommendations was to 'establish the truth and do justice' on 'the issue of people denounced as victims of forced disappearance' during the 1970s and early 1980s (CNDH 2001b: 1). Initially only these types of acts – forced disappearances – were considered to constitute human rights violations in the 'transitional justice' process. This is relevant because, as I will show in Chapter Five, once established the SPO modified its mandate several times as a response to 'political accidents' (McCormick 1993) and thus came to investigate other human rights abuses such as genocide.

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<sup>50</sup> Dr. José Luis Soberanes owed his appointment of President of the NHRC to the PRI.

<sup>51</sup> This section takes up Claire Moon's (2008) methodology used in her study on South Africa's transitional justice process.

The legal process that the NHRC used to limit Mexico's 'transitional justice' to the issue of forced disappearances was meticulous, legitimate and authoritative. Article 102 of the Mexican Constitution established that the NHRC has the faculty to receive complaints against any other authority or public servant (DOF 2003: article 9; DOF 2009: article 102). Once the NHRC admits complaints on alleged human rights violations it initiates investigations and documentation (DOF 2003: article 97). If, and only if, the NHRC determines the existence of human rights violations does it issue a recommendation in which it establishes the steps that state authorities must take to award restitution (DOF 1992: articles 43 & 44). This is the *modus operandi* which, according to the law, the NHRC must follow when investigating human rights violations (HRW 2008: 13).<sup>52</sup> By investigating and documenting the complaints that led to Recommendation 26/2001, the Ombudsman followed exactly that procedure.

Recommendation 26/2001(CNDH 2001b; CNDH 2001d) was based exclusively on five hundred and thirty-two complaint files that the NHRC claims to have received between 1990 and 2000. Such complaints were 'formulated' by relatives of the victims 'in a direct fashion or through a Non Governmental Organization' (CNDH 2001b: 11). Hence only these cases were investigated by the Ombudsman. Thus, the conduct of this powerful institution born during the authoritarian era was absolutely legal. This is important because, as retributivists claim, the application of the rule of law is independent of its results (Méndez 2007; Zalaquett 1989): i.e. as long as the juridical process to deal with the past is conducted in accordance to the law, states fully meet their duty to punish even if such process ends in acquittal. And this was exactly what president Fox argued when he later suspended the SPO in 2006 although it had not obtained a single criminal conviction. According to him, whatever its results, the SPO

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<sup>52</sup> This *modus operandi* has been already explained in the previous chapter (Chapter Three).

and the institution that ordered its creation – i.e. the NHRC – carried out their work always according to the law.

The NHRC recognises that the five hundred and thirty-two cases were not 'the only ones' (CNDH 2001b: 10). The NHRC continued 'receiving and seeing to complaints on disappeared persons' (CNDH 2001b: 10; CNDH 2001d: 13). Yet, in Recommendation 26/2001, the NHRC decided – *ad arbitrium* – to refer to just five hundred and thirty-two particular cases of forced disappearance. This is relevant as the abuses ignored by the Ombudsman were not included in the Recommendation and thus were not counted in the 'transitional justice' process. Had other type of complaints related to other past abuses (e.g. torture, ill treatment, killing) been included in Recommendation 26/2001, the NHRC would have issued other recommendations to put in place other types of transitional justice strategy. This is what Hacking (2000: 31) meant when he claimed that 'classifications do not exist only in the empty space of language but in institutions, practices, material interactions with things and other people'.

Even though Recommendation 26/2001 only included five hundred and thirty-two complaint files on disappeared persons, the NHRC did not approach all cases in the same way. After analysing the complaints, the NHRC concluded that the evidence in ninety-seven of them was 'insufficient, legally speaking, to conclude the existence of forced disappearance or any other human rights violation' (CNDH 2001d: 17). That is to say, the NHRC considered that the abuses committed in ninety-seven cases did not constitute human rights violations as the evidence available was not enough to classify them as such. The victims' complaints could be true, but legally inadmissible. As a result, these ninety-seven cases were ousted from the 'transitional justice' process.

The NHRC's argument for dismissing these cases was, again, legally valid. The law that regulates the NHRC's actions establishes that the Ombudsman, 'in his actions', has 'public faith to *certify the veracity of the facts* in relation to the complaints [...] filed before the National Commission' (DOF 1992: article 16, emphasis added). In this regard, the NHRC relied on the *Manual for the classification of violation acts of Human Rights* (1998; 2008), which contains a list of categories and concepts to classify acts that can be considered, according to the law, to be human rights violations.<sup>53</sup> By invoking the authority of these legal classifications, the Ombudsman invested itself as the 'master of a joint social store of words, of concepts', as an expert allowed to offer 'the means to think realities yet unthinkable and proposes a whole arsenal of organizational techniques and operational models [...] a stock of solutions and precedents' (Bourdieu 2004: 30). This is significant because, as Bourdieu (1986: 13) suggests, 'law is, without doubt, the form par excellence of symbolic power of nomination' since it 'creates the things named'.<sup>54</sup>

In addition, the NHRC was 'unable to accredit' forced disappearance in another one hundred and sixty cases according to the available evidence (CNDH 2001d: 17). However, for this group of cases the NHRC transferred the responsibility of determining if forced disappearance had taken place or not to the General Attorney's Office. None of these cases achieved the status of human rights violations – yet they were not necessarily cancelled. With this operation, these one hundred and sixty complaints on alleged forced disappearances were ousted from the 'transitional justice' process, and automatically became 'investigation hypotheses', which the General

<sup>53</sup> This manual has been the object of critiques by human rights experts who have pointed out its deficiencies. See, for example, Programa Atalaya (2008). The manual was recently re-edited and is sold in Mexican bookstores. See Soberanes (2008).

<sup>54</sup> This is significant because, as Hacking (2002a: 40) suggests, 'in natural science, our invention of categories does not "really" change the way the world works. Even though we create new phenomena which did not exist before our scientific endeavours we do so only with a license from the world (or so we think). But in social phenomena we may generate kinds of people and kinds of actions as we devise new classifications and categories.'

Attorney's Office would investigate not as past human rights violations, but as 'common crimes'.

As a result, the NHRC considered that in only two hundred and seventy-five complaints – out of the five hundred and thirty-two – could it be concluded that human rights had been violated (CNDH 2001d: 17). Only within this group of cases was it 'feasible to prove as demonstrated' that forced disappearances had occurred (CNDH 2001d: 21). And only in these cases could the NHRC demonstrate that the disappearances had been 'carried out or tolerated by the Mexican State's public servants' (CNDH 2001d: 21). This is relevant as the 'transitional justice' process in Mexico – which was supposed to come to terms with almost seventy years of Mexican authoritarianism – was founded only on the disappearance of two hundred and seventy-five people. (The kind of violations that were excluded are analysed later in this chapter.)

*The subjects: victims and perpetrators*

Recommendation 26/2001 defined and classified the type of victims of past state crimes that would be counted in the process, and the perpetrators of certain abuses that would be subject to prosecution. That is, the recommendation distinguished victims and perpetrators of human rights violations (which are politically motivated and imply state involvement) from victims and perpetrators of common crime (Wilson 2001: 81). And each group (victims or perpetrators) would be clearly identified by specific characteristics. So the NHRC concocted the kind of slots into which people could fall and be counted. This is relevant because, as Hacking (2002b: 48) suggests, 'categories of people come into existence at the same time as kinds of people come into being to fit those categories'.



Victims of past abuses came to be officially accepted as such if they were able to satisfy three requisites demanded by the NHRC. First, at the moment of opening investigations, victims' families were supposed to have 'no news' [...] 'on the whereabouts' of those disappeared. Second, the NHRC also had to prove 'beyond a doubt' that the disappeared persons had been detained 'illegally and unconstitutionally' by 'public servants' (CNDH 2001b: 28). Third, the NHRC had to 'be certain' that the victims 'had been detained by public servants who exceeded their functions' and 'lacked the power to carry out such an illegal deprivation of liberty' (CNDH 2001b: 28). Only after all these characteristics were satisfied could the NHRC 'assume' the 'forced disappearance' of a person on whose behalf a complaint was made.

Thus, with the authority to qualify the validity of the complaints from victims, the NHRC only investigated victims in whose cases it was 'able to credit':

That the disappearances were carried out through a procedure that began with the detention of the person and its reclusion in a safe house or remission to a reclusion centre habilitated *ex professo*, where they were subjected to constant interrogations in complete isolation, and that those responsible for the detentions were public servants who acted at the law's margin and with the utmost impunity (CNDH 2001d: 27)

This conceptualisation of human rights violations demanded proof that the victims were actually victims on the basis of the parameters imposed by the NHRC's definition. Victims whose disappearance did not meet these criteria, whose suffering was not demonstrable according to this particular legal reasoning, were ousted from the 'transitional justice' process: e.g. dissidents abducted and killed by paramilitary groups, victims illegally detained and tortured in military camps who were released years later, dissidents who were unlawfully imprisoned in psychiatric institutions.

The definition of perpetrators of past crimes was exclusively 'state public servants', ignoring the guerrilla groups that – as examined in Chapter One – also

perpetrated atrocities. According to the NHRC, the two hundred and seventy-five cases under investigation showed 'without a doubt' that:

the actions of the public servants [...] violated the human rights of those disappeared, by deviating [from] the essential objective of all democratic states of respecting its subjects' right to life and to procure the conditions that will allow them to exercise the right to a free and full development, without any limits except personal capacity, as [the] means to achieve the purpose of a dignified life, employed the state's power as an instrument to force them simply to subsist in incompatible conditions with the dignity that they were entitled to as a person, for the sole fact of being a person [sic] (CNDH 2001b: 42).

The public servants who Recommendation 26/2001 refers to were only those who 'lacked the authority' to carry out the 'illegal deprivation of liberty' of two hundred and seventy-five persons – as if there were state agents who were authorised illegally to deprive people of liberty (CNDH 2001b: 28; CNDH 2001d: 20). These would be the perpetrators of past state crimes that the new democracy would bring to justice.

The NHRC's definition of perpetrators of past abuses led to a retributive style of 'transitional justice' being implemented because the main objective of the SPO was to investigate and prosecute *individuals* who committed forced disappearances. However, at the same time, the definition of perpetrators implied that they were officially part of a class: as members of 'public offices in the country' they were members of a *political group* (CNDH 2001b: 13). Recommendation 26/2001 even pointed out some of the political institutions in which the perpetrators – as members of a political group – worked, for example 'the Federal Security Direction, the General Attorney's Office, Mexico City's General Attorney's Office, the Police and Transit General Direction of the Department of Mexico City, the General Attorney and Justice Department of the State of Mexico, and the Mexican Army' (CNDH 2001b: 33). Additionally, the NHRC asserted that it had 'evidence' that allowed it to 'corroborate the organisation and *modus operandi* of the security forces that participated in the retention of people' (CNDH 2001b: 34). Clearly, this is an odd operation. The NHRC, *a priori*, identified

perpetrators as members of a group ('public servants'), but simultaneously it recommended that they should not be treated as members of a group, but as individuals. In other words – and the irony here is evident – the idea of prosecutions was justified over the notion of individual guilt rather than over institutional responsibility, but perpetrators had to belong to a political institution or a political group in order to be prosecuted.<sup>55</sup>

Moreover, according to the NHRC the state agents who committed forced disappearances were not the only people responsible for human rights violations. Recommendation 26/2001 included the Public Prosecutor's Office's agents who, at the time, did not investigate nor bring to court the guilty. The NHRC treated 'the public servants' who 'failed to comply with their responsibility by not carrying out an investigation to establish the fate of the persons filed as missing in the 70s' as also responsible (CNDH 2001b: 40). The NHRC reported that 'the investigations, when they were opened, were closed without any progress in the clarification [...] of [the] forced disappearances. Neither could they locate the beginning and conclusion of the procedure foreseen in the law for that type of case' (CNDH 2001b: 40). Thus, Recommendation 26/2001 concluded that:

From all the latter it is clear that the public servants who violated their obligations, in turn violating the human rights of those aggravated and their families, were, amongst others [...] the Federal Public Prosecutors Office's agents, and the federal entities where these cases were presented, who were in charge of the previous investigations aforementioned, who at the time should have exercised the powers that were conferred to them as society's representatives, did not adjust their actions [to abide by] the law, and consequently, with their respective omissions, [contravened] the principle of legality and the right of access to justice of the aggravated and their families (CNDH 2001d: 36).

Therefore, according to this reasoning, it was not only those who carried out the atrocities who were responsible for human rights violations but also those who did

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<sup>55</sup> A similar irony is explored by Scott Veitch (2001) in his study on legal amnesties in South Africa. He wrote (2001: 39), 'the applicant [of an amnesty] can neither be treated as a member of a class (because of the need for full disclosure which is dependent on the uniqueness of the case), nor not be treated as a member of a class (for the purposes of the political criteria of the offence)'.

nothing to prevent, investigate, and punish the abuses. This was significant for three reasons. First, because the NHRC had involved a particular group of bystanders in the 'transitional justice' process: the Public Prosecutor's Office's agents who failed to investigate the whereabouts of the disappeared. Second, because the NHRC implicitly recognised that the administrators of the PRI era were aware that these atrocities had occurred, although they had officially denied it for decades. Third, the NHRC tacitly recognised that the abuses were possible as there had been an extensive complicity network amongst public servants of different state agencies. However, responsibility attributed to this group of 'public servants' was never officially established through any specific 'transitional justice' mechanism.

#### *The historical period under investigation*

Recommendation 26/2001 set the temporary limits of the period that would be examined in the 'transitional justice' process: from 1970 to 1985. Since the NHRC only included the complaint files on forced disappearances that occurred between 1970 and early 1980, Fox's administration was reduced to investigating abuses that had occurred in those years only. This was significant because the atrocities committed during Mexico's protracted authoritarian regime had been identified as occurring mainly during this brief period of time. Moreover, the importance of this reasoning was that the atrocities perpetrated before 1970 and after 1980 – examined in Chapter One – did not achieve the status of human rights violations and so would not be counted in the 'transitional justice' process.

#### *Outlining the 'only way' to proceed*

The NHRC had classified human rights violations, the victims, the perpetrators, and the historic period that would be a part of the 'transitional justice' process (knowledge). But this classification had also established the particular mechanisms through which the Fox

administration, experts, and non-governmental human rights organisations could intervene in this process (power).

The NHRC's main recommendation was the creation of a Special Prosecutor's Office (the SPO) that would be appointed by the Republic's General Attorney (CNDH 2001a). The SPO should investigate – solely – the crimes that 'could follow from the facts' referred to in Recommendation 26/2001(CNDH 2001d: 38). Nothing else. So the SPO was 'special' because it would only investigate the two hundred and seventy-five cases of forced disappearance laid out by the NHRC. The investigation of any other type of past human rights violation was not mandated to the SPO and, therefore, would not be a part of the 'transitional justice' process.

Moreover, according to the NHRC, only if it was 'legally appropriate' should the SPO share 'in consideration of the competent judicial authorities the results' of its investigations – only in those cases in which in the SPO's opinion the suffering of the victim had legal grounds and could satisfactorily be taken before a judge (CNDH 2001d: 38). So the investigations that the NHRC carried out during eleven years were insufficient. The SPO had to validate again the evidence provided by the NHRC and only then decide, arbitrarily, whether it would take the cases before the courts. This is an illustration of Short's insight that human rights 'are not simply givens, but products of social and political creation and manipulation' (Short 2007: 858).

As in Kafka's (2009: 197) parable, 'Before the Law', victims of abuses and their relatives waited patiently for years before the NHRC because it guarded the door that appeared to lead to the Law. But, just as the door-keeper in Kafka's parable, the NHRC responded with ambiguity: perhaps they will have access, but not at this moment. The victims' only certainty was that the NHRC guarded the only door through which they

could access justice. So the victims would have to wait and go through that particular door to the Law or leave without truth or justice being realised.

In other words, if the NHRC was unable to determine the existence of forced disappearance, the victims' complaints were dismissed as providing insufficient evidence of being human rights violations cases and abandoned from the 'transitional justice' process. If the cases were dismissed, the victims found after eleven years (1990-2001) that the alleged human rights violation – forced disappearance – had never taken place (legally). But if the complaints acquired the status of being forced disappearances they had to be investigated, once again, by the SPO (from 2000 to 2006), which had to take the cases to a judge. Finally, according to Recommendation 26/2001, only in the cases in which a judge credited the offence should the Fox administration 'revise the possibility of awarding restitution' (CNDH 2001d: 38). Thus the courts should officially decide if the atrocities indeed existed – legally speaking. Only then could Fox's administration contemplate the possibility of providing compensations to victims. This is why Short claims that the study of the social construction of human rights categories – the 'social life of rights' (Short 2007) – is so relevant, because such ideas do not only exit in the sphere of language, but in practices; because these human rights categories have material effects and hence affect people (e.g. victims of past abuses) and transitional societies.

The point is that, according to the NHRC, this should be the 'only way' to face Mexico's history of abuses. Vicente Fox could have rejected this strategy, but he did not. As I examined in Chapter Three, Fox had different alternatives to face the past (a truth commission, a policy of oblivion), but he presented the SPO as the only lawful approach to address past human rights violations during his administration. By facing the past via the SPO, Fox sought to draw a thick line between his democratic

administration and the previous authoritarian era. The problem was that the SPO – the only way – had been devised by an institution of the authoritarian era.

### **Making 'transitional justice' valid**

The previous section showed how, by issuing Recommendation 26/2001, the NHRC had established the concepts that would allow the organisation and, above all, to intervene in the 'transitional justice' process. This section turns to the analysis of how Recommendation 26/2001 served another political purpose: it validated, officially and publicly, the 'transitional justice' process; it legitimised – as an incontrovertible truth – that which could be considered to be the only correct way to come to terms with the past.

#### *A process in accordance with the law*

The NHRC legitimised its recommendations emphasising its legality: i.e., the validity of the arguments carefully constructed by the NHRC was predicated upon their legal authority, on being legally correct. In doing so, the NHRC elaborated a peculiar syllogism: the Ombudsman carried out his investigations according to the law, which is apolitical, neutral, and objective; the NHRC's recommendations are based on such investigations; therefore, the NHRC's recommendations are apolitical, neutral, objective and hence legitimate. This is 'the immense advantage of law', as Latour (2010: X) suggests, that people who talk on its behalf – such as Mexico's Ombudsman – 'never have any doubt that their way of arguing is entirely specific; that there is a clear distinction, inside this way of arguing, between what is true and what is false'. This mattered in Mexico's 'transitional justice' process as some of the NHRC's recommendations could have been controversial or questionable, but they were legal and, therefore, they were right: e.g. the arbitrary decision to reduce the investigations to

cases of forced disappearances that occurred between 1970 and 1985. The NHRC did not include, for instance, the case of the killing of students in 1968.

The NHRC's first step to show that Recommendation 26/2001's regulations were adequate was to highlight the legal quality of its evidence, its investigation methodology, and its legal analysis. According to the Ombudsman, Recommendation 26/2001 was valid as the procedure employed to collect and analyse the evidence was correct according to the law – 'in accordance to the current legal framework' in Mexico (CNDH 2001d: 4). Moreover, the NHRC claimed that it made 'its best effort to gather evidence that allowed [it] to achieve historical truth and corroborate facts that stem from the complaints filed [by the victims] regarding forced disappearance' (CNDH 2001d: 20). It was never clear, however, what the NHRC meant by 'historical truth'.

The NHRC emphasised that it carried out 'a logical–legal analysis' of the evidence in order to determine if human rights violations were committed at all in the cases under investigation. Its reasoning was not just legal but 'logical' – neutral, natural, methodical, rational, and universal (Bourdieu 1986: 5).<sup>56</sup> But the 'logical–legal analysis' consisted of a very particular operation. After 'integrating the files' the NHRC compiled the 'declarations or testimonies of the people who had adequate information [about] the investigation of forced disappearances' (CNDH 2001d: 26). However, only some relatives of the victims had the opportunity to narrate their stories of suffering – those who did not have 'adequate information', according to the NHRC's criteria, were

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<sup>56</sup> Recommendation 26/2001 came to be valid because the NHRC followed a 'logical' and 'legal' 'method'. By arguing that its method was following legal standards, the NHRC sought to present its method as 'a system of norms and practices that appears to be founded, a priori, on the equity of its principles, the coherence of its formulations and the rigour of its applications, that is, as if it were participating from the positive logic of science and of the normative logic of morality' (Bourdieu 1986: 4). By arguing that its method was logical, the NHRC was echoing the arguments deployed to justify the objectivity of natural sciences. So the NHRC legal methodology, like modern natural sciences, would appear to be 'objective rather than subjective accounts [...]'. And the objective character of the NHRC's analysis, like the objective character of the natural sciences, was 'supposed to be further secured by a method that disciplines practitioners to set aside their passions and interests in the making of scientific knowledge' (Shapin 1998: 162).



simply ignored. As a result, the NHRC gathered – in eleven years – ‘five hundred and forty-four testimonies of three hundred and thirty-four people’ (CNDH 2001d: 34).

But these five hundred and forty-four depositions of the victims’ relatives were not evidence that was valid or truthful in itself. Victim testimonies had to be evaluated and approved by the Ombudsman and his agents. This is significant because, as Bourdieu (1986: 10) suggests, ‘the judicial facts are the result of a juridical construction (and not otherwise) [...] a real retranslation of every aspect of an “affaire” is necessary [...] in order to constitute an object of controversy as a case’. But in Mexico this process of ‘rettranslation’ was visibly more complex: in order to ‘certify’ victims’ testimonies, the NHRC ‘linked’ them to ‘other public and private documents, resulting [in] the ocular inspections, expert opinions, and presumptions’ (CNDH 2001d: 17). So the testimonies became acceptable only if human rights officials were able to ‘link’ them to other types of factual and documental evidence. Therefore, in Mexico, as Moon (2008: 84) suggests about other transitional justice efforts, testimonies ‘are not considered as individual and valuable truth claims in their unique formulation’. Testimonies are in fact constrained by transitional mechanisms’ prior assumptions about what counts as relevant to their investigations and what is considered peripheral (Moon 2008: 84).

However, this process of ‘validation’ was not always effective for two reasons. First, some of the victims’ testimonies could not be verified against official documents for the simple reason that there were not always official documents to verify them against. To justify this absence of documents, the NHRC offered a flimsy explanation: ‘forced disappearance is regularly characterised by its authors [not leaving] evidence of their action’ (CNDH 2001d: 21). Second, the NHRC determined that not all testimonies would be admitted as the NHRC ‘preferred [...] those documents, data or public records

of full value' (CNDH 2001d: 17). Thus, victims' testimonies might have been true, but not necessarily right according to the Ombudsman's criteria. Only the official documents selected – *ad arbitrium* – by the NHRC could offer 'elements of sufficient conviction' to determine the existence of human rights violations (CNDH 2001d: 17).

To legitimate this legal reasoning, the NHRC invoked the authority of the First Chamber of the Nation's Supreme Court of Justice. According to the Supreme Court (Semanario Judicial de la Federación, Primera Sala, Quinta Época, Tomo CXV cited by CNDH 2001d):

The testimony is the most precise information instrument that the prosecutor [*juzgador*] has, but the most dangerous at the same time, not so much due to how much the witness deliberately lies relative to a fact, but because he/she evoke[s] incorrectly the perceived act, in other words, the experience of an event that has been seen or heard.

Thus, by invoking the Supreme Court, the NHRC gave itself legal authority to evaluate, validate, or ignore the depositions of victims' relatives. The 'logical-legal analysis' used by Dr. Soberanes to evaluate testimonies was not only legally correct (rational, neutral, natural, lawful) but officially authorised by the highest judicial body in the country.

This complex operation to legitimate, in the name of the law, Recommendation 26/2001 can be summarised as follows. The complaints of the victims' relatives were analysed by the NHRC. Such analysis was crucial as it determined if the complaints could acquire the status of human rights violations. To carry out its analysis, the NHRC contacted three hundred and thirty-four victims and collected five hundred and forty-four testimonies. However, the victims' tales of suffering had no legal value in themselves – hence the collection of testimonies was a farce. Yet, by collecting testimonies, the NHRC was able to claim that victims participated and supported the Ombudsman's recommendations. Victims' testimonies only counted when they could be verified against official documents guarded in state files – for example, in the

archives of the extinct secret police where the NHRC found 'thirteen thousand and forty-seven documents' (CNDH 2001d: 26). However, as forced disappearance leaves no traces, most of the documents provided no evidence of forced disappearance at all. What this means is that the NHRC collected victims' testimonies for a logical-legal analysis all the while knowing that these testimonies would be considered inadmissible by such logical-legal analysis.

The disturbing effect of this 'logical-legal' process was that victims' 'voices' only existed when the NHRC authenticated them through the 'voice' of the perpetrators narrated in the official documents of the authoritarian era. So, only the 'voice' of the official documents of the authoritarian regime could maintain alive the 'voice' of the victims in the democratic regime. In this process, a state institution established during the authoritarian era (i.e. the NHRC) translated victims' claims into the juridical language of human rights (i.e. forced disappearance).

#### *The historical narrative*

The NHRC justified Mexico's 'transitional justice' process through a particular historical narrative. The NHRC's narrative limited the occurrence of atrocities during Mexico's authoritarian regime to less than fifteen years – from 1970 to 1985 – in order to make the idea of political violence and repression coincide with the cases investigated by the Ombudsman. Moreover, as the NHRC sought to impose a retributive mechanism (i.e. the SPO), its narrative about what happened in the PRI era was only about individual offenders who committed specific crimes (the illegal abduction of dissidents). In doing so, the NHRC excluded: a) other accounts of the past: e.g. Mexico's history of abuses before 1970 and after 1985; b) other kind of abuses: e.g. torture, killing, severe ill treatment; c) collectivities and bystanders: individuals who did not perpetrate crimes but 'did contribute to harm' (Ainley 2011: 409). As a result, this

account sought to portray the authoritarian regime as a brief period of time in which few 'bad apples' disappeared dissidents in isolated fashion. This is certainly relevant because, as Moon (2008: 70) has demonstrated, 'the effect of historicizing such events and actions is not simply an act of objective "cataloguing": it is political. It is to invoke the spectre of a particular history in order to justify the investigation of certain events over others in order to legitimize particular narratives over others.'

Recommendation 26/2001 includes a section on the 'background and environment' of human rights violations during the authoritarian era (CNDH 2001d: 6-13). Subtly abandoning the land of the law to enter the field of history, the NHRC warned that it was 'necessary' to refer to 'the political, social and economic circumstances' that 'generated' forced disappearances (CNDH 2001d: 6). According to the NHRC, the history of political violence in Mexico stemmed from structural national and international causes that only began at the end of the 1960s and ended definitively at the beginning of the 1980s. In the domestic sphere, according to the Ombudsman, political violence was the result of 'grave economic circumstances, high unemployment, agrarian problems, criminality, as well as external influences' (CNDH 2001d: 7). This structural cause led Mexican 'activists' – the victims – to react 'to the policies of the government in turn' – the perpetrators (CNDH 2001d: 7).

Although the NHRC officially acknowledged the socioeconomic pressures that gradually led to violence, its final recommendations presented 'transitional justice' as a process related to the violation of civil and political rights. This is relevant as this move echoed the transitional justice ideas that emerged in the 1990s, as examined in Chapter Two – rather than coming to terms with historical complexities, 'transitional justice' was presented as related only to political problems that were legal, and short term in

nature (fifteen years) in order to deal with them specifically during the transitional period.

But political violence in Mexico, according to the Ombudsman, was also a consequence of the impact of international conflicts. Without abandoning the formality of legal language, the NHRC explains the international context which allowed the occurrence of atrocities in Mexico – the explanation is so bizarre that it is worth quoting at length:

The journey from bipolarity to multipolarity, stemming from the agreement of pacific coexistence between the two superpowers, along with all the political crisis and cultural innovations and social changes that the end of an era produces, based on the dominant centrality of two hegemonic and confronted worldviews, as well as two versions of the world, turned each into each one of both societies and its individuals, in the hard nucleus of the ideological and conceptual universe, which had its correspondence in the imposition of analytical assumptions and value perceptions which arrived, at the ideological extreme, to become petitions of principle with which the intellectual and scientific world became official. In both extremes, the ideological field was reduced to black and white and the possible spectre of world interpretations to 'communism' and 'democracy' [considered to be the only two] possible forms of political regime (CNDH 2001d: 7).

What the NHRC meant is that past atrocity in Mexico was a direct consequence of the Cold War. Although the PRI regime committed gross violations of human rights before the 1960s and after the 1990s, the NHRC's narrative sought to justify state repression in Mexico by appealing to the war against the international communism threat. From this perspective, ideological battles between socialism and capitalism were the real issue. Although the influence of international actors was mentioned, at least tangentially, in Recommendation 26/2001, the NHRC did nothing to investigate this issue.

The NHRC's narrative can be summarised as follows. National problems and international conflicts inevitably 'detonated' the student movements in the 1960s which, in turn, produced the emergence of subversive groups in the 1970s which, in turn, caused state 'antisubversive policies'. From this perspective, there were human rights violations only from 1970 to the early 1980s, and the crime of forced disappearance was

perpetrated by few state agents against 'activists' (CNDH 2001d: 8). Certainly, this way of narrating the history of repression during the PRI era fits in with the cases investigated by the NHRC.

The NHRC also delimited the presence of two different set of actors – precisely differentiated – that participated in the political violence: the victims (the guerrilla groups that suffered from 'antissubversive policies') and the perpetrators (state security agents). This taxonomy echoed human rights discourses surrounding the concepts of victims and perpetrators in which, as Borer (2003: 1089) argues, 'the two groups tend to be talked about [by transitional justice scholars and human rights activists] as if they were two completely separate and homogeneous groups of people'. Scholars, activists, and Human Rights NGOs such as Méndez (2007), Orentlicher (1991), Zalaquett (1989), Rotberg and Thompson (2000), HRW (2003), and the ICTJ (2008) make this clear distinction between victims and offenders in transitional justice processes. However, as Borer (2003: 1091) has demonstrated, 'the differences between the two groups are not as clear-cut as human rights scholars and activists [...] tend to portray them'. The NHRC proved Borer right. Recommendation 26/2001's narrative assembled within the label of victims of human rights abuses not only those individuals who suffered from state repression, but also those who made use of violence to challenge the PRI regime. The problem with this classification is that those who suffered repression and those who made use of violence against state agents were not necessarily the same – there were victims of abuses who were not a part of guerrilla groups.

This taxonomy of victims of abuses served another political purpose: it helped the NHRC to reify the image of dissident groups as 'victims'. The NHRC was very careful in not describing any of the 'victims' as guerrilla members, or elements of armed movements who also perpetrated atrocities. Recommendation 26/2001 calls the

opponents of the regime 'activists'; and armed groups were simply labelled 'groups' or 'movements'. According to this narrative these 'groups' were actually 'important' because of their 'transforming capacity' (CNDH 2001d: 8). 'Democracy and the fight against the authoritarian regime', warns the NHRC, found in such movements 'the creators and writers of the new political and ideological truths that animated the battle during the next three decades' (CNDH 2001d: 8). Moreover, the NHRC defined the type of violence that was justifiable. The NHRC vindicated the political violence of (subversive) groups because they only 'sought the way to be heard', only tried to achieve their 'accumulated and unresolved demands' by the state (CNDH 2001d: 8). The 'activists' used violence because 'the time for endless and sterile discussions had passed and it was time to move on to facts, to action' (CNDH 2001d: 8). In contrast, the NHRC questioned the state's 'repressive policies' against 'activists': 'national security' reasons invoked by the PRI regime were not 'valid to justify the forced disappearance of persons' (CNDH 2001d: 37).

The vindication of former guerrilla members, dissident groups, and their crimes was particularly relevant in Mexico's transitional moment as the NHRC did not challenge left-wing political organisations that – as examined in Chapters One and Three – were supporting Fox's 'transitional' policies during its first year in office. In addition, Fox sought to exonerate former dissident groups in order to pay a political debt: Fox's victory was possible because it was backed by leftist political groups (formed by former dissidents) that saw in him the right candidate to overthrow the PRI regime. In the 2000 presidential election, Fox and his conservative party received almost two million votes from the left (Aguayo 2010b: 137). Moreover, this narrative helped to justify Fox's political decision to maintain the amnesty law granted to guerrilla members in 1977 (examined in Chapter One); and to concede impunity to

those dissidents who perpetrated crimes after that date. The point is that the NHRC's historical narrative sought to answer the question 'What happened then?' with reference to an understanding of contemporary politics (Veitch 2001). As Hacking (2000: 131) suggests, the past is not so fixed: 'if new kinds are selected, then the past can occur in a new world. Events in a life can now be seen as events of a new kind, a kind that may not have been conceptualized when the event was experienced or the act performed'.

*Human rights obligations of a new democracy*

The legal dispositions that gave way to Mexico's 'transitional justice' process came invested with the authority – neutrality, irrevocability, validity – of human rights language. Recommendation 26/2001 was legitimate, the Ombudsman claimed, because it had been 'carried out on the basis of legal and humanitarian premises that govern the actions of the National Human Rights Commission' (CNDH 2001d: 4). So it was lawful simply because it had been produced by the NHRC, which, detached from the field of politics, guided its actions merely on human rights principles.

Moreover, the Ombudsman presented his recommendations as ethical duties and human rights obligations that the new democratic regime had to comply with. Fox's administration had to investigate and punish the cases of forced disappearance because, according to international human rights law, 'the responsibility [of investigating past state crimes] endures with independence the changes in government over the course of time' (CNDH 2001d: 33). Paradoxically, the NHRC asked Fox's administration to comply with the human rights obligations that it never demanded from the PRI administrations that preceded it.

The NHRC also justified, in the name of human rights, its decision to classify two hundred and seventy-five complaint files as cases of forced disappearance. The Ombudsman sought to legitimise not only this peculiar classification, but also its



'logical–legal' methodology, as well as the political recommendations that resulted from there. The NHRC classified just such cases as human rights violations because the victims had suffered abuses according to 'articles 1, 5, 7, 8.1, 11.1, and 22 of the American Convention of Human Rights; 2.1, 3, 5, 7, 9, 11.1, and 13.1 of the Universal Declaration of Human Rights; I, II, VIII, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man; and 9.1 and 12.1 of the International Covenant on Civil and Political Rights' (CNDH 2001d: 37). Therefore, more than half of the cases under investigation did not have the status of being human rights violations and they were abandoned from the 'transitional justice' process because the victims' suffering did not correspond to that stipulated under international human rights norms.

#### *Making 'transitional justice' public*

A final strategy used by the NHRC to legitimise its recommendations on 'transitional justice' was to make use of the media. It leaked Recommendation 26/2001 to the press before its official presentation to president Fox on November 27, 2001. The NHRC sought to disseminate its particular way of thinking and conceptualising 'transitional justice'; it made the concepts and regulations on 'transitional justice' known – and shared – effectively by other actors participating in the process, such as non-governmental human rights organisations, activists, and experts. It sought to make the 'transitional justice' process sound far more credible and reasonable than it actually was. There was a reason for this. The NHRC's recommendations to establish a special prosecutor's office – announced in November 2001 – were unexpected. As explained in the last chapter, deliberations to establish a truth commission lasted for nearly one year, from July 2000 to April 2001. And in June 2001 Fox actually ordered the establishment of a truth commission that never materialised. By leaking its recommendations

beforehand, the NHRC sought to ease the impact of this inexplicable move from a restorative to retributive model of justice.

The NHRC's strategy worked. As Short suggests, the media is one of the main institutions that help to promote misinformation and so take a leading role in the construction of transitional justice processes (Short 2007: 861). Thus, Recommendation 26/2001 came as no surprise: its content had been widely circulated beforehand, acquiring a powerful sense of familiarity and inevitability before it was officially presented.

The NHRC leaked Recommendation 26/2001 twice. As it sought for the information to be credible mainly among left-wing political groups who demanded an investigation into past crimes, on November 4, 2001, the NHRC leaked the document to two newspapers identified with leftist political movements: *La Jornada* and *Proceso magazine* (Ballinas 2001; Cabildo and Monge 2001; Granados Chapa 2001). Then, on November 26, a day before the report's launch, the document was leaked to different newspapers (Granados Chapa 2001). Consequently, the Ombudsman was 'severely criticised [...] by senators for the information leaked to several media' (Turiati 2001). However, Dr. Soberanes denied the accusations and was never investigated.

### **'It's useless': making 'transitional justice' acceptable to perpetrators**

So far, I have offered an account of the arguments advanced by Mexico's ombudsman to justify the particular kind of 'transitional justice' (ideas and practices) that would be established during Fox's administration. However, the validity of Recommendation 26/2001 also resulted from the fact that, in itself, it had no immediate legal effects. As I suggested in the introduction of this thesis, the dilemma that Fox's administration faced with relation to human rights violations committed during the PRI regime was that of facing the perpetrators – who still retain power – without disturbing the fragile political

stability of the new regime (i.e. why did Fox venture to establish a 'transitional justice' process that would put at risk the new regime's stability, and why did the authoritarian elite allow it?). Recommendation 26/2001 served, at least temporarily, to sort out this dilemma because it was not legally binding, and because it did not reveal the name of those guilty of the abuses. Therefore, it actually had no concrete effect that would risk the impunity that the perpetrators of the abuses from the PRI era enjoyed. Recommendation 26/2001 became valid because it was innocuous.

*NHRC's recommendations: Legally not binding*

During the 1990s, the enforcement of several of the NHRC's recommendations had been questioned by organisations such as Human Rights Watch as selective and uneven at different times concerning different situations (HRW 2008). John M. Ackerman's (2007: 161) study on the NHRC demonstrates that a 'significant number' of recommendations were rejected by the government, while others were accepted but never instituted. According to HRW, the reason for the NHRC's limited impact is that 'it has routinely failed to press state institutions to remedy the abuses it has documented, to promote reforms needed to prevent those abuses, to challenge abusive laws, policies, and practices that contradict international human rights standards, to disclose and disseminate information it has collected on human rights problems' (HRW 2008). This can be understood because, as Wilson suggests, state human rights institutions in many Latin American countries have been established to 'deflect responsibility and criticism away from governments' (Wilson 2001: 28). Therefore, this pattern contrasts with the rapid way in which Recommendation 26/2001 was accepted and put into practice by Fox's administration – both steps during the same ceremony. So, why was the Recommendation so rapidly accepted by the government?

The NHRC's recommendations urged president Fox to create the SPO. But this recommendation, whose legal foundations had been carefully elaborated by the NHRC, was not legally binding. In spite of being inspired by international human rights principles (the right to truth and the right to see justice done), the recommendation was just that: a recommendation. Hence the new and democratic Fox administration could accept or not the recommendations and eventually carry them out or not.

Therefore, at the time it was publicly presented – during Fox's first year in office – Recommendation 26/2001 was just a possibility. President Fox could simply have ignored it. Had Fox ignored the NHRC's recommendations, different transitional justice strategies could have been implemented (e.g. a truth commission, a lustration system).

This is relevant because, by not being legally binding, some of these recommendations were actually avoided by Fox's administration and thus never materialised. For example, the NHRC included in the category of those liable not merely those officials who perpetrated atrocities, but agents of the public prosecutor's office who knew about the abuses and did nothing to prosecute those guilty. But Fox's administration never contemplated any mechanism by which the complicity of this group in the commission of gross violations of human rights might be investigated.

#### *Human rights abuses that were not yet crimes*

José Luis Soberanes presented the Recommendation 26/2001 (CNDH 2001b) as a result of an arduous 'logical-legal analysis' that allowed the NHRC to determine 'without a doubt' that public servants had 'violated the human rights of those disappeared' in two hundred and seventy-five cases under investigation (CNDH 2001d: 37). According to the law, the Ombudsman had collected, evaluated, and classified the available evidence in each case. Also, he proved 'reliably' that the victims had been detained 'illegally and unconstitutionally' by public servants (CNDH 2001d: 20). Moreover, he demonstrated

that in all the cases there had been violations of the following rights (stipulated in the Mexican Constitution and international human rights norms): 'personal rights and adequate defence', and 'equality before the law, circulation and residence, liberty, judicial security, justice, protection against arbitrary detention, due process, [...] the integrity of the person' (CNDH 2001b: 43).

However, the NHRC was not a legally authorised institution that could determine if forced disappearances constituted a crime, nor could it establish if those liable were guilty. Legally speaking, the NHRC was not empowered to determine if a fact is a crime, given that by law this is the responsibility exclusively of agents of the public prosecutors' office and the courts. So the 'logical–legal analysis' that the NHRC used to gather and value evidence, and the legal and historic arguments that allowed it to conclude that human rights violations had existed, had actually been a toothless exercise. Those liable would become guilty – and the abuses would become crimes – when the public prosecutor's office and the court so determined.

The irony here is obvious. The NHRC claimed that its reasoning was correct and legal, but in the end stated that it was toothless as it had no power to pursue legal action against perpetrators. The importance of this curious operation is that the NHRC's investigations and recommendations, in themselves, did not threaten the perpetrator's impunity (United Nations 1993).<sup>57</sup>

### *Protecting the guilty*

The NHRC confirmed the existence of forced disappearance in just few cases because it could 'have certainty' that the victims 'were detained by public servants who exceeded

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<sup>57</sup> This, however, is not a special characteristic of Mexico's ombudsman. National human rights commissions in the world are not judicial bodies, so they have only a 'quasi-judisdictional' competence. They can draw the attention of a given government 'to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations'. So these institutions can determine the existence of human rights violations, but they can't determine if such violations are in fact crimes (United Nations 1993).

their functions' in those cases only (CNDH 2001d: 28). The NHRC proved that these state agents 'lacked the faculties to make such an illegal deprivation of liberty' (CNDH 2001d: 28). Therefore, the NHRC not only knew the names of the two hundred and seventy-five victims of forced disappearance, but the name and post of the perpetrators.

However, once again, Soberanes stated that the NHRC was not legally authorised to pronounce on those alleged to be guilty. Legally speaking, Soberanes could not establish whether 'public servants' who acted illegally were liable. 'In any case', the NHRC adverted, 'it is [the] responsibility of the Public Prosecutor's Office and the judges to determine penal responsibility' (CNDH 2001b: 28).

But the subject is far more complex (and disturbing). As observed above, the NHRC was legally unable to determine officially whether perpetrators of past human rights abuses were liable for punishment, yet it was not prevented from naming their names. During the ceremony at The Black Palace, once he presented the Recommendation 26/2001, José Luis Soberanes gave President Fox a closed envelope containing the names of seventy-four alleged perpetrators of past crimes (Venegas and Ballinas 2001). However, Soberanes refused to make the names of those allegedly liable known. Soberanes did not name names arguing that he was not 'legally authorized to do so' on the grounds that those named were only alleged to be suspects and revealing their names would be against their good name and reputation (Reforma 2001a). So Recommendation 26/2001 establishes that:

Attending to the formerly exposed, the National Human Rights Commission considered that it is in no position to reveal nor make known the names of the public servants involved in the facts, considering that their probable liability has not been established and in consequence could incur a violation of the rights to [...] legal security foreseen in articles 14 and 16 of our Republic's General Constitution, especially when the enjoyment of these rights can only be limited via a trial followed by the courts previously established, in which the essential formalities of procedure are complied with and in accordance [with] the laws issued before the fact (CNDH 2001b: 15).

Therefore, the institution that failed to protect the victims of human rights abuses for eleven years was now concerned with the perpetrators' respectability. The best account of this kind of irony is given by Cohen (1995: 22): 'justice, whether justified as retribution or just deserts, individual or general deterrence [...] must be done and seen to be done by giving the accused all the benefits of due process and legality that they never allowed their victims'.

Concealing the names of those found guilty contrasted with the standard method followed by the NHRC as it 'always makes the names of alleged perpetrators of human rights abuses public' (Acosta and Ennelin 2006: 101). According to the law, the NHRC was mandated to give the names of the alleged guilty in public without this giving rise to any liability (DOF 1992). Thus, the questions remain: why did Soberanes not comply? How could he seek to protect the rules he breaks? Was it possible for an ombudsman to commit human rights violations in the name of human rights? Perhaps, the reason for this is given by Bourdieu (1986: 8): 'jurists [...] have the power to exploit the polysemy and ambiguity of juridical forms by [...] not applying a law which, literally understood, should be applied' or by 'applying a law which should not be applied'.

To justify his unusual – and unlawful – decision to conceal the name of the alleged perpetrators of past abuses, Soberanes used human rights talk. He invoked article eleven of the American Convention on Human Rights, which establishes that 'everyone has the right to have his honour respected and his dignity recognized' (OAS 1969). According to this reasoning, Soberanes could not reveal the names of the perpetrators of atrocities because by doing so he would have violated their dignity. Therefore, another irony is evident here. By keeping secret the name of the perpetrators, the NHRC was protecting their dignity and thus respecting human rights norms, but was

acting illegally – bypassing its own legal mandate. Beyond this irony, this operation was politically significant as it avoided exposing and shaming those perpetrators reincorporated in the new regime.

Hence Recommendation 26/2001 did not threaten the impunity of the perpetrators of atrocities. This is how the distinguished human rights activist, Rosario Ibarra – who founded the Committee Pro-Defence of Prisoners, Persecuted, Disappeared, and Politically Exiled of Mexico in 1977, after the disappearance of her son in 1975 – interpreted this event: 'What kind of a report is it if it does not have the names of those responsible or the whereabouts of the disappeared?' (Grayson 2001). To put it simply, Rosario concluded, 'It's useless' (Grayson 2001). This is what Moon means in her description of the appeals made by Argentina's mothers of the disappeared, when she claims that the state in transitional societies often privileges 'certain types of truth – who died, how many, and how', which sometimes displaces, for the victims, more important truths such as 'who killed them?' (Moon 2012: 194).

### **Social, political, and material effects**

President Fox accepted the NHRC's report and put into effect the majority of its recommendations (the way in which they were implemented is the subject of Chapter Five). Contrary to what Rosario Ibarra argued, Recommendation 26/2001 was not that 'useless' after all. This section examines the most significant outcomes of this particular way of problematising, conceptualising, and organising Mexico's process of 'transitional justice'. I have already hinted at a few of these effects throughout the chapter; here I seek to examine them in further detail.

#### *The (authoritarian) lineage of human rights categories*

In her study on women before the Truth and Reconciliation Commission in South Africa, Fiona C. Ross (2003) addresses 'the history' of specific 'categories' that emerge



in transitional justice moments. In South Africa, Ross (2003: 25) explains, 'women [...] was a category with a particular history in the Commission's work', which 'emerged after specific interventions: patterns in testimonies given before public hearings [...] and interventions by a variety of social specialists'. 'Such interventions', Ross (2003: 25) claims, 'succeeded in drawing attention to particular forms of violation [...] while eluding others.' In the case of Mexico, Recommendation 26/2001 also presented a series of transitional justice categories 'with a history', which resulted from the intervention of non-governmental human rights organisations that presented complaints before the NHRC, as well as from a decade of the mediation of NHRC agents who were experts in human rights but part of the authoritarian bureaucracy at the same time. The outcome of such interventions was to produce particular categories of human rights abuses, victims, and perpetrators, while excluding others from Mexico's 'transitional justice' process, as I explain in what follows.

The Special Programme on Alleged Disappearances, which led to Recommendation 26/2001, constituted the first filter through which victims and perpetrators were excluded from the process. The victims of past abuses who did not file a complaint before the NHRC between 1990 and 2000 thus appeared never to have existed. There were numerous reasons why the victims or their relatives could have not gone before the NHRC. First, there was the problem of the NHRC's historical context. The Special Programme on Alleged Disappearances began shortly after the NHRC was created by presidential decree in 1990. At that time, the NHRC was a new institution with no reputation, whose programmes (such as the one on 'alleged disappearances') began to be known by Mexican people. Not all the victims of abuses knew or trusted an institution recently created by the authoritarian regime.

Besides the problem of the NHRC's legitimacy, there was a geographical problem. The complaints about abuses were not necessarily filed by the victims' relatives, but by various human rights organisations that represented them (CNDH 2001d: 1). The headquarters of the NHRC are in Mexico City, as are most of the non-governmental human rights organisations. However, there were victims of abuses throughout the entire country as the repression of dissidents took place not only in Mexico City, but in other cities. As explained in Chapter One, the guerrilla was not only urban, but rural: for example, out of the five hundred and thirty-two cases under investigation by the NHRC, three hundred and eight were alleged to have taken place in rural areas (CNDH 2001d: 1). Therefore, the victims' relatives who did not have the means to access the NGO network in Mexico City or the NHRC directly had less chance of being heard.

Another problem was related to the slow and disappointing development of the Special Programme on Alleged Disappearances. Even if victims of abuses, their relatives, or non-governmental human rights organisations might have been reticent in going to the NHRC in the beginning, perhaps they would have eventually done so afterwards had there been some significant progress in the investigations. But that was not the case. The investigations of the NHRC stalled for a decade. Thus, it is very unlikely that the victims' relatives or non-governmental human rights organisations decided to go to the NHRC to file a complaint about atrocities committed during the previous regime when the investigations had not produced any results in years.

But there is a darker side of this story of how human rights categories came into being. As mentioned before, the NHRC had been created by President Carlos Salinas in order to legitimise his administration before the international community (Covarrubias Velasco 1999; Keck and Sikkink 1998; Mazza 2000). Salinas had been accused of gross

violations of human rights: e.g. he was responsible for the massacre of Zapatistas sympathisers. Thus, Salinas established the NHRC by presidential decree as an indication of his commitment to human rights. This is how Tim Padgett, *Newsweek* and *Time* correspondent in Mexico, put it: 'the Zapatista rebellion [...] wrought some of the worst carnage I've ever seen'. However, Padgett says, Salinas 'fooled us into thinking that he had modernized Mexico [...]. He charmed us into forgetting that most Mexican politics is a byzantine, Mafioso affair' (Padgett 1996). This can be explained because, as Kathryin Sikkink suggests, Salinas was 'extremely sensitive to his country's external image and to the international repercussions of human rights complaints. More than many leaders, Salinas often takes pre-emptive measures to project the image of his administration's concern with human rights' (Sikkink 1993: 434).

In this context, the victims' relatives faced a dilemma. The NHRC's special programme on disappearances was the first official investigation into the matter. It offered the victims' relatives an opportunity to learn about the whereabouts of the disappeared family members. However, by participating with the NHRC programme, they would be accepting Salinas' arrangements. If they refused to cooperate with the NHRC, the victims gave up the only chance they had to participate in an official investigation to find out the destiny of their disappeared relatives. But, at the same time, by accepting the human rights policies of the authoritarian regime, they directly contributed to increasing the legitimacy of Salinas' administration.

Moreover, during its first years of existence, the NHRC was managed by the Ministry of the Interior (Ackerman 2007: 121). The problem with this was that the Secretary of the Interior during Salinas' administration was none other than Fernando Gutiérrez Barrios – the 'professional of violence' who worked in the secret police for years and became its director between 1964 and 1970. Gutiérrez Barrios – as examined

in Chapter One – was one of the main persons accused of having been responsible for repression (Aguayo 1998: 38; Rodríguez Munguía 2008: 77). Therefore, between 1990 and 1992, the NHRC was accountable over its investigations on forced disappearances to the former director of the secret police.<sup>58</sup> So in that context it was unlikely that the victims of repression or their relatives would go to a human rights institution that depended bureaucratically on the former state agent in charge of repression. It is arguable, then, that Mexico's 'transitional justice' had actually 'begun' in the PRI era.

*Atrocities that were not counted in the process*

The victims, their relatives, and the non-governmental human rights organisations that did go before the NHRC did not have their access to the 'transitional justice' process guaranteed either. As already indicated, their complaints were not always accepted by the Special Programme on Alleged Disappearances and so were not considered by Recommendation 26/2001. The NHRC offered multiple legal excuses that denied the occurrence of abuses documented by human rights activists or rejected the victim's testimonies of suffering ('there is not enough evidence to be certain that a person in fact disappeared'; 'there are not official documents to confirm what the victims' relatives testified'; 'what victims suffered was not exactly forced disappearance, but something else'; 'this is a human right violation, but not exactly a crime'; 'this looks like forced disappearance, but the General Attorney should keep investigating' (CNDH 2001d)). So, in the end, the NHRC received complaints only about forced disappearances that had occurred between 1970 and 1980.

But the process of delimiting Mexico's 'transitional justice' to the investigation of forced disappearance was a complex operation. The NHRC had in fact demonstrated

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<sup>58</sup> In 1992, the Mexican Constitution was reformed and granted the NHRC independent standing from the Executive Branch. And, anyway, in 1993, Gutiérrez Barrios abandoned the Ministry of Interior.

the occurrence of other type of abuses, which were then bypassed. For example, Recommendation 26/2001 documented 'acts of torture', stating:

in countless number of cases, when being detained people were remitted to the installations that were at the disposition of agents of the [now] extinct Federal Direction of Security, where they were blindfolded and interrogated and forced to declare through threats, beatings, the application of electric current to their genitals, and subjected to rape and ill treatment (CNDH 2001d: 29).

Yet, in spite of the evidence, the NHRC did not recommend any type of 'transitional justice' mechanism to investigate and seek justice for these abuses.

Recommendation 26/2001 also pointed out:

It is not overlooked [...] that the *modus operandi* of the public servants [...] to carry out detentions of the disappeared began in public; however, once they interrogated the first people, and the denunciations that contributed the facts had occurred, they would afterwards, without any written warrant from the authority to support and motivate their acting, go to different addresses to detain other people (CNDH 2001d: 28).

Thus, it was clear to the NHRC that the authoritarian state consistently used a policy based on fear, which affected not only the guerrillas but also all those people who – according to the secret police – had information related to insurgent groups. Even so, the NHRC did not consider that these abuses – e.g. illegal searches, arbitrary arrest, and detention – were human rights violations, and threw them out of Mexico's 'transitional justice' process. The NHRC offered no explanation for not looking at these crimes.

Limiting 'transitional justice' to the category of forced disappearances had four main outcomes. First, it wiped out from the 'transitional justice' process other types of human rights violations perpetrated by state officials during the PRI era. This is relevant as it reinforced the exclusion of victims whose cases were not to be addressed by any 'transitional justice' mechanism. As a result perpetrators who were not involved in the disappearance of dissidents but participated in the commission of other abuses were not identified. For these criminals there would never be punishment.

Second, it attempted to frame the way in which Mexican people understood what occurred during the authoritarian past. Forced disappearance was a regular state practice mainly during the 1970s. However, the use of political violence began before 1970, and ended after 1980, the temporary limits delimited by the NHRC. As Chapter One of this thesis shows, Mexico's authoritarian regime employed political violence between the 1940s and the 1990s. That chapter provides evidence of state violence that occurred as early as 1946 (the killing of twenty-six student protestors), and as late as 1994 (the massacre of Zapatista sympathisers). However, the occurrence of atrocities between 1940 and 1970 and between 1980 and 1994 was not acknowledged by the NHRC, and was thus ignored in the 'transitional justice' process.

Third, forced disappearance affected mainly members of guerrilla groups, but the survival of the authoritarian regime was made possible by a complex repressive machine that affected other segments of the population. Aguayo (1998) demonstrated that the PRI administrations were characterised by the 'ease with which they [used] force'. The authoritarian state agents intimidated, tortured, repressed, and assassinated university students, journalists, relatives of political dissidents, members of opposition parties, members of labour organisations, and peasants unions. As shown in Chapter One, this is how it happened with the rail workers protests and the doctors' movement – repressed in 1959 and 1964 (Meyer 1991: 378). In neither of these episodes were protestors disappeared: state agents detained and tortured people who were later released (the rail workers' leaders stayed in jail until 1970). These victims of abuses never disappeared, but their suffering was excluded from the 'transitional justice' process because the NHRC decided to do so.

Finally, confining 'transitional justice' to the category of forced disappearance affected Mexican society's understanding of the country's democratic transition. For

Ortega-Ortiz (2008: 18) Mexico's transition was 'the result of multiple controversial political struggles' in which 'workers, farmers and student unions, who confronted the authoritarian state' participated. There were political parties in the transition which sought political transition through elections, but there were also social movements, mainly leftist, which made use of political violence or suffered state repression. This is important because, as Ortega-Ortiz (2008: 37) argues, Mexico did not have a 'velvet transition' as we tend to believe.<sup>59</sup> Yet the importance of examining the extended use of repression – beyond forced disappearance – that diverse social movements suffered – beyond the guerrilla – was overlooked by the NHRC.

*Representing victims' suffering*

A great deal of ingenuity is being devoted to the problem of defining 'forced disappearance' because no concept can capture a process in which the victims are illegally detained, deprived of their liberty illegally, incommunicado, illegally interrogated, possibly tortured, and assassinated – as Nigel Rodley (1999: 245) points out, 'words fail to capture reality'. No explanation makes sense. This problem of definition is better examined by Cohen (2005: 105):

The phenomenon of 'disappearances' takes its very definition from the government's ability to deny that it happened. The victim has no legal corpus or physical body; there is no evidence to prosecute, not even a sign of a crime [...]. For a disappearance to be a disappearance, it has to be denied [...]. *Desaparecidos*, 'the disappeared', were people who would be [...] 'absent forever' [...]. Officially they were neither living nor dead.

Nevertheless, Recommendation 26/2001 echoed the way in which different human rights authorities – activists, experts, members of transnational organisations – have built the most appropriate definition to capture the issue of forced disappearance in

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<sup>59</sup> As examined in Chapter One, the idea of 'velvet transition' has been widely used by political actors and journalists to describe Mexico's transition toward democracy. See, for instance, Carmen Aristegui's interview with Manuel Espino in Carmen Aristegui and Ricardo Trabulsi (2009: 127).

the past thirty years.<sup>60</sup> Therefore, the way in which the NHRC defined and classified 'forced disappearance' was not only legally correct, but in line with international human rights norms on the matter (OAS 2012; OUNHCHR 2006).

As a result, the suffering and experiences of harm of a particular group of victims – *los desaparecidos* – came to be a legal category that required investigation, analysis and justice. But this particular definition was also significant because of the suffering it was unable to represent. Forced disappearance, Rodley (1999: 248) argues, is a 'ghoulish process', but 'it is in fact just that: a process, with various phases'. According to the language of human rights, the suffering of a victim in each of these phases is codified in a right – the right to life, to be free of torture, to the protection of inhumane, cruel and degrading treatment, to personal freedom, to legal personality, and to access to justice (Perez Solla 2006: Chapter Two). The importance of this legal codification lies in it defining suffering only as the use of violence on the victims' bodies. Therefore, by limiting 'transitional justice' to the category of forced disappearance, the NHRC restricted our understanding of suffering in the authoritarian era to the mere use of physical violence on a particular group of people.

The suffering ignored by the legal language of human rights – whose emphasis is placed on physical violence – was never counted in the 'transitional justice' process. That is what Ross (2003: 12) meant when she claimed that 'using a notion of "even-handedness" that presumed that "violation" necessarily produced "victims"', transitional justice mechanisms strip away context and 'the effects of power by

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<sup>60</sup> The debate to define forced disappearance began in 1978, but the United Nations General Assembly only adopted the Disappearances Convention in 2006. Kramer and Weissbrodt (1981) give a detailed account of the intervention and political negotiations between human rights activists, state agents, and human rights experts who sought to define and classify forced disappearance at the United Nations Commission on Human Rights in 1980. Frey (2009) describes how forced disappearance was defined from 1978 to 2006.



condensing suffering to its traces on the body'. This is relevant because, as Borer (2003: 1092) argues in relation to South Africa's TRC:

The decision of the Commission to concentrate only on violations committed as specific acts, resulting in severe physical and or mental injury in the course of past political conflicts, was controversial and often unpopular. It meant that victims of [...] laws passed by the apartheid government, or of the effects of those laws including hunger, poverty and the lack of basic health care, would not be deemed victims according [to] the TRC.

My intention is not to undermine the suffering of the disappeared or of those who suffered the regime's political violence. My point is simply this: by limiting 'transitional justice' to the category of forced disappearance, the NHRC highlighted the physical suffering of certain dissidents, but obscured the experiences of relatives and kin. For instance, it overlooks how the phenomenon of the disappeared produced separated and impoverished families. It also ignores the fact that the disappearance of men affected women directly, who found themselves in a disadvantaged situation.<sup>61</sup>

A final effect of defining suffering as the use of violence on the victims' bodies was that only the most dramatic cases of abuses were reported, which were not necessarily the most widespread. For instance, Chapter One of this thesis shows how the authoritarian system intimidated and oppressed daily the opponents of the regime with measures that infused fear, without recurring to physical violence or grave human rights violations: threats of being fired, manipulation of information, phone taps, and death threats.

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<sup>61</sup> It is not the main purpose of this thesis to analyse the transitional justice process in Mexico from a gender perspective, but it is important to acknowledge how ignoring the suffering of the women who were related to the disappeared determined their position in the transitional justice process. The women would talk as mothers, daughters, or wives of the victims, but never presented themselves as victims. Two widely known cases in Mexico – and internationally – that exemplify this are those of Rosario Ibarra and Tita Radilla. The first speaks as the mother of Jesús Piedra, the second as the daughter of Rosendo Radilla. Jesús Piedra and Rosendo Radilla disappeared in the 1970s. I will analyse Tita Radilla's case in the Conclusions to this thesis.

*Perpetrators, responsibility, and punishment*

Recommendation 26/2001 established, officially, a retributive justice process, whose main purpose was the punishment of perpetrators. However, as I argued earlier in this chapter, Recommendation 26/2001 allowed for many crimes to simply cease being crimes: all those that were not catalogued as forced disappearances between 1970 and 1980. In doing this the recommendation ensured that the perpetrators of other types of human rights violations – or other unclassified abuses – would never be investigated, prosecuted, or punished. The political effect of this measure was to allow the perpetrators to be reintegrated within the new democratic regime: as must perpetrators were not prosecuted, exposed or dismissed, they simply retained their posts as if nothing had happened. By not risking the impunity that most perpetrators enjoyed, Fox managed to maintain the political stability of Mexico's incipient democracy. Moreover, as I mentioned in the previous section, by avoiding the investigation and prosecution of human rights violations perpetrated by dissidents, the NHRC decriminalised the acts of those who used political violence to oppose the former authoritarian system.

As the NHRC placed forced disappearance into the category of being a human rights abuse, it implied that forced disappearances were perpetrated by state agents who acted illegally. This was significant because it left aside those perpetrators of forced disappearance who were working for the state, but without being a part of the formal state structure: members of paramilitary groups.

Finally, another effect of limiting the 'transitional justice' process to forced disappearances was that of obstructing the assertion of responsibility. As forced disappearance consists of a process with different phases, it is difficult to prove individual liability. Rodley (1999: 248) describes forced disappearance as a process – 'the initial capture, the taking to a place of detention, possible removal from place to place of detention, possible interrogation during detention, final removal from the place

of detention and eventual disposal of the body, the person having been deprived of life at some point in the process' – in which a great number of perpetrators are involved. But those involved in one phase do not necessarily know about the other phases or those involved. So the concept of forced disappearance used by the NHRC did not distinguish between individuals who perpetrated only one crime and those whose responsibility was to order the commission of such acts. This is why Ainley challenges retributivists' assumptions on the allocation of responsibility for past abuses via retributive mechanisms (e.g. the SPO). According to retributivists such as Méndez (1997b) and Zalaquett (1989), as human rights abuses are committed by identifiable offenders, culpability must be allocated to those individuals found guilty of perpetrating such offenses. However, as Ainley claims, responsibility for past state crimes 'cannot be parcelled out neatly to the direct perpetrators of harm [...]. Assigning responsibility for atrocity is extremely complicated given the layers of culpability involved' (Ainley 2011: 411). This insight is appropriate to the Mexican case. Therefore, another irony here is evident: the same institution (the NHRC) that established a retributive style of 'transitional justice', whose purpose was that of prosecuting individual perpetrators, determined as well a category of crime – forced disappearance – which hindered the identification of individual responsibility and thus precluded justice.

## **Conclusions**

This chapter has sought to answer the second research question that framed this thesis: how was the 'transitional justice' process in Mexico constructed, and what were the implications of this construction? To answer this question, this chapter examined how the NHRC's Recommendation 26/2001 provided the organising concepts that would govern 'transitional justice' mechanisms during Fox's administration (knowledge). In doing so, the Recommendation outlined and justified the institutions and actors that, in

the new regime, were allowed to intervene in the process – all in the name of human rights.

Thus, this chapter helps us to understand how certain human rights categories (e.g. forced disappearance) were deployed by Mexico's 'transitional justice' process rather than others; how such categories emerged through a sophisticated 'logical-legal' analysis that was everything but neutral, natural, methodical, apolitical or even rational; the political purposes this particular construction served; and how once they emerged, these categories had political, material and social effects on people and the country's transitional moment.

Also, this chapter showed that Mexico's 'transitional justice' process was devised by an institution – the NHRC – associated with the PRI regime which was consequent upon the interpretation of human rights categories which, whilst superficially seeming to serve the victims were in fact constructed in such a way as to actually maintain the impunity enjoyed by perpetrators.

The Recommendation and its human rights regulations had diverse effects, not only within Fox's administration, but in Mexico's democratisation. The NHRC specified that only the forced disappearance of two hundred and seventy-five persons would be counted in the 'transitional justice' process. Other types of abuses committed during the PRI era were ignored and never treated as abuses. As a result, many perpetrators of abuse would never face justice. Moreover, by specifying that forced disappearance would be the only human rights abuse to be addressed by 'transitional justice', a conceptualisation based on the use of physical violence on the victims' bodies, the Recommendation bypassed other types of suffering and activities endured by Mexican people during the authoritarian era.

But this chapter also sought to examine further the first research question explored in the previous chapter: why did Fox venture to establish a 'transitional justice' process that would put at risk the new regime's stability, and why did the authoritarian elite allow it? This chapter showed that the political significance of Recommendation 26/2001 was that it allowed the Fox administration to overcome the dilemma it faced during the transition: how to confront without risk the perpetrators of abuses during the past regime. Recommendation 26/2001 did not threaten the impunity of the perpetrators of atrocities (e.g. it was not legally binding, it did not revealed the name of those guilty) and simultaneously and paradoxically appeared to addressing the demands of those attempting to confront the perpetrators of abuses, while defining the 'transitional justice' mechanisms that would in fact further endorse impunity.

## **Chapter Five**

### **The SPO's Retributive Goals: *A de facto Amnesty***

Chapters Three and Four of my thesis examined the factors that shaped Mexico's 'transitional justice'. Chapter Three sought to answer the first key question that guides this research: why did Fox venture to establish a 'transitional justice' process that would put at risk the new regime's stability, and why did the authoritarian elite allow it? Chapter Four sought to answer the second key research question posed in the introduction to this thesis: how was the 'transitional justice' process constructed, and how did its particular construction condition its performance?

In this chapter the discussion turns to the analysis of the development and workings of 'transitional justice' mechanisms and its consequences for Mexico's democratic transition. Thus if Chapters Three and Four examined the factors that led to the creation of, and gave shape to, specific 'transitional justice' mechanisms, this last chapter analyses how those same factors compromised their evolution, performance and results – the relationship between the way in which 'transitional justice' was constructed and its policing. It seeks to answer the third and last research question framing this thesis: how, and to what extent, did 'transitional justice' affect the process of democratisation?

In addressing this question, and in adherence to my methodological and theoretical framework, this chapter demonstrates three things. First, it shows how the different factors that allowed the establishment of a retributive justice mechanism to deal with the past led to its results – i.e. impunity, absence of punishment. Far from being 'a very appropriate response to impunity', the Mexican Solution granted a *de facto* amnesty to perpetrators of past abuses. The Mexican case captures what Cohen

terms 'policing the past': the way in which states (such as Mexico) control the past through transitional justice strategies (e.g. a retributive strategy that treats perpetrators with impunity) in order to meet the political agenda of the present (e.g. political stability).<sup>62</sup>

Second, the chapter shows how the 'organising concepts' provided by Recommendation 26/2001 of the National Human Rights Commission (NHRC) constrained the development of Mexico's 'transitional justice' process until its closure in 2006. As examined in Chapter Two, the language of human rights allows for the conceptualisation, and policing of 'transitional justice' mechanisms. Through this language, crimes and protagonists of the past are socially and politically constituted in such a way as to allow particular forms of action in relation to the past, to bring certain authorities, laws and institutions into being (policing). In Mexico, the language of human rights allowed Fox's administration to channel the work of the Special Prosecutor's Office (SPO) through existing structures of power: laws and institutions that were influenced by members of the previous authoritarian regime.

Third, the chapter shows how the functioning of the SPO was affected by the continuous political negotiations between the different actors that participated in the process. Political deliberations on how to regulate the 'transitional justice' process did not end with the establishment of the SPO in 2001 – on the contrary, such deliberations continued until its closure five years later.

In other words, this chapter shows that 'transitional justice' mechanisms were not immutable or foreign to their social or political context (Short 2007). In Mexico, the SPO evolved during its functional period, for example as a result of bureaucratic or political issues. This is important because, as I explained in Chapter Two, authors of the

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<sup>62</sup> The concept of policing the past was examined in detail in Chapter Two.

first and second cluster of transitional justice literature assume that transitional justice mechanisms are indifferent to the social, historical and political medium in which they are in. These studies take a certain institution as a departure point – say the TRC in South Africa – and from there analyse its alleged benefits or flaws. However, they ignore the fact that the TRC in 1998 was not identical to the TRC originally established in 1995; for example, the gathering of testimonials suffered serious changes in 1996 and then in 1997 ('there was a sea-change in the TRC's activities which were refocused from victims' narratives to perpetrators findings') (Wilson 2001: 38). Similarly, for legal and political reasons, the SPO in Mexico gradually modified its strategies to 'see justice done' from its origins in 2001 until it was shut down in 2006.

The chapter is divided into four parts. The first explores the way in which the Fox administration materialised – and altered – the NHRC's Recommendation 26/2001. The second and third parts analyse the most important cases investigated by the SPO: the disappearance of political dissidents during the 1970s, and the assassination of students in 1968 and 1971 (known as the genocide cases). The final section summarises the most relevant political effects that this particular way of facing past state crimes had in Mexico's new democracy.

### **Materialising and adjusting 'The Mexican Solution'**

#### *The case of Carlos Francisco Castañeda de la Fuente*

On February 5, 1970, President Gustavo Díaz Ordaz arrived on time for his appointment at the Revolution Monument in Mexico City. His strategists programmed a public ceremony at eleven in the morning to commemorate the fifty-third anniversary of the Mexican constitution. That was Díaz Ordaz's last year in power and this event was an opportunity to reiterate that the PRI regime was democratic and respectful of the law (Loaeza 2005).



That same day, Carlos Francisco Castañeda de la Fuente woke up at eight in the morning, had breakfast and went out to buy a newspaper. He was employed in a garage, but took the day off because he had more important plans: to kill the president. Castañeda de la Fuente returned to his flat, shaved and read the newspaper (*El Universal*), where he found the schedule for Díaz Ordaz's public activities for that morning. The Revolution Monument was not far away from where he lived. If he left his flat at ten, by eleven he would be ready to shoot his Pistole Parabellum 1908, known as a Luger, which he had bought with the money he saved for a year (Castillo 2004a).

Castañeda de la Fuente put away his gun in a plastic case and walked for half an hour to meet the president. His idea of obedience to the law was very different from that of Díaz Ordaz. A fervent Catholic, Castañeda de la Fuente was 'willing to die in the fulfilment of divine justice' (Castillo 2004d). He wanted to kill the president to avenge the students assassinated by the army in 1968. To justify his plan, Castañeda de la Fuente elaborated a peculiar syllogism: in Mexico ninety per cent of the population is Catholic; all the assassinated students in 1968 were Mexican; hence, 'many Catholics died that night and I had to avenge them' (Castillo 2004a).

Castañeda de la Fuente pulled the gun out of the case and shot the car in which he thought the President was travelling, but that day Díaz Ordaz had taken another route. In his place was the Minister of Defence, and in any case no one was hurt, as the shot hit the car's chassis. Immediately after he had fired the gun Castañeda de la Fuente was detained and taken to the Federal Security Direction (DFS) – the defunct secret police – where he was held incommunicado and tortured: 'Commander Miguel Nazar Haro made me pull down my pants and with a hemp string he tied my testicles and gave a strong pull; he told me to pray' (Castillo 2004a). He was then interrogated: 'What do you want me to pull, an eye, a tooth or a nail? [...] How do you want to die, [to be] shot

or burnt?’ (Castillo 2004c). Meanwhile, in less than six hours, the secret police captured, interrogated and tortured Castañeda de la Fuente’s family and friends, who were illegally detained for eight days (Castillo 2004d).

However, Castañeda confessed nothing relevant: he was not a part of any dissident group or guerrilla movement, nor did he have accomplices or a criminal record. He was submitted for psychiatric evaluation on March 7, 1970, a month after his attack against the president. The Criminal Medical Office concluded that ‘currently [he] does not display an evident psychiatric pathology’ nor ‘a paranoid psychosis’ (Castillo 2004b). Castañeda de la Fuente was a lonely gunman who appeared to be completely sane.

Had he been presented to a judge, Carlos Francisco would have received a maximum sentence of five years for ‘attempted murder’. Instead, he continued to be detained, held incommunicado, tortured and held without due process for four months at the DFS installations, then at Military Camp Number One, and finally at a Migrant Station in Iztapalapa (Castillo 2004a). During this time, neither the police nor the Military discovered anything new.

Then unexpectedly, on June 5, 1970, the chief of the Forensic Medical Service concluded that Carlos Francisco ‘does suffer from a mental disease’: he was ‘mentally weak with a paranoid state whose relevant pathological nucleus is a reformist idealist delirium’. As he displayed ‘symptoms that were threatening to society’ it was necessary for him ‘to be transferred to a mental facility’ (Castillo 2004b). According to his medical record, his mental disorders possibly came from birth: his delivery was premature, ‘he was born in the street and hit his head’, he was always ‘shy and introverted’ (Castillo 2004d). Or maybe it all began during his teenage years, when he had ‘ideas referring to great intellectual and emotional conflicts on political issues, on

his sexual roles, and his role in life'. Whatever the reason, Castañeda de la Fuente was diagnosed with a 'psychotic schizophrenic process of chronic and incurable course' and remaining free constituted a hazard to other people (Castillo 2004b).

Foucault (1991a: 236) argued that the first principle that gave way in the prison reform of the nineteenth century was that of 'isolation': 'the isolation of the convict from the external world [...] the isolation of the prisoners from one another', as 'solitude must be a positive instrument of reform'. In Mexico, the Attorney General and the DFS took this principle to its extreme: Castañeda de la Fuente was completely isolated, not in prison but in a psychiatric hospital. Through the Construction Committee of Sanitary Engineering of the Ministry of Health, the psychiatric hospital built a special 'bunker' for the new patient: a small room made out of a 'solid block of concrete' (Castillo 2004b). And in order to protect his rights and interests, the judge on the case assigned a 'tutor' to him, a state agent dependent on the Ministry of the Interior (Castillo 2004c). Castañeda de la Fuente was committed there for four years. However, his tutor never contacted him again.

In 1974, the hospital authorities transferred Castañeda de la Fuente to 'ward five', the area for 'dangerous patients' (Castillo 2004b). There, Carlos Francisco was used as a guinea pig for the trial of 'a very ample gamut of drugs' – 'all known neuroleptics, ataraxics and antipsychotics' (Castillo 2004b). He was even used for the development of a 'clinical pharmacological research trial [...] presented at the fifth world specialty congress' (Castillo 2004b).

Nearly twenty years later, in 1992, the paralegal Norma Ibañez was carrying out an internship at the psychiatric hospital where Castañeda de la Fuente had been committed on June 4, 1970. Norma noticed what no one (none of the hundreds of interns who had worked at the hospital, nor the social workers, doctors or nurses) had

observed before: Castañeda de la Fuente had 'no criminal record' (Castillo 2004c). Why was he interned there and for so long? Once she was aware of this, Norma made a complaint to the National Human Rights Commission (NHRC).<sup>63</sup>

A year went by. The NHRC did not issue a single human rights recommendation to any state authority related to this case. The Interior Ministry confirmed that 'neither in the ordinary record nor the confidential archive' were there any reports explaining why Castañeda de la Fuente was imprisoned (Castillo 2004c). Meanwhile, the hospital authorities submitted Castañeda de la Fuente for one final psychiatric examination, but found nothing abnormal about his mental health: there was 'improvement of the symptomatology for which he was seen', the doctors said (Castillo 2004c). After twenty-three years, as he had no criminal record and had had no trial, Castañeda de la Fuente was released. 'President Gustavo Díaz Ordaz forgave me, and I also forgave him' were the last words Castañeda de la Fuente said the paralegal Norma Ibañez, in 1992 (but Díaz Ordaz had died in 1979).

We know about this case because it was under investigation by the SPO (Castillo 2004a), but it was not unusual. 'How many cases like these took place during the dirty war?' asked journalist Gustavo Castillo (2004c). Ignacio Carrillo Prieto, the Special Prosecutor, put it this way: it is possible that some members of armed movements during the 1960s and 1980s were imprisoned in clandestine jails' or mental institutions for decades. As a result, Carrillo Prieto said, these dissidents became mentally ill, so once they were released 'became homeless' (Castillo 2004c).

I described this case in detail because it allows me to connect the previous chapters – about the background and construction of the 'transitional justice' process –

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<sup>63</sup> As I explained in the previous chapter, the NHRC was created in 1990 by president Carlos Salinas.

with this chapter on the policing of the 'transitional justice' process and its effects on Mexico's democratic transition in three ways.

First, as I mentioned in Chapter Two, in her critique of transitional justice, Arthur (2009: 333) suggests that transitional justice practices do not really 'come to terms with historical complexities' as one might expect in an effort to deal with the past. The case of Castañeda de la Fuente demonstrates this insight. This case shows that the systematic violation of human rights in Mexico was possible for decades not only as a result of the sophisticated security machinery (Military, police, secret police), but also because of the complicity of other state institutions that had nothing to do with internal security (e.g. the mental health system). At least eleven state institutions were related to Castañeda de la Fuente's case: the DFS, which detained and tortured him; the army personnel at Military Camp Number One; the state agents of the Migration Station of Iztapalapa who tortured him; the Criminal Medical Office, which certified that he was sane; the Forensic Medical Service, which determined he was insane; the court that ordered his commitment in a psychiatric hospital; the Sanitary Engineering Construction Committee, which built the bunker where he remained completely isolated for four years; the Health Ministry; the psychiatric hospital where he stayed for twenty-three years and was used for medical experiments; the Interior Ministry, which assigned him a 'tutor'; and the National Human Rights Commission, which did nothing to redress the damage. However, as the SPO was based on a retributive sense of justice, the institutions involved in Castañeda de la Fuente's case were never investigated – the SPO sought to identify and prosecute only individual offenders. Hence, the institutional framework that made abuses possible was not addressed or changed under the new regime.

Second, Castañeda de la Fuente's case is interesting because it shows the difficulties encountered by the SPO in using the language of human rights when establishing responsibility for past atrocity. From 1970 to 1993, Castañeda de la Fuente was a victim of unimaginable abuses, which were not perpetrated by sadists, but by a multiplicity of 'tiny cogs' in the authoritarian regime machinery: the police, the Military, immigration officers, nurses, doctors, psychiatrists, social workers, and interns. This story exemplifies Hannah Arendt's (1994) concept of the banality of evil. Arendt warns about the atrocities – the inconceivable evil – that can result from a series of ordinary acts carried out by ordinary people who are 'terribly and terrifyingly normal' (Arendt 1994: 276). And this normality, as Cohen (2005: 100) points out, is born out of 'ordinary human qualities: not fully realizing the immorality of what you are doing; being as normal as all your peers doing the same thing; having motives that are dull, unimaginative and commonplace (going along with others, professional ambition, job security) [...], not grasping what the fuss was about'. However, the SPO's investigations into Castañeda de la Fuente's case had no results: no one was arrested or prosecuted. As the SPO had a retributive approach to justice, and therefore sought to punish individual perpetrators, we might want to ask who the SPO should prosecute in Castañeda de la Fuente's case – the DFS agents who tortured him, the army personnel who illegally detained him, the doctors who experimented on him, or the nurses who knew about his case and did nothing? How can one define through the language of human rights twenty-three years of suffering: forced disappearance, illegal imprisonment, torture, cruel and inhumane treatment? This case is a powerful demonstration of Ainley's (2011: 409) claim that the responsibility for past atrocity 'lies not with individual perpetrators alone but also in significant measure with collectives and with those individuals who did not commit crimes but did contribute to harm'.

Collaborators and bystanders (nurses, doctors, judges) are not completely innocent nor criminally guilty. They are, however, central to atrocity – as they fail to prevent the commission of abuses – but they are rarely prosecuted (Ainley 2011: 422).

Third, Carlos Francisco's case is important because it shows the ambiguities of the SPO's mandate. As I examined in the previous chapter, the NHRC recommended that President Fox should create a SPO to prosecute state agents related to the disappearance of dissidents. However, Castañeda de la Fuente's case did not constitute forced disappearance according to the NHRC's guidelines, nor had it been included originally in the cases that the SPO had to investigate. So, why was the case under investigation? This and other cases were included in the 'transitional justice' process as a result of political negotiations. Hence, the mere existence of Castañeda de la Fuente's case is relevant because it shows that beyond the alleged ideals of justice or truth by which it is inspired, 'transitional justice' was a site for political deliberation *par excellence*. I will address below how, why and with what effect Carlos Francisco's case came to be investigated by the SPO.

#### *The SPO's ever changing retributive mandate*

In the previous chapter I explained that on November 27, 2001, in the Black Palace, the NHRC 'recommended' the creation of the SPO (CNDH 2001c; CNDH 2001d). According to the NHRC, the SPO was supposed to investigate two hundred and seventy-five cases of forced disappearance that were allegedly perpetrated by state agents in the 1970s. As President Fox accepted this recommendation, this would be the SPO's only task (Presidencia de la República 2001b).<sup>64</sup>

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<sup>64</sup> It is important to highlight that Fox only agreed to carry out the investigation regarding the disappeared during the 1970s. He ignored other equally relevant recommendations. For instance, a crucial recommendation for the new democracy that never materialised was linked to reforms of the intelligence services. The Centre of Investigation and National Security (CISEN), established in 1989, is the intelligence organ in Mexico. But the CISEN substituted the secret police (DFS), which had been partly

However, the original objective of Mexico's 'transitional justice' – to investigate and prosecute cases of forced disappearance – did not hold for long. Indeed, the only constant in the 'transitional justice' process was that the SPO's mandate was perpetually changed. The first modification occurred only twenty-four hours after the ceremony at the Black Palace when the presidential decree by which the SPO was officially established came into force. According to this decree, the SPO's task would be:

To know of all investigations, integrate preliminary investigations that are initiated by complaints formulated [...] on facts that probably constitute federal crimes committed directly or indirectly by public servants against people linked to social or political movements, as well as prosecute the resulting crimes before competent courts in accordance with the applicable law (Poder Ejecutivo Federal 2001a).

This paragraph is obscure. It is a good example of what Bourdieu (1986: 9) in his study *La force du droit* called a 'legal field': a space bordered by 'legal language' that separates those 'specialists' (e.g. lawyers, judges) who are 'prepared' to enter that space and those who will be excluded (the client, the victim, 'the simple layman who use ordinary language'). And this division, according to Bourdieu (1986: 8), allows specialists of the legal language to deal with the law arbitrarily, as a 'docile, adaptable, flexible instrument' to 'profit the most from the law's elasticity', its 'contradictions, ambiguities and its gaps'. In Mexico, as I will demonstrate in what follows, the main beneficiaries of the SPO's 'legal language' were perpetrators of past human rights violations.

Clearly, we do not need to be experts in legal language to know that the SPO's new mandate did not refer to forced disappearance – as was originally intended by the NHRC's Recommendation 26/2001. What was not so evident was the way in which this

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responsible for human rights violations during the PRI era. As transitional justice mechanisms had as a goal 'that these things [human rights violations] [should] never again occur in Mexico', the Ombudsman recommended the democratisation of Mexico's intelligence services (CNDH 2001c: 38). This was important because these services continued to work as they had during the previous regime (Benítez Manaut 2008b: 273). Yet this recommendation was overlooked by the Fox administration and even today the CISEN works in the same premises as the previous regime (Rodríguez Sumano 2008: 167; Benítez Manaut 2008a: 186; Herrera Lasso 2009). I will return to this point in the Conclusions to this thesis.



mandate was to be interpreted. As the International Centre for Transitional Justice put it, 'from the beginning, the SPO's mandate was limited and vague' (ICTJ 2008: 2).

For example, it is unclear what the decree meant by 'federal offences'. According to Acosta and Ennelin (2006: 103) this meant that 'in general the SPO [would] not deal with matters committed by public servants at the state level, ruling out of the investigation [...] acts committed by the local state police'. A contradiction is evident here. How could the SPO prosecute only 'federal offences' when most of the cases of forced disappearances documented in the NHRC's Recommendation 26/2001 were perpetrated by local state agents? Therefore, one of the contributions of the SPO was to help decriminalise the actions of the majority of those who opposed the former state.

A second problem was related to the victims of abuses. According to this new presidential decree, the victims had to be 'linked to social or political movements'. The idea that the SPO had to investigate political crimes exclusively was not unusual. On the contrary, as I examined in Chapter Three, human rights have always been based on a distinction between politically motivated abuse – a human rights violation – and a simply criminal act. Hence 'separating human rights and common crime is the first distinguishing act of all human rights institutions' (Wilson 2001: 81). The problem was that in Mexico the distinction between victims of abuses 'linked' to 'social and political movements' and those that were not was never outlined. The SPO's mandate did not establish, *a priori*, what that link comprised, nor how the concept of 'social or political movements' should be understood (Aguayo and Trevino-Rangel 2007). As Acosta and Ennelin (2006: 103) stated, the decision regarding which victims were linked to social or political movements would be 'a task which may prove difficult' as it 'is dependent on the SPO's and the Court's interpretations, since the Decree offers no definition of

these and no guidance on the criteria to be applied'. Thus, despite being inspired by human rights ideals, defining the link between victims and political groups was not just a matter of neutral classification, but also a political act (Moon 2008). That is why Wilson (Wilson 2001: 81) suggests that in transitional justice institutions 'politics operates at the level of assumptions about what is "political" and what is not'.

A third complication of the SPO's mandate was related to the historical period under criminal investigation: how far back did the SPO have to go in order to see justice done? According to Cohen (1995: 31), this is an 'obvious' 'temporal problem' that all transitional justice mechanisms have to deal with: 'how far back to go in looking for accountability (truth or justice)?' For restorativists – examined in Chapter Two – the answer is, in part, clear: truth commissions should investigate a pattern of abuses over a specific period of time (Hayner 2002). For example, the Commission for Historical Clarification in Guatemala covered the period from 1962 to 1996 (a time period coterminous with the thirty-six year period of civil war); the National Commission on the Disappearance of Persons in Argentina investigated only the years 1976 to 1983 (a period coterminous with the rule of the military *junta*). The Truth and Reconciliation Commission in South Africa covered the period from 1960 to 1994 (a periodisation that was clearly contingent as it marked the turn to violent opposition against the state, rather than the date when the apartheid was formally inaugurated, 1948). But Cohen suggested that the answer was not that simple: 'my own personal opinion is that no amount of time can be "too long" to satisfy the needs for truth and some measure of accountability, nor can some arbitrary legal time limit be set (Cohen 1995: 31). The argument that some wounds are too old to be exposed has little moral integrity.' Whatever we might think of these suggestions, in Mexico the problem was much more serious: the SPO's mandate never established a time limit, so the SPO 'did not have a

specific historical period on which to focus its investigations, and the duration of its mandate was never established' (ICTJ 2008: 2). I will discuss the implications of this failure to periodise later in this chapter.

This new and ambiguous SPO mandate lasted only two months. The tasks that the SPO had to carry out drastically changed as a result of a 'political accident' completely outside the 'transitional justice' process. On January 30, 2002, the Supreme Court of Justice decided that the General Attorney's Office should initiate an immediate investigation into the 'massacre of Tlatelolco': the killing of an undetermined number of students on October 2, 1968 (Aranda 2002b; Suprema Corte 2002). Almost a month later, the General Attorney's Office publicly announced that it would abide by the court's order and therefore opened the preliminary investigation 064/FESPLE/02 (PGR 2002a). However, the General Attorney's Office would not conduct the investigation itself. The General Attorney arbitrarily decided to transfer the responsibility of carrying out the prosecutions to the recently created SPO (PGR 2002b).

But what was this political accident? The Supreme Court's decision was anything but spontaneous – it was a result of almost four years of legal proceedings and political deliberations. To understand the court's decision we must go back to 1998 (Suprema Corte 2002). That year, a group of activists and victims of repression presented a complaint before the General Attorney's Office for the killing of students on October 2, 1968 (before the change of regime). They argued that what had occurred that fateful day constituted: 'genocide, abuse of authority and illegal abduction' (Aranda 2002b). In other words, the victims were asking the General Attorney's Office of the PRI regime to initiate a criminal investigation against state agents of the PRI regime related to the massacre. Predictably, the General Attorney's Office rejected the

complaint and invoked a refined legal excuse: the crimes had expired according to the statute of limitations.

In response to the negative reply from the General Attorney's Office, the victims and activists took their case to court (Suprema Corte 2002). The case then became trapped in the labyrinth of Mexico's legal system, which took four years to reach a conclusion: how could the General Attorney's Office determine that the crimes had reached their statute of limitation without knowing anything about them? As a result of this acute legal reasoning, in January 2002 (i.e. after the change of regime), the Supreme Court ordered the General Attorney's Office to investigate immediately whether the facts presented by the victims constituted a crime in the first place, and then conclude if such crimes had expired or not according to the statute of limitation (La Jornada 2002). The General Attorney's Office complied with the Supreme Court's order. However, the General Attorney explained that as the 'facts that led to this criminal investigation' (the killing of students in 1968) were 'related to past social movements', they had to be investigated by the institution specifically created to investigate such kind of events: the SPO.<sup>65</sup>

Thus, at the end of February 2002, less than one hundred days after its creation, the SPO's mandate had been altered twice. The press reported this confusion: the 'SPO on the disappearance of persons during the 1970s' would hereafter be known as the 'SPO on genocide' (Aranda 2002b; Avilés Allende 2002).

Days later, the SPO made public a 'working plan' through which it clarified what it sought to do. Three months had passed since its creation and the Special Prosecutor was not announcing what the SPO had done during that time, but what it was planning to do in the future. The SPO would carry out three different investigations.

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<sup>65</sup> It is important to note that not all activists or victims of abuses celebrated this decision. Some, like Ana Ignacia Rodríguez, unsuccessfully opposed this measure, for they considered the SPO distrustful: 'a truth commission' would be 'more adequate' (Aranda 2002b).

First, it would set up a 'Legal Investigations Programme A' in charge of the cases of forced disappearances, which had been previously investigated by the National Human Rights Commission. Second, there would be a 'Legal Investigations Programme B', which would address the Supreme Court of Justice's resolution regarding the killing of students in 1968. Finally, the SPO would establish 'Legal Investigations Programme C', which would be in charge of all 'complaints filed' to the SPO that had not been included in the previous ministerial programmes (SPO 2002).

It was never clear, however, what the SPO sought to achieve with the 'Legal Investigations Programme C'. The effect of the programme was that it maintained the ambiguity on the SPO's tasks. As it did not focus on a predetermined historical period, 'Programme C' implied that the SPO would investigate anything that had taken place in the past. Yet, exactly which state crimes would be investigated was a mystery: the assassination of more than forty indigenous people in Acteal, Chiapas, in 1997? The killing of Zapatistas in 1994? The abuses committed by the secret police between 1947 and 1985? The repression of railroad workers in 1959?

The story of how the SPO's mandate changed does not end here. Following another political accident outside the 'transitional justice' process, the SPO modified its mandate for a third time in July 2002. From then on, the SPO was also in charge of investigating 'the Corpus Christi massacre': the massacre of twenty-five dissident students by the paramilitary group '*Los Halcones*' (The Hawks), which took place on June 10, 1971, in Mexico City.

To return to the political accident that played into these questions, in June 2002, the Democratic Revolutionary Party (PRD) presented a complaint against the person whom they maintained was responsible for the 1971 massacre: former president Luis Echeverría. The normal procedure would have been for the PRD to go to the Special

Prosecutor, Ignacio Carrillo, since he was in charge of the SPO, which investigated abuses committed in the past. However, PRD members filed their complaint before Mexico City's District Attorney as they 'did not trust the work of the SPO' because 'the Special Prosecutor's Office on Forced Disappearances [...] has not given even a glimpse of its work' (Proceso 2002a and 2002b). 'We do[n't] see Mr Carrillo [the Special Prosecutor] doing anything', they said. Yet, a month later, Mexico City's District Attorney did exactly what the PRD wished to avoid: transferred the Corpus Christi case to the SPO. This was the third and last change to the SPO's mandate. This is relevant because, as I explained in Chapter Two, authors of the first and second cluster of transitional justice literature consider that transitional justice mechanisms are indifferent to the political and social medium in which they are in. The account of how the SPO's mandate changed shows that the institutionalisation of human rights norms through transitional justice mechanisms is a quintessentially political process shaped by its social context, a means through which power is exercised (McEvoy 2007; Short 2007).

In the following years, although its mandate remained intact, the number of criminal investigations the SPO carried out increased under 'Programme C'. In less than a year, the SPO was investigating the homicide of Joel Arriaga in the city of Puebla; the assassination of students on the rooftop of the University of Puebla; the death of six hundred and sixty-two members of the PRD between 1988 and 2001; the murder of seventeen peasants in Aguas Blancas in 1995; the killing of the teacher Misael Nuñez ordered by the teachers' union leader, Elba Esther Gordillo; the assassination of seven peasants in Sonora in 1975; and the death of several people in Oaxaca in 1996 (PGR 2003).

These cases led nowhere. The cases brought under 'Programme C' ended in impunity. Not a single case reached the court because the SPO gave priority to cases under 'Programme A' and 'Programme B'. Therefore, the only cases that opened a way through the Mexican justice labyrinth and achieved mass media celebrity status were those of forced disappearance during the 1970s; the slaughter of students in 1968; and the Corpus Christi massacre case in 1971. The analysis of how these three cases were governed through what Nikolas Rose and Mariana Valverde (1998: 542) term a 'legal complex' – 'the assemblage of legal practices, legal institutions, statutes, legal codes, authorities, discourses, texts, norms and forms of judgement' – is the subject I tackle next.

Before embarking on this analysis, allow me to emphasise that the story of the SPO's mandate is relevant for four reasons. First, these changes in the norms created new human rights categories (e.g. genocide), which would be investigated by the SPO; therefore new types of victims would be considered within the 'transitional justice' process, new perpetrators would be prosecuted, and new authorities, laws and institutions would intervene. Second, because this story proves, once again, that *in the Mexican 'transitional justice' process different political accidents had greater consequences than human rights principles*. The SPO's mandate changed at least three times as a pragmatic response to political conflicts – 'little dramas'. Third, because unlike the first and second cluster of literature on transitional justice, this story shows that transitional justice mechanisms are constrained by their social context.

Fourth, as I explained in previous chapters, the Fox administration presented the SPO as an inevitable and necessary mechanism for the country's democratisation. However, the story of the SPO's mandate shows that the idea that 'transitional justice' could be reformed had existed from the beginning. From the outset, the SPO had an

ambiguous mandate that allowed the Fox administration to change arbitrarily the SPO's goals, strategies and tasks and, hence, the objectives of 'transitional justice'. And each transformation was justified in the name of human rights.

### **Forced disappearances**

In spite of the SPO's mandate transformations, forced disappearances remained a crucial issue in the 'transitional justice' process. The SPO sought to prosecute the forced disappearance cases that had occurred in the 1970s through 'Programme A', and would prosecute any other forced disappearance case that took place in the past through 'Programme C'. However, until the shutting down of the SPO in 2006 there was not a single conviction related to forced disappearance cases (ICTJ 2008: 3).

The analysis that follows examines the different factors that allowed the 'transitional justice' process to protect, rather than punish, the perpetrators of forced disappearance.

#### *Illegal abduction, forced disappearance or crime against humanity?*

In the previous chapter, following Rodley and Cohen, I explained that the existing definition of forced disappearance can hardly capture the suffering of victims of such a 'ghoulish process', which has different phases: the victim is captured illegally, held incommunicado, tortured, illegally interrogated, then murdered (Rodley 1999). In this chapter, I return to the concept of forced disappearance. But this time I am interested in the way in which this concept travelled through Mexico's 'legal complex' (Rose and Valverde 1998).

In 2003, in a special report on the 'transitional justice' process in Mexico, HRW warned that 'the crime that most adequately describes what took place in the majority of cases investigated by the SPO is forced disappearance' (HRW 2003). HRW's opinion coincides exactly with what the NHRC concluded in its Recommendation 26/2001: the



SPO should investigate the forced disappearance of hundreds of people. However, forced disappearance did not exist in any Mexican legal text when the events took place – in the 1970s. Therefore, as forced disappearance did not exist in the legislation, what occurred in the past – the disappearance of people by the secret police or the army – could be anything except forced disappearance. This exquisite legal reasoning can seem absurd, but is legally correct. As Cohen affirms, ‘many such legalistic moves are wonderfully plausible as long as common sense is suspended’ (Cohen 2005: 108). Thus, the SPO was created to prosecute a crime that, according to the law, never existed. And, if a crime never took place, there would be nothing and no-one to investigate, judge, and prosecute.

Legal problems pertaining to the relationship between past crimes and current jurisdiction – ‘retroactive justice’ – have been addressed by early transitional justice literature (Cohen 1995): how can one apply the principles of the present to the actions of the past when the crimes articulated in the present were not considered crimes in the past. The rule against retroactivity is a widely accepted principle of international criminal law. These problems are also familiar in domestic criminal contexts (e.g. statutes of limitation, double jeopardy, retrospective liability). But in Mexico the subject was more complex and disturbing. It was not that the new democracy suddenly encountered these legal problems; rather, problems of ‘retroactive justice’ were foreseen well in advance by the PRI regime. The SPO was officially created in 2001 by the new democratic regime. However, as explained in the previous chapter, President Fox established the SPO at the suggestion of the NHRC, a holdover from the authoritarian regime. This is perverse because the NHRC was an institution that served to preserve PRI immunity (Ackerman 2007). This example underscores, empirically, Cohen’s claim

that 'some perpetrators "anticipate" the techniques of denial and cover-up that will be used later' (Cohen 1995: 19).

The point is that the authoritarian regime that systematically disappeared political dissidents never ratified international conventions on forced disappearance, so this crime was not included in the penal code. Mexico established the crime of forced disappearance in the legislation after the regime change, in 2001. However, according to article 14 of the Mexican Constitution, 'no law will be applied retroactively to the detriment of any person'. Therefore, as HRW put it, 'under Mexican law [...] it is impossible to charge someone with a specific offence of forced disappearance that was carried out before 2001' (HRW 2003: 20). As already stated, this legal obstacle had been foreseen before the SPO was created. The NHRC had warned in Recommendation 26/2001 – the recommendation that led to the creation of the SPO in 2001 – that the absence of 'legal precepts' on forced disappearance in Mexico would make it very hard to punish the perpetrators (CNDH 2001b: 44). The irony here is obvious: the Nation Human Rights Commission knew that it was almost impossible to prosecute the perpetrators of forced disappearance – and nonetheless recommended Vicente Fox the creation of a SPO to do exactly that.

However, the NHRC itself offered a solution to solve this problem. According to Recommendation 26/2001, as the term 'forced disappearance' did not exist in Mexican legislation, the SPO could use the term 'crime against humanity' to prosecute state agents who disappeared dissidents (CNDH 2001b: 31). The NHRC came to this conclusion through a legal reasoning: when forced disappearance occurs multiple rights are violated (e.g. the right to life; to be free of torture; to the protection of inhumane, cruel and degrading treatment; to personal freedom; to legal personality; and to access to justice); hence forced disappearance could be considered a 'crime against humanity'

(CNDH 2001d). Using this logic, if forced disappearance is a crime against humanity, the Fox administration had the obligation of investigating and prosecuting those responsible – this was expected of ‘states with democratic aspirations’ such as Mexico, according to the NHRC.

This NHRC’s sophisticated argument may have been legally correct, but it was nonetheless naïve in a country like Mexico. HRW put it this way:

It [was] not enough merely to choose the legal arguments that were legally sound. [The SPO] had to convince judges that [its] novel legal arguments were consistent with Mexican law. [The SPO] had to impress upon judges the weight of Mexico’s international obligations to prosecute human rights violations. In short, prosecuting these cases require[d] pushing Mexican criminal law in new directions. It require[d] overcoming the very legal doctrine and habits that had, for decades, served to perpetuate the culture of impunity (HRW 2006: 101).

But the SPO had another alternative to navigate through Mexico’s ‘legal field’ (Bourdieu 1986). Before 2001, the Mexican legislation included a crime that was somewhat similar to forced disappearance: illegal abduction. This crime had existed in the penal code when the disappearances took place, so the SPO could prosecute the perpetrators by pressing charges for illegal abduction. The concept of illegal abduction was not free from juridical problems and legal contradictions, however. The first complication was that this crime had already expired. The time period established by the statute of limitations for the crime of illegal abduction is only twenty-two years and six months, according to Mexico’s legislation. As most cases of illegal abduction under investigation by the SPO took place in the 1970s, it was clear that the time allotted by the statute of limitations had run out for these crimes (HRW 2003; HRW 2006; ICTJ 2008).

The second problem with the concept of illegal abduction was related to the identity of the perpetrators. According to the NGO Mexican Commission of Defence and Promotion of Human Rights, the Mexican penal code establishes that the crime of

illegal abduction can be perpetrated only by privates or non-state agents (Comité 68, et al. 2006: 21). Therefore, this concept would have been useless to the SPO as the cases of forced disappearance under investigation were committed by state agents.

The SPO had three alternatives to prosecute state agents responsible for the disappearance of hundreds of people during the previous regime. The first option was to use a human rights concept *par excellence*: forced disappearance, but this strategy was destined to 'fail' as the concept could not be used retroactively. The second choice was to employ the concept of crimes against humanity, but this was unknown to Mexican judges. The last alternative was to use the term of illegal abduction, but this was absurd given that this crime had expired, and it also implied that it had been perpetrated by non-state agents.

#### *Stretching the law: the role of the Congress*

Vicente Fox's triumph implied there had been a radical transformation – at least in the official discourse – in Mexican foreign policy. The country would stop being authoritarian, attend to human rights international treaties, and instead become a democracy that would seek a 'more intense activity' in the 'international scenario' regarding human rights norms (Castañeda 2001b). Fox and his strategists stated that his main priority for Mexico's foreign policy between 2001 and 2006 would be to 'promote and strengthen democracy and human rights as fundamental bases for the new international system' (Poder Ejecutivo Federal 2001b: 60). To do so, Fox's administration proposed to accept 'the universally recognised rules' on human rights and 'the harmonisation of our internal legislation to international commitments' in human rights and humanitarian law (Poder Ejecutivo Federal 2001b: 61).

Following this strategy, the foreign minister, Jorge Castañeda (who had proposed the creation of a truth commission in 2001) promoted the signing and

ratification of at least fourteen international treaties related to human rights during the first two years of the Fox administration. Out of these international instruments, the most important for the 'transitional justice' process, was the Inter-American Convention on Forced Disappearance of Persons, signed on May 4, 2001, and ratified on April 9, 2002 (OAS 2012; SRE 2012).

The press reflected the celebratory atmosphere before the ratification of this treaty. The newspaper *Reforma*'s headline was self-descriptive: 'Forced disappearance will have no statute of limitation' (Reforma 2001b). According to the press, this was a sign that 'Mexico joins the international trend that seeks to strengthen the international system of protection of human rights' (Reforma 2001b).

The ratification of the Inter-American Convention on Forced Disappearance of Persons seemed a positive signal for the 'transitional justice' process: it would allow the use of the concept of forced disappearance retroactively. According to article VII of the Convention, 'criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations' (OAS 2012). Thus the convention would allow charges to be pressed for forced disappearance although the crime did not exist in the Mexican legislation in the 1970s.

However, the Convention was born dead. When Fox sent it to the Mexican Senate for its ratification it included some legal traps – a reservation and an interpretative declaration – which rendered it harmless. An 'interpretative declaration' is a legal euphemism used by the United Nations that allows states of the international community 'to clarify the meaning of certain provisions or of the entire treaty' (UN Office of Legal Affairs 2006: 16) – as if human rights treaties were not sufficiently

clear. This illustrates Cohen's argument that 'powerful forms of [...] denial come from the language of legality itself':

Countries with democratic credentials sensitive to their international image now offer legalistic defences, drawn from the accredited human rights discourse. This results in the intricate textual commentaries that circulate between governments and their critics [...]. Does the second clause of article 16(b), para. 6, apply to all the state parties? (2005: 107)

The peculiar way in which Fox's administration reinterpreted the meaning of the Inter-American Convention on Forced Disappearance of Persons resulted in a 'reservation' that protected perpetrators of forced disappearance. The main beneficiaries were military personnel. According to article IX of the Convention, 'acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties' (OAS 2012). Moreover, the convention states that 'persons alleged to be responsible for the acts constituting the offence of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions' (OAS 2012). However, Fox's administration stated that in Mexico this article would be understood in the opposite way: 'Military jurisdiction does not constitute a special jurisdiction in the sense of the Convention' – hence the military justice system would continue to assert jurisdiction 'when a member of the armed forces commits an illicit act while on duty' (SRE 2012). This meant that, in Mexico, members of the armed forces charged with forced disappearances would be tried in military courts (Academia Mexicana de Derechos Humanos 2003: 10). Therefore, as HRW claimed, this reservation 'contradict[ed] the purpose of the treaty and violat[ed] international law, as international bodies have repeatedly held that military jurisdiction may never apply to cases involving human rights violations' (HRW 2006: 24).

In addition to this reservation, Fox included an 'interpretative declaration' that neutralised the Convention's temporary dimension: 'it shall be understood that the provisions of said Convention shall apply to acts constituting the forced disappearance of persons ordered, executed, or committed after the entry into force of this Convention' (SRE 2012) – after April 2002. Therefore, the Convention would apply only to those cases of forced disappearance that could occur from 2002 onwards. What this really meant was that the Convention could not be used by the SPO because, as we know, its objective was to investigate human rights violations that took place in the past, not in the future.

The Mexican Senate – also elected in 2000 – could have rejected both the 'reservation' and the 'interpretative declaration', but it did not. The Senate discussed the ratification of this treaty on December 10, 2001. The fact that the discussion took place on that day was no accident: the senators chose a politically significant date – December 10 marks the annual (and global) celebration of Human Rights Day.

As was predictable, the PRI senators defended the legal traps attached to the treaty. Senator César Camacho Quiroz, for example, said that it was 'evident that the passing of time does not alleviate the pain that the crimes of war and crimes against humanity provoke'. These crimes, he said, 'dishonour all of human civilisation's efforts, hence perpetrators should not escape justice, invoking any legal pretext' (Senado de la República 2001). For this reason, Senator Camacho applauded this treaty's ratification as it 'is an instrument against impunity'. However, he also accepted the interpretive declaration and reservation because, he said, they would serve to 'remain congruous' with the Mexican Constitution (Senado de la República 2001). The problem with Senator Camacho's interpretation is that the point of ratifying the treaties was, precisely, not to remain congruent with the Mexican Constitution – as the Constitution

allowed the impunity that those who had violated human rights in the past enjoyed to be perpetuated.

But the PRI senators were not alone in approving the 'reservation' and the 'interpretative declaration'. Senators of the PAN – Fox's party – backed them up. Only the left-wing parliamentary group – the PRD – criticised the chicanery attached to the Convention. Senator Rutilio Cruz Escandón warned 'that the interpretive declaration, that the Mexican government holds in this case, completely alters the Convention's nature and shows the lack of the Mexican government's will to take on concrete commitments' on human rights (Senado de la República 2001), but his warning was ignored by the members of his party.

At the end of the discussion, all senators of the new democratic regime – ninety-one who attended the session that day – voted in favour of the treaties, chicanery and all (Senado de la República 2001). As a result, the human rights treaty could be potentially useful in the future if the new democratic regime carried out forced disappearances – but would be irrelevant for the 'transitional justice' process that sought to deal with the disappearances that took place in the past.

There was another way in which the Mexican Congress stretched the law in order to perpetuate the impunity that perpetrators of past state crimes enjoyed. The Congress took advantage of what Cohen identified as one of the 'temporal problems' of transitional justice: for some people, claims Cohen (1995: 31), 'there is something faintly repellent, even unjust, in the relentless judicial pursuit of fugitive monsters from a decade or even a generation ago'. Should the new democratic regime really be prosecuting a frail seventy-year-old man living quietly in Mexico City? The problem with this interpretation, as Cohen argues, is that transitional justice is about the 'the creature empowered to dispatch millions to death, not the balding old man wearing



headphones; about the doctor who raped and tortured, not this pleasant man running a clinic in Montevideo' (Cohen 1995: 47).

Suddenly, in Mexico it was inhuman to send elderly perpetrators to jail. On December 11, 2003, Congressman Joel Padilla Peña, a member of the Work Party (PT), a left-wing party, presented a legal initiative to reform Article 55 of the penal code (Cámara de Diputados 2004). Under this initiative, people in prison who were older than seventy years could leave jail and retire in the comfort of their home, where they would be placed under house arrest (Cámara de Diputados 2004). Aiming to justify this measure, the PT parliamentary group invoked the language of human rights – civil rights, human rights of people imprisoned, and human rights of the elderly. For the PT congressmen, these human rights norms established in 'most international instruments [...] enunciate universally recognised fundamental ethical principles which, although they do not impose obligations, are an ethical imperative for UN member states, such as Mexico' (Grupo Parlamentario del PT 2003).

Although it was justified as a moral imperative, inspired by the universal principles of human rights, this legal disposition had a clear political intent. Most perpetrators of crimes of the past were older than seventy. Therefore, should they be arrested, perpetrators of forced disappearance would never set a foot in jail – they could follow the legal process against them while watching television with their grandchildren in their living room.

Congressmen viewed this legal initiative favourably, but transferred it to the Justice and Human Rights Commission in the Lower House for 'analysis and study' (Cámara de Diputados 2004). Five months later, in April 2004, the initiative was approved unanimously. Every congressman voted for this measure – including the eighty-eight PRD congressmen – although the SPO was investigating at the time the

disappearance of six hundred and sixty-two PRD members in the 1990s. Even more absurd was that within the PRD parliamentary group were congressmen Pablo Gómez and Salvador Martínez Della Roca, who had been victims of repression during the authoritarian regime. How could victims of repression promote 'transitional justice' and block it at the same time? I do not have an explanation for their behaviour. However, it is a variant of what McEvoy (2011) has referred to as 'culture of quietism': 'not speaking out' about significant events (e.g. the emergence of laws) that undermine human rights 'is in fact a very meaningful act of language, an inherently active rather than a passive response'. Silence in such circumstances is a form of collusion (McEvoy 2011: 369).

The law was passed on to the Mexican Senate. The senators could have rejected this initiative, but did not. On April 28, 2004, the senators approved this reform to the penal code, again unanimously. Since then, perpetrators of past state crimes had nothing to be concerned about given that the Mexican Congress had granted them a *de facto* amnesty (Comité 68, et al. 2006: 50) – they would never go to prison for human rights abuses.

*(Ad hoc) military 'transitional justice': the role of the army*

When the SPO was created, President Fox ordered the armed forces to cooperate closely with the 'transitional justice' process. However, unsurprisingly, the Mexican military was 'the institution that has shown the least willingness to collaborate with the Special Prosecutor's Office' (HRW 2006: 71).

First, the armed forces were reluctant to testify before the SPO to what had occurred in the past. By carrying out the investigations on forced disappearances, the SPO should have requested the testimony of a great number of military personnel involved in them, but the SPO only subpoenaed five retired servicemen. These state

officials – unlike their victims – had a due process right to a fair hearing, and they opted to remain silent (Comité 68, et al. 2006: 35; HRW 2006: 84).

Second, the Military were also hesitant to give information that might lead to the location of those who had disappeared. The members of the Argentine Team of Forensic Anthropologists, who briefly collaborated – unsuccessfully – with the SPO in 2003, so confirmed: ‘it would be very difficult to find the remains of victims without having direct witnesses who could point out precisely where investigators should dig’ (HRW 2006: 85).

Third, the Military refused to provide documentary evidence. The presidential decree through which the SPO was officially established instructed the ‘National Defence Minister to [...] request the Military Prosecutor’s Office [...] to provide the General Attorney, the information that it required’ in order to investigate and prosecute past state crimes (Poder Ejecutivo Federal 2001a). However, the Military did exactly the opposite: it withheld all information, and even denied that the events had ever taken place. As I showed in Chapter One, the armed forces disappeared dissidents by using ‘death flights’. Dissidents were illegally imprisoned by military personnel at Military Camp Number One in Mexico City; then they were transferred to a military base in the state of Guerrero; and finally they were shot in the head and thrown into deep sea inside sacks filled with stones (Cedillo 2008). In spite of the available evidence about this terrifying process, the army denied everything (HRW 2006). According to the Ministry of Defence, ‘military prisons’ were never used to detain civilians, although they were used to detain ‘military personnel’ who had ‘infringed military discipline’ (HRW 2006: 90); and the information on the death flights in the state of Guerrero never existed (Comité 68, et al. 2006: 19; Medellín 2004b).

But the history of how the armed forces blocked the 'transitional justice' process does not end here. Not only was the army unwilling to cooperate; it also undertook direct measures to block the process. Surprisingly, in September 2002, the Military Prosecutor's Office accused three senior officers – Mario Arturo Acosta Chaparro, Francisco Quirós Hermosillo and Francisco Barquín – of participating in the death flights and the disappearance of one hundred and forty-three people (HRW 2003: 15). But, how could the armed forces accuse three of its members of being responsible for the atrocities they denied had occurred? What purpose could this denial serve?

The first effect of this military trial was that it helped to legitimise the armed forces in the new democratic regime. This trial seemed to be a signal that the armed forces had changed: this was the first time that their participation in past human rights abuses was formally acknowledged; and all seemed to indicate that the armed forces would combat the impunity that they had enjoyed for decades.

However, the trial was a farce, a result of another 'political accident' that had nothing to do with the 'transitional justice' process. Generals Acosta Chaparro and Quirós Hermosillo had been in prison since 2000, accused of drug trafficking (Reforma 2000a), so they did not have to be arrested and then prosecuted on charges of forced disappearance – they were already serving sixteen- and fifteen-year sentences respectively (Aranda 2002a; Medellín 2004a). In fact, information on their participation in the death flights came to light accidentally while they were being investigated for drug trafficking (HRW 2006: 91). They were simply being 'recycled' through the 'justice process'.

There were three additional issues that made this military trial a sham. The first related to the victims. The Military were being investigated for the disappearance of one hundred and forty-three people, but at least seven of them were still alive and their

location known (Barajas 2003).<sup>66</sup> Thus, it is understandable that the activist Rosario Ibarra – whose son disappeared in the 1970s – considered this *ad hoc* military process ‘suspicious’ (Castillo and Herrera 2002). She thought this was all a ‘ruse’: it was much easier and more convenient to say that the armed forces had thrown the bodies into the ocean than to investigate the real location of the disappeared – many of the disappeared had been seen alive in military prisons, said Rosario Ibarra (Castillo and Herrera 2002; Moon 2012).<sup>67</sup>

The second issue was related to the categorisation of what had occurred. How would the Military define a process in which the victim is illegally arrested, held incommunicado, tortured, illegally interrogated, transferred from one military prison to another, shot in the head and finally thrown into the ocean? The Military Prosecutor's Office did not classify this process as a human rights violation, but as a criminal act – thus it accused the officers of ‘simple homicide’. Yet, for this crime the time allotted by the statute of limitations had already elapsed (Castillo and Herrera 2002; Medellín 2004a). The Military Prosecutor's Office granted these perpetrators a *de facto* amnesty (Fundación Diego Lucero, et al. 2005: 7).

The third issue was related to a blatant conflict of interest. During the trial, the Military Prosecutor's Office called various members of the armed forces as witnesses. One of the most important was General David Quintero Rocha, as he was stationed at Military Zone 27 in the state of Guerrero between 1977 and 1983 – during the years, and at the place, where the death flights took place. However, this witness was none other than one of the three judges of the Military Supreme Court in charge of hearing

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<sup>66</sup> Despite the evidence, the military court considered that the legal process would only take twenty-two cases into consideration.

<sup>67</sup> Since the late 1970s, Rosario Ibarra has followed the same strategy as las Madres de la Plaza de Mayo in Argentina, who have refused financial and memorial reparation from the state. According to las Madres de la Plaza de Mayo ‘the reappearance of those disappeared’ is the only acceptable form of repair: ‘bring them back alive’ (See Moon 2012).

this case – for this improvised military trial, this judge played the role of witness at the same time as hearing the case (Aranda 2003).

In his role as witness, interrogated on the illegal detention, torture and murder of dissidents in the military facilities in the state of Guerrero, General Quintero Rocha responded: 'I don't remember' (Aranda 2004). This is a good example of Cohen's 'Kurt Waldheim Syndrome': the personal denial of publicly known past atrocities – 'At the time, I didn't know what was happening'; 'I might have known at the time, but afterwards I forgot it all'; 'I don't remember' (Cohen 2005: 125).<sup>68</sup> But General Quintero Rocha was not the only person who suffered from this syndrome. Five other high ranking military officers were called to testify, but none of them remembered anything regarding the death flights: 'we know nothing about it', they said (Aranda 2003).

In the end, none of the three older officials was sentenced for their participation in the death flights. Major Barquín Alonso died of diabetes in 2005; General Quirós Hermosillo died of cancer in 2006 (Aranda 2006; Medellín 2005); and General Acosta Chaparro was released in 2006 after an order by a military judge. Thus, General Acosta Chaparro was able to recover his 'emoluments and his General rank' (Castillo 2007).

Beyond the impunity that this military trial guaranteed the three officers, the case had three important political consequences for the Mexican transition. The first effect was that it blocked the investigations that the SPO was carrying out regarding members of the armed forces. Was it necessary to have two prosecutors – the Military and the SPO – working on the same issue at the same time?<sup>69</sup> (Castillo and Herrera 2002). If the Military were being investigated by the Military Prosecutor's Office, they

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<sup>68</sup> Kurt Waldheim was the fourth Secretary General of the United Nations. His hidden complicity in Nazi war crimes was exposed in the 1980s.

<sup>69</sup> The one hundred and forty-three cases of forced disappearance investigated by the Military Prosecutor's Office were taken from Recommendation 26/2001 that the SPO was investigating at the time.

would most certainly not be investigated by the SPO. And although the trial ended in acquittal, the SPO could not press charges against these officers because of the principle known as 'double jeopardy' – a person cannot be judged twice for the same crime (Academia Mexicana de Derechos Humanos 2003: 6).

The second effect of this process was to confirm that the armed forces had enough power to neutralise the 'transitional justice' process. A widely known principle of human rights establishes that military courts should not prosecute or investigate human rights violations – so state authorities should transfer jurisdiction over human rights cases from military to civilian authorities (Fundación Diego Lucero, et al. 2005: 6; HRW 2003: 16). However, in the new Mexican democracy, the army decided to ignore this elemental principle and investigate itself, and President Fox allowed this to happen; he could have ordered the army to transfer these investigations to the SPO, but he did not (Fundación Diego Lucero, et al. 2005: 10).

The third political effect was related to the victims' families. Cohen rightly notes that 'perpetrators [...] only pretend to forget', but that 'this hardly ever happens to victims' (Cohen 2005: 131). However, in Mexico's 'transitional justice' process, the victims had powerful reasons not to remember publicly what had occurred in the past. As part of its investigations, the Military Prosecutor's Office installed an office in the state of Guerrero with the object of obtaining information about people disappeared by the army in that area (HRW 2006). Once there, the Military Prosecutor's Office called the victims' families to give evidence about what had occurred, but they were reluctant to talk to the army (Academia Mexicana de Derechos Humanos 2003: 6). According to HRW, there were three reasons for this. First, some were simply afraid of members of the armed forces: 'How am I going to go to the Military Prosecutor's Office when I'm denouncing an army general?' Second, they could not believe in the army's political

will to investigate past crimes: 'they ignored us back then, why would it be different now?' Third, they did not want to collaborate with the former perpetrators of disappearances: 'they are the ones who took my husband away' (HRW 2003: 18).

The Military Prosecutor's Office in the state of Guerrero also seriously affected the SPO's job. As part of its investigative tasks, the SPO installed an office in the state of Guerrero. The result was that the victims and their families believed that the SPO and the Military Prosecutor's Office were the same thing, hence their reluctance to collaborate with either.

The army's role in the 'transitional justice' process was aptly summarised by HRW: 'The country [was] once again leaving the task of justice in the hands of the institution that carried out the crimes in the first place. It [was] perpetuating the old system in which those involved in public security are not bound by the rule of law' (HRW 2006: 105).

#### *Results: the role of the courts*

Before being shut down in 2006, the SPO had initiated criminal investigations in seven hundred and ninety-seven cases of forced disappearance (OUNHCHR 2011). Some of these cases were investigated by the SPO through 'Programme A' – exclusively dedicated to the cases of disappearance of political dissidents in the 1970s. Most of the cases under investigation were related to the disappearance of members of the Revolutionary Democratic Party (PRD) in the 1990s and were thus addressed through 'Programme C'.

As I mentioned earlier, the SPO could have initiated criminal investigations of all these cases using two different legal terms: forced disappearance or illegal abduction. The former was a human rights category which had only existed in Mexico since 2002 and could not be used retroactively because of the interpretive declaration



imposed by President Fox and ratified by the Senate. The latter, although it was not a human rights category, was included in the Mexican penal code, but the period allotted by the statute of limitations for this crime had run. Even though the reasons for this decision were never made public, the Special Prosecutor chose to support his criminal investigations into the concept of illegal abduction (HRW 2006: 100). In so doing, the SPO had to convince judges that the statute of limitations for illegal abduction cases did not begin to run out so long as the victim remained missing. Hence the obvious irony: Mexican 'transitional justice' was run by an institution that should have investigated human rights violations – but this same institution was incapable of using a human rights violation category.

In the end, as Acosta and Ennelin (2006: 106) said, 'the SPO [...] had to fight against the Mexican justice system, notorious for its long history of corruption and incompetence'. In more than five years of existence, the SPO was able to file charges in only fifteen of the seven hundred and ninety-seven cases. It obtained arrest warrants for twelve former officials, but only six were arrested. One of them was Miguel Nazar Haro – feared former director of the secret police (DFS). He was arrested in 2004, but because he was older than seventy years, he was set free and placed under house arrest. Nazar Haro was thus the first beneficiary of the recently established reform to the penal code, which, inspired by the language of human rights, allowed elderly criminals to stay at home. Although the law came into force three months after Nazar Haro was arrested, the judges agreed that the law should be applied at once and retroactively – respecting the human rights of the elderly and those in prison seemed to be an urgent issue.

In November 2002, just one year after the SPO was established, President Fox said it was 'very likely that most of those responsible will not go to jail, because we have already gone through all legal provisions to indict them for past crimes' (Reforma

2002). And Fox's statement proved right. Until its closure, the SPO did not obtain a single criminal conviction for forced disappearance (ICTJ 2008; OUNHCHR 2011).

### **Mexican genocide**

As previously explained, the SPO was not created by the Fox administration to investigate the murder of dissident students in 1968 and 1971. These fateful events became a part of the 'transitional justice' process once the SPO was already running. Even so, the criminal investigations ended in impunity.

#### *Aggravated homicide, crimes against humanity, or genocide?*

What human rights category could best capture what occurred in 1968 and 1971? According to HRW, an option was to press charges for 'aggravated homicide': 'there is no question that the killings fit the definition of this crime' (HRW 2006: 97). However, the concept of 'aggravated homicide' is not a human rights category; the term has existed in the Mexican penal code for years. Once more, the SPO was an institution allegedly in charge of prosecuting human rights violations, but because of its context it could only prosecute 'normal' crimes (Comité 68, et al. 2006: 20).

The problem with the concept of 'aggravated homicide' was that, according to the law that applied when the events took place, the statute of limitations for this crime was thirty years. Thus the time allowed by the statute of limitations had elapsed.

Was there another way of investigating the killing of students in 1968 and 1971? Several human rights organisations came up with an idea: the SPO should use the concept of 'crimes against humanity' (Comité 68, et al. 2006; Fundación Diego Lucero, et al. 2005; HRW 2003). According to HRW, for instance, as the murder, torture, executions and illegal abductions 'appear to have been carried out in a widespread and systematic way by state agents, they almost certainly [could be treated as] "crimes

against humanity,” as defined in international law’ (HRW 2003: 23; ICC 2002).<sup>70</sup> In addition, as crimes against humanity are deemed to be part of *jus cogens*, the Mexican government was supposed to accept that no derogation is ever permitted for these crimes.

However, the SPO ignored this legal strategy. The reasons why it did not use the concept of crimes against humanity are unknown (HRW 2006). According to HRW, a possible explanation is related to the setbacks of the Mexican legal system:

[I]f the ‘crimes against humanity’ option makes good sense from an international law perspective, it would have represented a major new development for Mexican criminal law [...]. Making this case to judges who are generally unversed in international law would have been a difficult task (HRW 2006: 98).

If the SPO decided not to use the figure of ‘aggravated homicide’ nor ‘crimes against humanity’ for fear of ‘failing’ within Mexican ‘legal complex’, it is perplexing that it chose to deploy the category of ‘genocide’.<sup>71</sup>

The idea that what had occurred in 1968 and 1971 constituted genocide was not new, nor was it a crazy idea of the Special Prosecutor. As I mentioned earlier in this chapter, since at least 1998 human rights organisations and victims’ families had requested the General Attorney’s Office to investigate the murder of the students at Tlatelolco as a case of genocide (Aranda 2002b). Thus the use of the term genocide in the Mexican ‘transitional justice’ process did not come out of the blue – it had circulated since at least 1998 and was shared among victims, and by the human rights community in Mexico (Comité 68, et al. 2006: 10).

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<sup>70</sup> According to the Rome Statute of the International Criminal Court, ‘crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population [...]: (a) Murder; [...] (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture [...]’ (ICC 2002).

<sup>71</sup> The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as any of a number of acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, e.g. killing members of a group; causing serious bodily or mental harm to members of a group; or deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part (UN General Assembly 1948).

But the idea of genocide became much more important as a result of yet another ‘political accident’ that was completely unrelated to the process of ‘transitional justice’: the arrest and extradition of the Argentinean former military Ricardo Miguel Cavallo.

Ricardo Miguel Cavallo – also known as Marcelo or Serpico – was a member of the intelligence group of Argentina’s notorious Mechanic School of the Armed Forces (ESMA) in 1976, in whose headquarters at least five thousand people were tortured after the *coup d’état* that imposed a military junta under the leadership of Jorge Videla between 1976 and 1982. In 1983, Cavallo was investigated for genocide, homicide and forced disappearance, but benefited from the ‘Full Stop Law’ promoted by the new democratic government in Argentina (Castro 2008).

In 1990, Cavallo retired from the Argentine Armed Forces and became a businessman. He joined TALSUD, an Intel company that developed electronic driving licences in Argentina, in 1994 (O’Donnell 2000). In 1999, TALSUD was such a successful company that its operations expanded to Mexico. There, the company won a public bid to provide the National Vehicle Registration (RENAVE in Spanish) service, a public database that allowed the government to follow a vehicle’s status from leaving a plant to when it was no longer roadworthy. RENAVE depended on the Ministry of Commerce and Industrial Promotion. It had been created by President Ernesto Zedillo (1994–2000) in order to curb the increasing theft of vehicles in Mexico. Ricardo Cavallo moved to Mexico City and took over as Director of RENAVE. The former Argentine torturer would help to reduce crime in Mexico.

In his position as RENAVE’s Director, Cavallo was inevitably under the spotlight – understandably, he was endlessly interviewed by Mexican media on the recently created institution that sought to limit the theft of cars in the country, a business that generated more than three hundred million dollars a year (Flores 2000a). On

August 22, 2000 – a few weeks after Vicente Fox's electoral triumph – some of Cavallo's victims who resided in Mexico recognised him on television. The victims contacted *Reforma* and asked the newspaper to initiate a journalistic investigation on Cavallo's past (Ekaizer 2003).

On August 23, *Reforma* contacted Cavallo. 'Are you this person?' the journalist asked. 'He looks very much like me, I can't deny it', Cavallo answered (Flores 2000b). However, Cavallo assured the journalist that it was all a mistake, and he had nothing to do with the man in the photographs who was wearing a military uniform. His only contact with the army happened when he performed his military service as a young man (Flores 2000a).

The next day, *Reforma* revealed on its first page that the successful businessman in charge of RENAVE, Ricardo Miguel Cavallo, had a striking resemblance to an Argentine former military who was investigated in Spain by Judge Baltasar Garzón for car theft in Argentina, falsification of documents, terrorism, torture and genocide (Vales 2000). In response, Cavallo denied all accusations and invoked a conspiracy theory: 'this project – i.e. the RENAVE – has enemies and I am in awe at how far they can go' (Flores 2000a). He maintained that the accusations against him were false and detrimental to the institution where he worked. The Mexican Minister of Commerce, Herminio Blanco, also came to his defence: 'that grand journalistic investigation' against Cavallo, he said, 'proves that we have touched upon personal interests, such as car theft' (Reforma 2000b). Car thieves were the real issue.

Offended by the accusations of the press, Cavallo proposed a trip to Argentina to obtain the necessary documentation to prove his identity and clear his reputation: 'I have taken the immediate decision to return to my country, to personally gather all those

documents that describe and prove my always law-abiding personality', Cavallo said to the press (Cavallo 2000). Cavallo travelled to Buenos Aires the same day.

Cavallo was in part correct. Although he had worked at Latin America's largest torture centre, there was no warrant for his arrest in any country – not in Spain, Mexico or Argentina. He was a free man and, legally speaking, innocent. Cavallo could thus take his flight without any worry. His plan was working without a hitch: he would arrive in Argentina in a few hours where he would be protected by the amnesty laws.

The Mexican federal police and Interpol quickly came up with an idea: to arrest Cavallo for alleged falsification of documents. The accusation was preposterous and unsustainable, but would prevent his escape and, more crucially, give any country interested in issuing a warrant for his arrest a little more time. Cavallo's airplane made a brief stop in the Mexican city of Cancun, where he was arrested for carrying false documentation, and transferred to Interpol's offices in Mexico City. However, if in forty-eight hours Interpol did not receive an international warrant for his arrest, Cavallo would be set free.

The next day, victims of the dictatorship in Argentina impatiently awaited Judge Baltasar Garzón – whom they had contacted in 1996 – to request Cavallo's extradition. If the request was not made in a few hours, Cavallo would be set free. But Garzón was on vacation in Costa Rica (Ekaizer 2003; Gasparini 2000), so the victims had to convince Spanish judge Guillermo Ruiz Polanco – who was unaware of the case – to request the Mexican government to keep Cavallo under arrest until an extradition order was processed (Acosta and Ennelin 2006: 98). It was not until September 12, 2000, that judge Garzón was able to make an official request for the extradition of Cavallo for terrorism and genocide.

Four months later, in January 2001, a Mexican judge ordered Cavallo to be extradited to Spain, but Cavallo appealed the verdict and the case reached the Mexican Supreme Court of Justice. 'Don't you realize I am another person? [...] Why is everyone bent on taking me twenty years back, as if I were a dummy mounted on a time machine?' Cavallo asked (Pérez Andrade 2001). Two and a half years later, the Mexican Supreme Court of Justice confirmed the judge's decision and authorised Cavallo's extradition to face trial for terrorism and genocide. Cavallo was sent to Spain in June 2003.

The story of Cavallo's extradition is important because it had an impact on the 'transitional justice' process. Mexico became the first Latin American country to allow the extradition of someone for gross violations of human rights. According to the Mexican Foreign Minister, Cavallo's arrest and extradition showed 'the government's commitment to human rights in our country and in all the world' (Castañeda 2001a). The Cavallo case was also crucial because it helped legitimise the SPO's legal strategy. For the Special Prosecutor, Ignacio Carrillo Prieto, the assassination of students in 1968 and 1971 constituted genocide because 'genocide implies the homicidal repression against a national group. The Court said in the Cavallo case that genocide implies the extermination of a national group, like the students and dissidents in Argentina, who opposed the dictatorship' (Castillo 2003). From Carrillo Prieto's perspective, if judge Baltasar Garzón pressed charges against Cavallo for genocide, why not do the same in Mexico against state agents in the PRI era? 'Let the image of genocide go beyond Auschwitz', Carrillo Prieto vehemently declared to the press (Castillo 2003).

The problem with the Special Prosecutor's sophisticated syllogisms is that they did not correspond with what the Mexican judges had said in the Cavallo case. The Mexican Supreme Court of Justice allowed Cavallo's extradition, but never addressed

the underlying issue of whether genocide could be committed against a political group (Acosta and Ennelin 2006: 99). The Mexican judge who received and allowed the extradition request did not address the question of whether a political group can be the victim of genocide or not. The judge only evaluated whether Spain's extradition request had been carried out in adherence to Mexico and Spain's bilateral extradition treaty (HRW 2006: 96). Thus, Carrillo Prieto never understood – or made us think he never understood – the judges' arguments and this misunderstanding led to the 'failure' of his legal strategy based on genocide.

The idea of prosecuting state agents of the PRI era for genocide was severely criticised from the beginning. Yet, a year after Cavallo's extradition, in June 2004, the SPO charged eleven people involved with the massacre of twenty-five students in 1971 with genocide (PGR 2002a). Over more than nine thousand pages, the SPO elaborated convoluted legal arguments to support this controversial case, which can be summarised as follows.

First, the SPO defined what a group is because in order for it to be possible 'to destroy a group [...] such [a] group must, necessarily and previously, exist' (PGR 2002a: 8708). 'Obviously', the Special Prosecutor clarified, a group refers to 'a group of humans' (PGR 2002a: 8708).

Second, since the Convention against genocide did not include political groups, the SPO desperately tried to classify the twenty-five assassinated students as a 'national group'. Paraphrasing the nineteenth-century French philosopher, Ernest Renán, the SPO pointed out that a national group is one that is formed by people who share 'a complex of material and spiritual links' like the Mayas in Mexico, or the Welsh, the Scottish and the British: 'three different nations' within Great Britain (PGR 2002a: 8711). Following this reasoning, the SPO considered that the students were a national group because they



were a group of people who shared something in common: they were dissidents (!). Therefore, the SPO concluded, the assassination of twenty-five students constituted genocide because: the state 'committed acts' with the purpose of 'destroying, completely or partially, a Mexican national group'; the group was 'clearly identified' as the 'Mexican student community'; and the group 'shared a common political ideology': all the students were 'dissidents' (PGR 2002a: 8719).

I now examine how this legal strategy – the genocide cases – led to impunity. But before embarking on that analysis, it is worth noting that the story of how the SPO defined the killing of students protestors in 1968 and 1971 is relevant because it shows – again – that transitional justice is not 'intrinsic' or 'necessary' – as the first and second clusters of literature on transitional justice claim. These cases confirm that transitional justice ideas and practices – e.g. the idea that the killing of students constituted genocide – are created and transformed within a particular historical setting. The genocide cases in Mexico's 'transitional justice' process resulted from different 'political accidents', and political negotiations.

The story of these cases is also relevant because it renders visible the role played by the language of human rights as a means through which power is exercised – a role that is often ignored by scholars whose work comprises the first and second clusters of literature on transitional justice who characterise transitional justice as something that is based on moral, legal, universal, neutral and depoliticised imperatives that states are obliged to follow. However, the Tlatelolco and Corpus Christi massacres confirm what Moon suggests in her reflection on the criminological study of genocide: that the events that international law attempts to describe and regulate are not taking place beyond but within politics (Moon 2011). Through the language of human rights, the SPO was re-reading and re-writing the past – the events that took place in 1968 and 1971 – in order

to satisfy contemporary political demands. And the 'conditional re-reading of the events of the past', as Scott Veitch puts it, 'requires a determinedly political assessment of the legal response'. So 'the legal truth, always at one remove from a "factual" truth, is here further displaced in the production of a legal memory that sees process indistinguishable from outcome' (Veitch 2001: 42).

*Stretching the law (again): the role of the Congress*

Another human rights international instrument ratified by Vicente Fox which seemed crucial in the 'transitional justice' process was the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. This Convention had been signed on July 3, 1969, but was never ratified by the PRI regime. The Fox administration ratified the Convention on March 15, 2002 – just a month after ratifying the Inter-American Convention on Forced Disappearance of Persons (UN Treaty Collection 2012).

The press registered this event as an additional sign that the new regime was completely committed to democracy and human rights. According to the newspaper *Reforma*, gross violations of human rights – such as assassinations, exterminations, submission, slavery, deportation, and persecution for political, racial or religious reasons committed against any civilian population – would never cease in Mexico (Reforma 2001b). The Convention would help address the overused government legal reasoning that human rights abuses expire after a certain number of years. Additionally, the press reported that by ratifying this Convention, senators 'sought to deter the commission of such conducts' in the future (Reforma 2001b).

However, as with the Inter-American Convention on Forced Disappearance of Persons, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was useless from the beginning. President Fox

sent the Convention to the Senate for ratification, but he proposed to add an interpretative declaration which rendered it harmless.

The 'interpretative declaration' imposed by Fox sought to abolish the Convention's temporary dimension – it sought to neutralise the Convention's essence. It was no surprise that Article I of the Convention on the non-applicability of statutory limitations established that statutory limitations do not apply to crimes against humanity 'irrespective of the date of their commission' (UN General Assembly 2012).<sup>72</sup> In addition, article IV states that countries have to 'undertake to adopt [...] any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes [...] and that, where they exist, such limitations shall be abolished' (UN General Assembly 2012). However, absurd as it sounds, the Convention would be acceptable to the Fox administration 'on the understanding that it will consider statutory limitations non-applicable only to crimes [...] which are committed after the entry into effect of the Convention' – that is, from March 2002 onwards (SRE 2012; UN Treaty Collection 2012).

Once more, the Mexican Senate could have ignored the legal trap added to the Convention by President Fox. Had the interpretive declaration been rejected, the SPO could have prosecuted those guilty by pressing charges for illegal abduction, aggravated homicide, or crimes against humanity without fearing that the court would argue that the time allotted by the statute of limitations for these crimes has elapsed. However, the Mexican Senate approved unanimously the interpretive declaration which rendered the Convention useless.

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<sup>72</sup> The Convention refers to war crimes and crimes against humanity, whether committed in time of war or in time of peace.

The PRI senators, understandably, gladly accepted the legal trap. Less understandable is that the PAN did so as well. For example, Víctor Manuel Torres Herrera from PAN supported the Convention's ratification:

War crimes and crimes against humanity go against [...] a person's dignity, against the community's harmonic life, they undermine social structures, constitute the most abject expression of the obtuseness of power and they close off all hope for a certain and happy future for our descendants [...]. [Therefore], the National Action Party could not agree more with this opinion, so we do not doubt to vote in its favour (Senado de la República 2001).

However, simultaneously, Senator Torres Herrera defended 'the interpretive declaration' arguing that it was 'a clear example of the reconciliation spirit and the Mexican Executive's sense of justice' (Senado de la República 2001). Another PAN Senator, Jorge Zermeno, also supported the Convention's ratification: in the new Mexican democratic regime it is not possible to continue to have laws that allow the expiration of 'barbaric acts [...] repugnant and grotesque' committed in the past, he declared to the press (Reforma 2001b). But then he – like the rest of his colleagues – voted in favour of the legal traps that allowed these crimes to expire. How could the PAN agree, at the same time, with a human rights treaty and the chicanery that annuls it? What happened in Mexico is a good example of what Veitch meant when he claimed that 'in the process of transition and coming to terms with the past, law and legal institutions afford an elasticity that challenges a reading of law – and arguably the rule of law – to a novel demand of justice corresponding to the perceived needs of the transitional period' (Veitch 2001: 42). The effect of the 'interpretative declaration' was that the statutory limitations to gross violations of human rights perpetrated in the past would continue to apply as if the Convention did not exist. The irony here is evident. To demonstrate its commitment to human rights, those recently elected in the executive and legislative branches ratified an international treaty which was essential to 'transitional

justice' since it made it possible to prosecute crimes of the past – but those same authorities made this treaty applicable only in the future.

*Results: the role of the courts*

On Thursday July 22, 2004, the SPO charged former president Luis Echeverría and another ten top aides and high-ranking military officials with 'genocide' for the killing of twenty-five protesters on June 10, 1971, in Mexico City (Castillo and Méndez 2004). Questioned by a reporter on whether he had a solid case, the Special Prosecutor answered: 'I have many flaws. I am a half-wit, but not completely stupid' (Gutiérrez Vega 2006).

The case received immediate support from experts and human rights organisations. International human rights activists, such as Daniel Wilkinson of HRW, celebrated the indictments as 'achieving the unthinkable' (Thompson and Weiner 2004b). Relatives of the protestors killed in 1971, such as Jesús Martín del Campo, called the indictments 'a small, but important step'. 'So many governments had told us this case was closed. At least now we are a little closer to justice' (Thompson and Weiner 2004b). Former president Echeverría, at that time eighty-two, was the first president ever charged with a crime in Mexico.

Amid rumours that Echeverría had fled the country in order to escape justice, journalists began a search. But he was at home. 'I am at peace', he told to the journalists, because 'there had never been genocide in Mexico' (Thompson and Weiner 2004b).

The next day, Friday July 23, 2004, the Judge and his team began to analyse thirteen volumes of evidence and legal arguments that the SPO had meticulously put together over almost two years. Only twenty-four hours later, after allegedly revising

more than nine thousand pages of evidence, the judge determined that what had occurred on June 10, 1971, did not constitute 'genocide'.

The judge argued that, according to the evidence provided by the SPO, the killing of students was a case of 'simple homicide' (not aggravated homicide nor a crime against humanity). However, the time allotted by the statute of limitations for 'simple homicide' cases had run out. So the court refused to grant arrest warrants (Méndez and Castillo 2004).

But the Special Prosecutor insisted that his legal arguments were right – Echeverría and members of his administration perpetrated genocide. What happened in the court, Carillo Prieto claimed, was that the judge did not 'adequately weigh each and every one of the elements' of the nine thousand pages of evidence and testimony he had presented (Thompson and Weiner 2004a). But Juan Velázquez, Echeverría's lawyer, had a different opinion. According to him, 'in Mexico, there has never been genocide [...]. There have been clashes, deaths, but never genocide, as a policy of the state'. 'In my thirty-five years in as a lawyer, in all my political cases', Velazquez said with a certain irony, 'this one is the easiest of them all. It is doomed to fail' (Thompson and Weiner 2004a).

Sure of its legal arguments, the SPO filed an appeal, which eventually reached the Supreme Court. A year later, in June 2005, the Supreme Court reached the decision that the statute of limitations had been reached for ten of the twelve accused (Aranda 2005). These ten perpetrators would never be held responsible for their actions. The situation of former President Echeverría and his former Prime Minister, Mario Moya, was very different: the Supreme Court determined that the time allotted for the statute of limitations had not expired because they had enjoyed legal immunity during their administration (from 1970 to 1976). For them, the thirty-year period allowed for

prosecution would terminate in 2006. Therefore, the Supreme Court returned the case to trial court for it to determine if the charges pressed by the SPO against the former president and his former minister were sufficiently founded to proceed to trial (Aranda 2005).

A month later, on July 27, the judge determined that the SPO had been unable to prove that the assassination of students in 1971 constituted genocide, and closed the case (Méndez Ortiz 2005a). According to the judge, a group of students cannot be considered a national group just because its members studied in the same school or just because they were dissidents. This ruling was not subject to appeal.

After this predictable defeat, the genocide strategy was criticised even more. However, the Special Prosecutor did not wish to change his legal strategy – the assassination of students would be a genocide case or none at all. Furthermore, the Special Prosecutor counterattacked his detractors. The problem was not in his legal arguments, but because there was a conspiracy against him. According to Carrillo Prieto, ‘everything is subject to this plan’s matrix’: ‘we are going to disqualify this poor man who is the Special Prosecutor, in order to say he is an asshole’ (Gutiérrez Vega 2006). Given that the media played a relevant role in this plan against him, the Special Prosecutor warned them: ‘let the media assume their responsibility: either they’re with the cover-up or they’re with this Office’ (Gutiérrez Vega 2006). Between May 31, 2005, and May 25, 2006, the SPO paid more than one hundred thousand pounds (two and a half million pesos) in press releases in Mexican newspapers against activists, academics, experts and journalists who criticised his strategy (Aguayo and Trevino-Rangel 2006a).<sup>73</sup>

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<sup>73</sup> I have the honour of being attacked by the Special Prosecutor through the press (twice). In light of this event, I began to research how many press releases he had paid for and how much they cost. This information has been analysed in Chapter Two of this thesis.

The Special Prosecutor also embarked on a smearing campaign against the judges. According to the Special Prosecutor, the problem was not his legal strategy but the courts: 'mechanisms that sound old, that rattle like junk, like jalopies' (Gutiérrez Vega 2006). Questioned on the role played by the judicial power, the Special Prosecutor answered: 'The Judicial Power can have judges so stupid that they sympathise with the perpetrators' (Gutiérrez Vega 2006).

Even so, he used the same strategy to address the case of the assassination of students in 1968. On September 19, 2005, after three years of investigation, through thirty-six tomes (thirty-four thousand pages), the SPO pressed charges of genocide against former President Luis Echeverría and six other state agents (Méndez Ortiz 2005c). Two days later, the judge rejected the charges, using different – and contradictory – legal arguments. In the case of former President Echeverría, the judges argued that there was insufficient evidence to prove that what had occurred in 1968 had been genocide (Méndez Ortiz 2005b). In contrast, for the seven other state agents, the judge considered that what had occurred in 1968 had indeed been genocide, but considered that the period allowed for prosecution by the statute of limitations had run. How could the same judge determine that the same event was and was not genocide at the same time? This remains a mystery – the point is that the eight accused by the SPO were innocent according to the law.

Understandably, the SPO appealed the ruling, but this time the Supreme Court declined to review the appeal, which was then reconsidered by a lower court. The case was accepted again and travelled through the labyrinths of Mexican justice for four more years.

The case came to an end on March 26, 2009. That day the judges determined that former President Echeverría was innocent. This time, the judges used a completely



different argument to set him free: what occurred on October 2, 1968, did constitute genocide, the period allowed for prosecution by the statute of limitations had not run yet, but they found insufficient evidence to prove that Echeverría had been involved in the assassination of students. At the end, no one was held responsible for genocide, simple homicide, aggravated homicide or crimes against humanity.

‘What are the Prosecution’s pending issues?’, a journalist asked the Special Prosecutor in June 2006. ‘We are only getting started. If you are keeping track we have processed the case of 1968 and 1971 [but] we still have about two hundred cases left. So you are not going to say goodbye to the SPO for a long time’, Carrillo Prieto replied confidently (Gutiérrez Vega 2006). However, only five months later President Fox ordered that the SPO should be closed.

### **‘Transitional justice’ and its effects in the process of democratisation**

By following a retributive sense of justice to come to terms with the past, Fox’s government helped to legitimise (indeed, protect) key political institutions that were still working under authoritarian premises. One example is that of the courts, which tolerated the perpetration of human rights violations during the PRI era. Although no court accepted the SPO’s prosecutorial strategies on forced disappearance or genocide, the tainted past of the courts was cleansed as their rulings were according to the Constitution. In a country where the law was constantly bypassed during the authoritarian era, the fact that the process of ‘transitional justice’ followed the rule of law was an indication that things had changed with the arrival of democracy. The ‘transitional justice’ process helped to improve the image of the justice system, which seemed no longer to be subordinated to the president as it was during the PRI era. Although the courts did not send a single perpetrator to jail, ‘the judicial branch has been strengthened, something that is always of the greatest importance’, said the

Mexican historian Enrique Krauze (2004) to *The New York Times*. 'The wide publicity that the events [the court's rulings on the genocide cases] received', he argued, was an 'achievement' – 'fruit of the freedom of expression that didn't exist' in the PRI era (Krauze 2004).

Another example of how the SPO helped to legitimise key institutions is that of the General Attorney's Office. Before the change of regime, the General Attorney's Office failed to investigate the whereabouts of the disappeared. Nor did it do anything to prevent, investigate, or punish other type of abuses (e.g., torture) perpetrated by the security forces against dissidents. In fact, as examined in Chapter One, the Public Prosecutor's Office's agents participated in atrocity: they oppressed political dissidents with measures that induced fear (phone taps, death threats) and were responsible for other types of human rights violations (illegal searches, arbitrary arrest, kidnappings). However, during Fox's administration, not a single tainted official working in this state office was exposed or dismissed; nor was the role of this institution in the commission of abuses assessed. On the contrary, it was the very same General Attorney's Office – via the SPO – the institution in charge of investigating and prosecuting past state crimes. The SPO depended on the General Attorney's Office. That is, Fox left the duty to investigate past abuses in the hands of the institution that turned a blind eye to such abuses in the past.

The Military also benefited from the creation of the SPO. Only three army generals were prosecuted – Acosta Chaparro, Quirós Hermosillo, and Barquín – but they were already in prison for drug trafficking. In addition, the Military were allowed to investigate (and punish) themselves. An essential principle of human rights states that military courts should not prosecute human rights abuses – therefore, Vicente Fox was supposed to transfer jurisdiction over human rights cases from military to civilian

authorities, but he did not. As a result, the trial of the Military obstructed the investigations that the SPO was conducting about members of the armed forces. If the Military were being investigated by the Military Prosecutor's Office, they would not be investigated by the SPO.

Beyond legitimising key institutions and tainted officials who were then incorporated into the new democratic regime, the SPO had other political effects. The SPO served to attract and control other 'transitional justice' practices. For example, the SPO absorbed the investigation of the student massacre in 1968 – an investigation which had existed since 1998. The same occurred with the killing of students in 1971, which was originally investigated by Mexico City's District Attorney. As Human Rights Watch (HRW) (2006: 70) put it, the 'creation of a "special" entity [the SPO] may have merely made it easier for the "regular" institutions of the justice sector to continue to duck their responsibility – leaving it to the new office to do what they should have been doing all along, and to take the blame for its failure to produce more substantial results'.

However, the SPO not only attracted and controlled investigations about past state crimes which already existed, but for more than five years it also helped to block any other transitional justice effort. For example, the victims of abuses could not take their cases to the International Criminal Court or the Inter-American Court of Human Rights as these are courts of last resort. These courts cannot act if a case is investigated or prosecuted by a national judicial system. Therefore, the victims had to go to the SPO first and wait for years before taking their cases to international courts. Thus, the SPO served, paradoxically, as an obstacle to justice.

## Conclusions

In 2003, Argentina's President, Néstor Kirchner, rescinded the laws of Due Obedience and Full Stop. This allowed forty-six former repressors to be taken to justice in Argentina. Meanwhile, Miguel Cavallo was still being tried in Spain. In 2008, Cavallo was extradited to Argentina and his trial extended until October 2011. Then, the court sentenced him to life imprisonment, along with ten other former servicemen, for crimes against humanity committed during the military dictatorship (Goni 2011).

In Mexico, in contrast, President Fox closed down the SPO on the last day of his administration, November 30, 2006. It had not obtained a single criminal conviction. It was capable of determining the whereabouts of only six people (out of more than six hundred cases under investigation). Two of them were killed while in detention. The other four had the same fate as Carlos Francisco Castañeda de la Fuente: they were committed to psychiatric hospitals (HRW 2006: 83).

As this chapter showed, even if the 'transitional justice' process did not obtain truth or justice, it brought about important consequences for the Fox administration. It contributed to the reincorporation and empowerment of the military forces within the new system; it helped to improve the image of the justice system, which seemed no longer to be subordinated to the President as it was during the PRI era; it granted a *de facto* amnesty to former perpetrators; it blocked other transitional justice efforts; it strengthened the Fox administration's legitimacy by being seemingly committed to human rights; and it preserved the fragile democracy's political stability.

This chapter showed how the many factors that led to the establishment of this particular version of 'transitional justice' in Mexico – analysed in Chapters Three and Four – restricted its development and results. From the outset Mexican 'transitional justice' had the same logic: comply with demands to face the past, without disturbing the PRI elites.

Particularly, throughout this chapter I showed that Mexican ‘transitional justice’ was affected by continuous political negotiations between different actors that participated in the process (e.g. members of the PRI era; Fox, his strategists and his party; left-wing political parties, human rights organisations; and former victims of repression). I also showed that the language of human rights played a crucial role in the ‘transitional justice’ process. This language led to the ‘transitional justice’ process that evolved through the existing structures of power – laws and institutions that kept working under authoritarian premises. Additionally, it was a rhetoric that served to justify – *a priori* or *a posteriori* – political decisions that seemed always to benefit former perpetrators.

The language of human rights also served to legitimise whatever resulted from this particular ‘transitional justice’ process – even the *de facto* exoneration of perpetrators was justified, as the application of the law is independent of its outcome. Thus, paradoxically, the language of human rights on which transitional justice is founded can be a useful tool to expose past abuses of power, but equally, as demonstrated in this case, can serve to legitimise such abuses.

## Conclusions

### Background

This thesis has explored how President Vicente Fox faced past state crimes perpetrated during the Institutional Revolutionary Party's seventy-year authoritarian regime through a Special Prosecutor's Office (SPO). As the SPO has been ignored as a topic of academic enquiry, I began this thesis by explaining why Mexico was an auspicious scenario for the emergence of 'transitional justice' in the first place. I showed that the PRI era survived for decades because the one-party state limited political pluralism (opposition political parties were insignificant until the 1980s), and articulated and restricted social demands through worker and peasant unions controlled by the official party; and the centralisation of power in the presidency allowed for the manipulation of the mass media, the co-opting of political dissidents, and pervasive corruption. Finally, and crucially, I demonstrated that the authoritarian regime harshly repressed its enemies. The violation of human rights was not an unusual practice carried out by a few bad apples in the police, the secret police, or the army. Kidnappings, torture, assassinations, forced disappearances, and other abuses were part of an official policy in which a multiplicity of institutions and state agents were involved, e.g., paramilitary groups and the health system. Already in 1997, Ernesto Zedillo's administration (1994–2000) was responsible for killing forty-five men, toddlers, and women (five of them pregnant) in Acteal, an impoverished Mayan Indian community in the state of Chiapas.

In Chapter One I explained how the triumph of Vicente Fox's conservative National Action Party (PAN) in 2000 was a significant step in the process of democratisation. The 2000 presidential election was the conclusion of a protracted process of political openness, the culmination of the steady liberalisation of the

authoritarian system. However, as I showed, in the government's official discourse and for many observers, Fox's electoral triumph was not the end of the democratisation process, but rather the juncture from which a series of political reforms could be implemented to consolidate a democratic regime in Mexico, e.g., the transformation of the police and the tax system reform. Hence the PAN's ascendance to government, more than a change in the ruling party, represented a change of regime – the elimination of the PRI and the political, social, and cultural practices associated with that party, a change from authoritarian rule to an incipient democracy.

Later, this thesis described how after the July 2000 election President Fox advanced a series of reforms to consolidate Mexico's democratic rule. Among the new policies, 'transitional justice' was a priority. However, Fox's decision to come to terms with the past generated controversy and divergent opinions. Human rights activists, victims of past abuses and their relatives, scholars, the left-wing Revolutionary Democratic Party (PRD), and international organisations such as Human Rights Watch (HRW) supported Fox's electoral promises to know the truth of what happened during the PRI era, and to bring perpetrators to justice. For this group, 'transitional justice' was a prerequisite to secure Mexico's democratic rule. In contrast, the PAN – Vicente Fox's conservative party – and some of the new administration cabinet's members opposed any effort to face the past, fearing that 'transitional justice' could put at risk the stability of the new democracy. The PRI was still a powerful political force and could challenge the Fox government's efforts to democratise Mexico. Therefore, those who opposed 'transitional justice' within the new regime considered it irrational to prosecute the members of the political party – the PRI – with which they sought to negotiate political reforms to modernise the country.

Therefore, I showed how Fox's administration faced the dilemma captured by Cohen's seminal article on transitional justice in 1995, in which he said: 'in these circumstances you may feel that punishment should happen but also agree that it is politically expedient and in the national interest that it should not' (Cohen 1995: 35). Thus Fox's government had to settle accounts with the PRI for the human rights violations perpetrated in the past, but without upsetting it in order to reach certain reforms to strengthen democratisation.

The aim of this research was to explore how the Fox administration solved this dilemma – meeting demands to 'do something' about the past, without provoking the PRI. Supported by detailed documentary research, this thesis offered a complete account of the factors that facilitated the emergence of Mexico's 'transitional justice' process in such a complex political context. In so doing, it pointed out some of the most important consequences of the 'transitional justice' process in Mexico's democratisation: e.g., it strengthened Fox's authority; it bolstered the idea that the Fox administration represented not only a change of political party in government, but a change of regime; it showed that the new regime was allegedly committed to human rights; it avoided inquiry into the role played by different institutions involved in gross violation of human rights (the ministry of health); it legitimised and protect political institutions still working under authoritarian premises (the Courts); it left the investigations in the hands of the institutions that turned a blind eye to such abuses in the past (the General Attorney's Office); it affected Mexican society's understanding of the country's history of abuses; as only a very limited number of abuses was investigated, most perpetrators were not prosecuted, exposed or dismissed; finally, it granted a *de facto* amnesty to perpetrators; as the PRI was never threatened, it return to power in 2012.



One main question guided my research: what factors facilitated the emergence of the ‘transitional justice’ process, and did these factors lead to its results – impunity? My responses to this question were also elaborated in relationship to three sub-questions: why did Fox venture to establish a ‘transitional justice’ process that would put at risk the new regime’s stability, and why did the authoritarian elite allow it?; how was the ‘transitional justice’ process constructed, and how did its particular construction condition its performance?; and how, and to what extent, did ‘transitional justice’ affect the process of democratisation?

As explained in Chapter Two, these research questions and the way I explored them were shaped by the third cluster of literature on transitional justice – a social constructivist approach. Transitional justice literature, the main field of enquiry that addresses how states and societies deal with past atrocities, emerged in the mid-1990s and since then has followed three main strands. The first cluster of literature – what Moon (2008) terms restorative and retributive approaches – promoted the value of facing past atrocity according to the standard legal responses available: truth commissions and tribunals. The second cluster of literature – what I call ‘broadened’ approaches’ – has sought to assess why transitional justice does not live up to the ideal in order to remedy its failures; and has broadened the scope of transitional justice from its original focus (on political transitions and human rights) to whatever is considered a case of present suffering produced by past abuses. Most studies on transitional justice belong to these two clusters of research. Despite their differences, scholars participating in these two clusters share some basic assumptions: transitional justice is ‘intrinsic’ in transitions; it is ‘good’ because of the benefits it brings with it, e.g. democracy and reconciliation; ‘all good things go together’, e.g. ‘only a democratic state can guarantee

truth and justice, only truth and justice can sustain a democratic state' (Arenhovel 2008: 581); and even if transitional justice goes wrong, it can always be improved.

In this thesis I followed a third cluster of studies on transitional justice – a social constructivist viewpoint – that emerged as a reaction to the two aforementioned clusters. Rather than 'promoting' or 'rectifying' transitional justice ideals or practices, scholars participating in this constructivist approach are concerned with exploring how transitional justice claims and activities are constructed, and how such construction affects societies. Unlike the first and second clusters of literature on transitional justice, the third cluster, which this thesis endorses, does not assume that transitional justice is 'good', 'apolitical', or 'inherent' to transitional societies because of its alleged merits or benefits. On the contrary, it does not take these common claims on transitional justice as self-evident, but seeks to understand how such claims were created, shaped, contested, and adapted by their historical milieus, social actions, and political bargains. This is a growing body of literature that explores the contextual factors that allow the emergence (and policing) of transitional justice knowledge and practices.

## **Findings**

In this section I present the most significant findings of my research. I have already examined them in detail throughout the thesis; here I seek to summarise them.

*Why did Fox venture to establish a 'transitional justice' process, and why did the authoritarian elite allow it?*

As demonstrated in Chapter Three, Mexico's 'transitional justice' process was not intrinsic or necessary to the country's democratisation. President Fox decided to establish 'transitional justice' to serve three political purposes. First, the 'transitional justice' process helped to legitimise the new regime's democratic identity and appear to confirm its allegiance to human rights. The process appeared to underline the

discontinuity between the PRI era and the new democratic administration. Unlike his predecessors, President Fox appeared committed to human rights principles – unearthing the past, digging up graves, and opening up wounds, in order to establish the truth and see justice done (in Cohen’s words, ‘control by opening’).

Second, strategically, by creating the ‘rules of the game’ President Fox was able to control the intervention of the other actors taking part in the process: activists, academics, human rights NGOs, victims’ relatives, or left-wing political groups such as the PRD – whose members demanded that Fox should come to terms with the past – as well as those members of the new administration who differed from his stance (e.g. Fox’s strategists who advocated for the establishment of a truth commission or a policy of oblivion). Had the Congress intervened – e.g. in the selection of the special prosecutor – Fox’s proposal may have suffered changes or been blocked.

Third, by establishing a retributive institution (the SPO) to unearth past crimes, Fox and his strategists sought to channel the investigations into the past through the prevailing structures of power: laws designed during the previous regime and institutions that were managed by members of the PRI era (the courts, the Attorney General’s Office, even the Military). Had a truth commission existed, Fox’s authority and plans to reform the country may have been challenged by the Military and the PRI elite. Therefore, Fox opted to come to terms with the past but left this job to the institutions whose officials had committed the crimes or did nothing to prevent them. As a result, Fox was able to maintain the stability of the new democracy as the SPO’s prosecutorial strategies never really threatened the PRI elite – the *priistas* were *de facto* investigating (and thus granting immunity to) themselves. Hence it is understandable why the PRI did not oppose the ‘transitional justice’ process.

Moreover, the PRI promptly allowed (in fact, urged) the creation of the SPO because, as I have demonstrated in Chapter Four, some of the prosecutorial strategies to investigate and prosecute the PRI were devised by the PRI's own elite during the previous regime (via the National Human Rights Commission). Such prosecutorial methods, unsurprisingly, led to impunity. Therefore, in the new democratic system, tainted officials of the PRI era sought to preserve the immunity they had enjoyed in the past. Perhaps they were not powerful enough to oppose 'transitional justice' mechanisms completely, but preserved sufficient power to intervene in their making.

*How was the 'transitional justice' process constructed, and how did its particular construction condition its performance?*

As I demonstrated in Chapter Four, in Mexico the 'transitional justice' process was constructed in such a way as actually to maintain the immunity of perpetrators of past state crimes. The language of human rights played a crucial role in this endeavour. Human rights talk framed the SPO's investigations into the past: the type of abuses that were considered to constitute human rights violations; then the kind of human rights violations that qualified for investigation (e.g. forced disappearance, genocide) and, therefore, the type of victims who were counted in the process; the perpetrators of certain crimes who would be subject to prosecution; and the institution and authorities that would intervene (the policing of the past).

The Fox administration limited 'transitional justice' to two human rights categories: forced disappearance and genocide. Only these 'dramatic cases' of abuses were reported, which were not necessarily the most generalised. Therefore, other types of abuses committed during the PRI era were ignored and never treated as human rights violations: torture, ill treatment, killing, kidnapping. The result of this operation was that most perpetrators of abuses never faced justice.

Besides, by limiting ‘transitional justice’ to the categories of forced disappearance and genocide, conceptualisations based on the use of physical violence on the victims’ bodies, the Fox’s government restricted our understanding of suffering in the authoritarian era to the mere use of physical violence on a particular group of people. The Fox’s administration highlighted the physical suffering of certain dissidents, but obscured the experiences of relatives and kin; it bypassed other type of harm and activities endured by Mexican people during the authoritarian era. As a result, there was never any punishment for those tainted officials who enabled atrocities by creating the social conditions which made them possible – those who did not commit crimes but did contribute to harm. Most individuals (and collectives) who contributed to the perpetration of abuses (the bystanders, the collaborators) were outside the jurisdiction of courts. In Mexico, the language of human rights, arguable, worked against victims of past atrocity rather than in their favour by establishing accountability.

Moreover, the human rights categories of genocide and forced disappearance were constructed, adapted, and manipulated in such a way as to grant a *de facto* amnesty to perpetrators. A prosecutorial strategy based on the category of forced disappearance, for instance, was destined to ‘fail’ as the concept could not be used retroactively in the country. The Fox administration adapted the international conventions on forced disappearance in such a way as to obstruct the prosecution of this crime in the past – the Mexican state would only prosecute those cases of forced disappearance that could occur from 2002 onwards. In addition, Fox manipulated international treaties on this issue in order to protect members of the armed forces, who would be tried for forced disappearances in military courts – the Military would prosecute themselves if, and only if, they decided to do so. And, as I demonstrated in Chapter Five, the SPO’s strategy to

charge former state officials with the crime of genocide for the killing of twenty-five students was preposterous.

Finally, the language of human rights served to legitimise whatever resulted from this particular ‘transitional justice’ process – even the *de facto* exoneration of perpetrators was justified, as the application of the law is independent of its outcome.

*How, and to what extent, did ‘transitional justice’ affect the process of democratisation?*

Apart from legitimising the new regime’s democratic credentials and strengthening Fox’s authority, the ‘transitional justice’ process brought about important consequences for the Fox administration, which I sum up below.

By establishing the SPO, Fox avoided an inquiry into the role played by different institutions involved in gross violations of human rights. The SPO would investigate individual offenders, rather than a pattern of past abuses. Therefore, by following a retributive sense of justice to come to terms with the past, Fox’s government helped to legitimise key institutions that were still working under authoritarian premises: e.g., the courts and the General Attorney’s Office. The Military also benefited from the ‘transitional justice’ process. Members of the Military were reincorporated into the new system without being unmasked or suspended. Only three army generals were prosecuted – Mario Arturo Acosta Chaparro, Francisco Quirós Hermosillo, and Francisco Barquín – but they were already in jail serving sentences of sixteen years for drug trafficking. They had been simply ‘recycled’ through the justice process. I also explained in Chapter Five that generals Quirós Hermosillo and Francisco Barquín died in prison without being tried for past state crimes, and Acosta Chaparro was set free.

Moreover, in Mexico's 'transitional justice' process, the Military were allowed to investigate and prosecute themselves. A basic principle of human rights establishes that military courts cannot prosecute human rights violations – therefore, President Fox was supposed to transfer jurisdiction over human rights cases from military to civilian authorities, but he did not. The effect of the *ad hoc* trial of the Military established in Mexico was that it contributed to legitimise the armed forces in the new democratic system – the trial seemed to be an indication that the Military had changed: it was a signal that the armed forces would combat the impunity they had enjoyed in the past. However, what really happened was that the trial of the Military blocked the investigations that the SPO was carrying out into members of the armed forces. If the Military were being investigated by the Military Prosecutor's Office, they would not be investigated by the SPO. Even if the trial ended in acquittal, the SPO could not press charges against these military officers because a person cannot be judged twice for the same crime. That is why human rights NGOs in Mexico claimed that the Military violated human rights twice: first, when they perpetrated the abuses in the past (e.g. through torture and forced disappearances), and later when they obstructed the SPO's investigations by allegedly prosecuting military members in military courts – they violated the right of victims to see justice done (Fundación Diego Lucero, et al. 2005). That is why Cohen questioned the alleged deterrent effect that transitional justice is supposed to bring with it, as there is the 'brutal political reality that despite all the knowledge about the past, the same institutions of repression reproduce themselves in a different social order' (Cohen 1995: 20).

Beyond legitimising key institutions and tainted officials, who were then incorporated into the new democratic system as if nothing had happened, the 'transitional justice' process served another crucial political purpose: it granted a *de*

*facto* amnesty to former perpetrators. As a very limited number of abuses was investigated, most perpetrators were never prosecuted or exposed; and the few perpetrators who were investigated were exonerated.

The SPO also served to attract and control other transitional justice efforts. For instance, the SPO absorbed the investigations of the student massacres in 1968 and 1971 – criminal investigations that existed independently of the SPO's work. However, the SPO not only attracted (and controlled) investigations about past state crimes which already existed, but for five years it also helped to obstruct any other transitional justice effort. Victims of abuses had to go to the SPO first and wait for years before taking their cases to international courts. The SPO was thus an obstacle to justice.

But did the 'transitional justice' process have an effect on Mexico's current political situation? A detailed examination of this question is beyond the scope of this research, yet let me offer some tentative answers.

I described in Chapter Three that in April 2001 President Fox scrawled on a small piece of paper the following instruction: 'Adolfo [Aguilar Zinser] will be the Coordinator for the Project "Truth Commission" and also will be in charge of the democratisation of the CISEN [Centre for Research and National Security, which is Mexico's intelligence agency]' (Fox 2001). I have explained already why such a truth commission never materialised – the PRI fiercely opposed the establishment of a truth commission and promoted instead the creation of the SPO. This time I am interested in the reasons why Fox and his strategists originally linked the idea of 'transitional justice' with the transformation of Mexico's intelligence services – a transformation that never materialised either.

After the 2000 election, some members of the newly appointed cabinet urged that the intelligence services inherited from the previous regime should be investigated



and dismantled. Beyond dismissing compromised personnel, reforming the intelligence services would be an opportunity to really know (and understand) the size and *modus operandi* of the former regime's security apparatus. In November 2004, Adolfo Aguilar Zinser, former Fox strategist, was clear about the significance of linking the establishment of 'transitional justice' with the reformation of the security apparatus:

All the information about you that has been compiled by intelligence operations, telephone intervention, credit cards, correspondence, personal activities, is scattered throughout the files and can only be pulled together via CISEN's security codes. But the spider web can only be unravelled by those who know its secrets. However, Fox's government did not dare to take control of CISEN – this was one of Fox's big mistakes (quoted in Jaquez 2004).

Aguilar Zinser's conclusion was frightening: 'I have no doubt that CISEN continues to serve the individuals and groups of the old regime' (quoted in Jaquez 2004).

Beyond intelligence services, with the change of regime human rights experts claimed that the investigation of the institutions that made the abuses possible – e.g. the Military, the police – would allow President Fox to begin the reform and democratisation of such institutions (Benítez Manaut 2008b; Rodríguez Sumano 2008). That was important for the new democracy, these experts said, because these institutions continued working with exactly the same rules, structure, and laws as they did during the authoritarian era. However, as John Ackerman argues, President Fox 'squandered his opportunity as the first opposition president after more than seventy years of PRI rule. Instead of rolling up his sleeves to transform public institutions, he took the easy route of leaving in place the vested interests of the past' (Ackerman 2012). As a result, according to human rights experts, as the old regime's security mechanisms did not go through any process of democratising reforms, they remain intact today. From this point of view, the disappearances and state crimes that occur today are tightly linked to the impunity of the past. This is how dozens of human rights NGOs put it in a report:

It is true that current perpetration of forced disappearance in Mexico cannot be compared to what happened during the 'Dirty War'. However, it is also true that forced disappearance is still practised in the country. This sheds light on the fact that the authoritarian structures that made the occurrence of forced disappearances possible have not yet been dismantled, and that the impunity of former criminals has created a favourable atmosphere for the perpetration of more gross violation of human rights in the present (Secretaría Ejecutiva de la Red TDT 2010).

But are these human rights activists correct? The answer has been suggested by journalists. From 2006 to 2011, at least twenty thousand people have been abducted in the context of the 'war against drug-trafficking' (HRW 2011). In a few cases we know that victims were abducted, detained, tortured, and executed as their bodies were found in mass graves. However, in most cases what happened to victims is still unknown – they are not dead, nor alive. Who abducted these people? It is not possible to know who are responsible for the disappearance of twenty thousand people as the cases are rarely investigated by Felipe Calderón's administration. The government claims that all these cases are abductions perpetrated by rival cartels. The problem with the government's statement, as widely documented by journalists, is that local security forces in Mexico have drastically deteriorated to the extent that 'now you don't know who is connected with whom, or where the threats are coming from [...] Every local commander, every official, and every community must work out an accommodation with organized crime' (Finnegan 2012). So, are the police being taught how to torture and abduct people from members of criminal groups or are those involved in organised crime learning their methods from the security forces trained in the authoritarian era? For instance, the Zetas – the most feared criminal group in Mexico – were founded by deserters from the Mexican military's élite special forces in the late 1980s and early 1990s. Today's Zetas are yesterday's members of the army. This is how William Finnegan describes them:

Trained as paratroopers and intelligence operatives, they introduced a paramilitary element to narco-trafficking, outgunning police units. Beheadings became their signature, along with castrations with genitals stuffed in mouths and corpses with a 'Z' carved into the flesh. Their ranks swelled with infusions from a notorious Guatemalan

counter-insurgency unit, the Kaibiles [...] The Zetas were military [in the PRI era]. Their mission was to kill and destroy (Finnegan 2012).

Beyond the sphere of organised crime, human rights activists have evidenced that Mexico's security forces go on perpetrating illegal abductions. The National Human Rights Commission (NHRC) has confirmed the participation of security forces in five hundred cases of forced disappearance from 2006 to 2011 – more than the total number of cases of forced disappearance under investigation by the SPO. As the UN Working Group on Enforced and Involuntary Disappearance concluded about Mexico in 2011: forced disappearances perpetrated by state agents 'happened in the past and continue to happen in the present' (OUNHCHR 2011).

In sum, the argument of human rights NGOs goes like this: the democratisation of the Military and the police, as well as the punishment of past state crimes during Fox's administration, would have been enough to prevent the repetition of such abuses in the current context. Had the 'transitional justice' process worked, it might well have helped to prevent the perpetration of abuses in the new regime. But can we really know whether the impunity of the past is related to the occurrence of human rights violations in the present? Cohen suggests a different answer. 'It might seem plausible enough that the cycle of political violence will never be broken under a regime of impunity' but 'the actual deterrent value of individual punishment in this political context remains even more uncertain than it is for conventional crime [...] In fact everything we know about the political conditions under which crimes of obedience occur makes it extremely unlikely that the risk of future punishment has even the remotest deterrent effect' (Cohen 1995: 37).

Whether Cohen or the NGOs are right, there were other – perhaps unintended – consequences of the 'transitional justice' process. For instance, there were no temporal

limits to the operation of the SPO, which could prolong its work indefinitely. The absence of a fixed deadline benefitted Fox, who was able to postpone indefinitely the punishment of perpetrators. The sense of ‘urgency’ to ‘do something’ about the past grew weaker over the years, giving way to other issues also relevant to the new regime’s agenda, e.g. drug trafficking or a new electoral cycle. As a result, the ‘forget the past’ rhetoric – ‘turning a new page’ – became increasingly popular. The sentiment that we should forget and move on was captured by Enrique Krauze in *The New York Times*: ‘despite its grave problems Mexico is confident enough to move ahead without turning too much toward the wrongs of the past’ (Krauze 2004).

The passing of time worked also in favour of the PRI elite, which gradually recovered its power. During Fox’s electoral campaign the idea of a ‘change of regime’ was identified with the idea of eliminating the PRI and its authoritarian legacy. However, as the PRI elite was not really threatened by the ‘transitional justice’ process, the former ‘official party’ has been getting ready to regain office in the 2012 presidential election (e.g., by blocking most bills in Congress from 2006 to 2012 in order to render President Felipe Calderón’s administration unworkable; negotiating unlawful contracts to receive biased media coverage; and trading poor people’s votes for food or money) (Hernández Navarro 2012; The Economist 2012; Tuckman 2012a). This paradox was captured by Jo Tuckman in *The New York Times*: in 2000, the PRI, ‘which had run Mexico for seventy years with the help of a mixture of authoritarianism, corruption and election-tampering, was voted out of office. This was seen as the end of an era, the relegation of an anachronistic institution to the scrapheap of history.’ However, ‘after twelve years in exile, the PRI is preparing to reassume its traditional place of power’ (Tuckman 2012b).

**Further research**

While answering three key research questions, my thesis also raises a number of important issues which would benefit from further research.

*A ‘transitional justice’ process that never was*

This research constitutes the brief biography of an institution that did not deliver what it promised: neither truth nor justice were achieved. In this sense, this is the story about a new democratic regime that attempted to comply with demands to face the past without disturbing the previous authoritarian elites and therefore established a ‘transitional justice’ mechanism that produced a *de facto* state of impunity. Instead of delivering truth and justice, the SPO ultimately deflected responsibility and criticism away from the new government (as the government pretended to be doing something about the past); and it helped to perpetuate the impunity enjoyed by perpetrators in the previous regime.

The findings of this research relate specifically to Mexico, but they give reason to reconsider transitional justice processes in other countries in a new light. For instance, as explained in Chapter Two, most studies within the first and second clusters of literature on transitional justice begin their analysis by describing a certain transitional justice institution (say the TRC in South Africa), taking for granted its alleged benefits, and then explain how things went wrong (e.g. the commission’s failure to achieve reconciliation). In so doing, these clusters of literature seek to examine how ‘good’ transitional justice ideals went wrong in practice. Wrong in the sense that such ideals resulted in projects that failed. The problem with these assumptions is, as this thesis shows, that transitional justice processes are political balancing acts that try to achieve certain things, but keep others at bay (e.g. prosecutions).

Scholars participating in the third cluster of literature on transitional justice, which this thesis endorses, have offered empirical evidence in this sense. For instance, in his study on South Africa's transitional justice process, Wilson suggests that truth commissions are not meant to deliver truth or reconciliation, but to be simply 'the Trojan horse used to smuggle an unpleasant aspect of the past (that is, impunity) into the present political order, to transform political compromises into transcendental moral principles' (Wilson 2001: 97). Since 1995, Stan Cohen has pointed out this paradox (transitional justice institutions that do not deliver): 'sometimes the new regime starts with the rhetoric of accountability but then [...] creates a de facto state of impunity' (Cohen 1995: 28). The Mexican case confirms this insight.

Therefore, more research is needed about the factors that facilitate the emergence of particular transitional justice processes. This is relevant as the normative discourses that vaunt transitional justice processes usually conceal the political bargains that make them fall short of their ostensible objectives. This insight should be particularly relevant for scholars participating within the second cluster of literature on transitional justice – e.g., Arriaza and Roht-Arriaza 2008; Sikkink and Booth Walling 2007 – as they seek to assess if tribunals or truth commissions have delivered the goals they claim to reach or whether transitional justice interventions were well executed. Their research is of limited use if they do not first explore how transitional justice institutions were constructed, and the political purposes such construction served.

### *Restorative goals*

Mexico's 'transitional justice' process was founded on a retributive style of justice: the Fox administration established the SPO, which depended on the General Attorney's Office, to investigate and prosecute perpetrators of past state crimes. The SPO sought to bring perpetrators to court, where they would be judged according to the law. However,

the ‘transitional justice’ process had what might be called a ‘restorative side’, which had not been addressed by any academic enquiry.

Mexico’s ‘transitional justice’ process was proudly named ‘The Mexican Solution’ by Ignacio Carrillo, the Special Prosecutor, because ‘truth, justice and reparations all go together’ (Doyle 2003: 69). So, what happened to the ‘truth’ and the ‘reparations’?

In an interview with HRW, the Special Prosecutor claimed to have ‘set up a two-person team to develop a programme to provide psychological care to the victims and relatives of past abuses’ (HRW 2003). In addition, the last version of the SPO’s working plan available on its official website stated that the SPO would establish ‘free telephone lines’ that would allow for ‘direct communication between society and the SPO’ (SPO 2002). I thought these mechanisms – the phone lines and the psychological care – were relevant as they were the only means by which victims of past abuses and their relatives could narrate their stories of suffering, without having to navigate through Mexico’s ‘legal complex’. Moreover, these mechanisms were not linked to the SPO’s prosecutorial strategies, so they would allow victims to give information – to tell the truth – about other type of abuses they had endured in the past that were not investigated: e.g., torture, ill treatment, killings, and kidnappings.

Using the newly created ‘transparency law’, I requested information on these mechanisms whose goals were to establish the truth and to heal old wounds.<sup>74</sup> The General Attorney’s Office responded that the programme to provide psychological assistance was indeed established, but only in two states of the Republic: Sinaloa and Guerrero. According to the official response, the team of psychologists worked with victims from September 2002 to June 2004. However, the General Attorney’s Office

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<sup>74</sup> Request number 1700065906.

claimed that it was unable to provide other information about the psychological programme because such information was classified as confidential. But why was this information treated as secret? What have victims of past abuses revealed about the past? How did this psychological programme actually work? Was it control by closing?

Then, I requested all the information available about the free telephone lines.<sup>75</sup> However, the General Attorney's Office responded that 'due to problems of a budgetary nature, it was not possible to install media reception and citizen services, such as a special free access line' (Trevino-Rangel 2007). But what exactly happened with these telephone lines? Is it true that they never existed? If they existed has the information about them been concealed? Even if these lines never materialised, had there been a plan to establish them?

To show his commitment to democracy, in 2002 President Fox ordered the opening of thousands of files of the disbanded secret police. He also instructed all ministries of state to dig into their files and select the documents that in their opinion might be useful for investigating past human rights violations. As a result, the government transferred more than eighty million files to the National Archives (*Archivo General Nacional*, AGN) where they would be available for public consultation. Again, this measure, which sought to reveal what happened in the past, was independent from the SPO's prosecutorial strategies. Of course, these files contained relevant information used by the SPO to construct its legal cases, but beyond the SPO's work, the disclosure of files was important as it offered victims and their relatives an opportunity to know about what happened in the PRI era (who died, how many, who tortured them, where the bodies are). This was particularly relevant for those who have not given up hope of finding their relatives alive (Aguayo 2001b).

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<sup>75</sup> Requests 1700066206 and 1700066306.



However, the AGN has consistently denied access to such information, invoking a human rights principle. According to the AGN, the files are used by the SPO in its judicial investigations, so they cannot be disclosed to victims as that would violate one of the most basic principles of human rights: due process of law. Victims of past abuses cannot access the former secret police's files as that could 'damage the SPO's procedural strategies' (Trevino-Rangel 2007). The AGN's argument is preposterous, but it has served to make information about past atrocity inaccessible ('control by closing').

Another reason why victims' families have not had access to the files disclosed by President Fox is related to the way in which such files are administered. Fox transferred the archives of the now-extinct secret police to the AGN together with its archivist, and the archives are now controlled by the same person who has managed them for thirty years. The former custodian of official secrets is the same individual who now decides who has access to what document and under what circumstances (Trevino-Rangel 2007). The only in-depth research about this issue has been undertaken by the journalist Kate Doyle. Her conclusions are disturbing: the SPO's investigation has served to identify the most dangerous information in the AGN's files, not with the purpose of disclosing the truth, but seeking to eliminate uncomfortable information forever (Doyle 2006c).

Finally, Fox promised to grant compensation to the victims of human rights violations and their families. For this purpose he ordered the establishment of a committee, within the Ministry of the Interior, which would define the criteria for redress (Poder Ejecutivo Federal 2001a). However, although the committee for reparations was – allegedly – established, no reparations were ever made to victims. In addition, as the International Centre for Transitional Justice has documented, no

information is available to the public about the reparations committee's work or its results (ICTJ 2008: 4).

### *Cultural denial*

Another issue that justifies more research is the question of why Mexican society knew and did not know, at the same time, about the human rights violations perpetrated in the PRI era. Was it possible for the PRI governments to perpetrate abuses over seven decades without Mexican society knowing? How many ordinary Mexicans knew what was happening? Did they know but not care? What did they know? Paraphrasing Cohen: what did they do with their knowledge about state repression, and what did this knowledge do to them? (Cohen 2005: x).

Cohen says that denial of atrocity might occur through official state policy – the deliberate cover up (Cohen 2005: 132). This was clearly the case in Mexico during the authoritarian era. As explained in Chapter One, the PRI regime efficiently denied that human rights abuses were taking place and so was able to maintain a democratic façade for decades. To do so, the PRI governments manipulated and censored mass media, and co-opted intellectuals and journalists through bribes, death threats, exile, and diplomatic careers. Moreover, details of torture, the disposal of bodies, and the illegal detention of dissidents in clandestine jails remained genuinely secret.

However, as Cohen argues, ‘even the most repressive and closed regime cannot achieve total secrecy or information control. Ordinary citizens come to know some truth [...] How can the impression be sustained that everything is normal when it so manifestly isn't?’ (Cohen 2005: 145). So there can be no doubt that some sections of Mexico's population knew or suspected what was happening to dissidents. Let me return to the case of Carlos Francisco Castañeda de la Fuente. He was illegally imprisoned for more than twenty years in a psychiatric hospital, where dozens of nurses,

doctors, psychiatrists, social workers, and interns knew about him. Castañeda de la Fuente was committed in 1970, but it was not until 1992 – when the paralegal Norma Ibañez made a complaint – that he was released. Why did other paralegals or caretakers before Norma Ibañez fail to take up his case? Did fear generate a state of self-censorship?

The analysis of what Mexicans knew at that time and what they did with that knowledge is important as it could help to increase our understanding about degrees of involvement in the commission of atrocity. How do we identify the different modes of involvement in keeping the PRI regime going? How do we understand the difference between commission and complicity, between active and passive collusion, between deliberate silence and wilful ignorance?

Moreover, with the arrival of democracy, what does Mexican society know now about what happened in the past? I wrote the last sections of this thesis in Mexico and discussed some of these questions with friends and former colleagues. Invariably, when talking about Mexico's history of abuses, I got two types of response. The first was literal or interpretive denial: 'I did not know', 'Did things like this happen in Mexico?', 'You cannot believe victims and human rights reports' (victims and human rights organisations were biased, ignorant, or exaggerating). A possible explanation for this has been suggested by Cohen: sometimes disturbing knowledge can be forgotten without direct state manipulation, as whole societies have an amazing ability to deny the past (Cohen 2005: 138). In contrast, those making the second type of response fully acknowledged what happened during the previous regime – former colleagues reminded me that 'this is what we always knew'. A Mexican classmate at LSE asked me without irony: 'Were you able to sum up Mexico's history of abuses in one chapter?' So the

questions remains: why did some Mexicans know about what happened, but others did not? Why do some remember and others forget?

There is a final question about this issue: does the way in which society dealt with the knowledge about suffering under authoritarianism effect how society deals with social suffering in the present? This question is relevant in the context of the ‘war against drugs’, in which from 2006 to 2012 at least sixty thousand people have been killed and, as mentioned before, twenty thousand more have disappeared. Joy Olson, from the Washington Office for Latin America, considers that the human rights crisis that Mexico currently experiences has been worsened precisely because bystanders fail to act. Her concerns are worth quoting at length.

It was a horrifying scene – seventy two people murdered all at once. One survivor bore witness to the massacre. The dead were migrants, mostly Central Americans [...] trying to make their way to a better future. It was August of 2010 when their bodies were found in Tamaulipas, Mexico. They were apparently killed by Mexico’s most feared drug trafficking organization, the Zetas [...]. Official reports said that the migrants were kidnapped off of buses. How could seventy two people be kidnapped and no one notice? Bus drivers must have known something. The bus company must have noticed. Other travelers? Government authorities? How was this possible? Where is the outrage? (Olson 2012).

So, we might want to ask, has Mexican society incorporated the culture of denial, a characteristic of the authoritarian era, into the new democracy?

### *Iatrogenesis*

In his book *Visions of Social Control*, Cohen uses Ivan Illich’s term ‘iatrogenesis’ to illustrate the perverse effects of social control mechanisms such as imprisonment. The term ‘iatrogenesis’ implies an irony: disease caused by medical intervention. Illich used the concept to suggest that medical progress is a myth: not only is medical treatment useless, but it can produce more pain or dysfunction. In his research on deviancy control, Cohen adapted this concept to show that ‘most forms of intervention

demonstrably do not work very well [...] Many forms of intervention are iatrogenic: they make things worse' (Cohen 1985: 168).

This examination of the Mexican 'transitional justice' process has provided an empirical examination of iatrogenesis. Throughout the work, I have demonstrated how the 'transitional justice' process achieved the opposite of what it – allegedly – sought to accomplish. For example, the SPO did not obtain justice, nor truth, but impunity. The 'transitional justice' process also led to the creations of new laws – justified in the name of human rights – that made the prosecution of perpetrators impossible, e.g., the law that proscribes the incarceration of those criminals older than seventy – the age of most perpetrators of past state crimes.

So far, as the aforementioned examples show, this thesis explored the effects of 'transitional justice' on Mexico's democratisation process. However, it would be worth researching in more detail the iatrogenic effects of Mexico's 'transitional justice' on victims of past abuses. Not only did victims get no truth or justice, but 'things got worse' for some of them. Let me illustrate this with three examples.

Rosendo Radilla was stopped at a military check-point in 1974. 'I won't be coming back for a long time' he said to his daughter Tita, who has been looking for him ever since. Tita Radilla is now vice-president of the Association of Relatives of the Detained-Disappeared in Mexico (AFADEM), a small non-profit organisation based in Atoyac de Alvarez, northwest Acapulco. She helps the relatives of more than six hundred victims to pursue justice and find the whereabouts of those who disappeared. As a result of her work, Tita Radilla has been harassed and is the victim of death threats. Since 2003 she cannot leave her office without the company of members of Peace Brigades International, a human rights organisation that seeks to minimise the danger she is in (Comité 68, et al. 2006). This measure to protect Ms Radilla was taken after

Zacarias Barrientos Peralta was killed that year – Mr Barrientos Peralta was a key witness in some of the cases under investigation by the SPO (Comité 68, et al. 2006: 28).

In June 2011, I attended a national conference on ‘transitional justice’, which took place in Mexico City, organised by scholars, victims’ families, NGOs, and human rights experts. Victims’ relatives narrated how by pursuing justice they ended up being intimidated, blamed, and even investigated by the police. With the arrival of democracy, victims’ relatives believed that the General Attorney’s Office would help them to find the whereabouts of their loved ones, but this did not happen and they always got the same responses from the prosecutors: ‘your relative must have done something’, or ‘your relative got what he deserved as he/she was certainly involved with the guerrillas’. So, the prosecutors blamed victims’ relatives for what happened, and in some cases they threatened victims’ relatives that they would investigate them to see if they were not still related to alleged subversive groups.

My last example is the historian Adela Cedillo, who has conducted the most important academic research on the ‘death flights’ to date. Former guerrilla members, who became part of the SPO’s working team, did not always agree with Cedillo’s interpretations of the past, so they publicly accused her of being a member of the police and of having obscure interests. Cedillo has received threats.

### **Postscript**

Vicente Fox closed down the SPO in November 30, 2006 – his last day in office. Meanwhile, almost ninety employees of the defunct SPO were investigated as there were fifty million pesos (about two million pounds) inexplicably missing (Gutiérrez Vega 2006).

In 2008, Tita Radilla's case reached the Inter-American Court of Human Rights (*Radilla Pacheco v. Mexico*). In November 2009, the Inter-American Court found that the Mexican Military were responsible for the disappearance of Rosendo Radilla in 1974 and that the government had failed to investigate the crime adequately. Thus, the Mexican State was sentenced to provide reparation to the family in the form of monetary compensation, and to modify its Code of Military Justice to make it 'compatible with international standards'. Felipe Calderón's administration (2006–2012) accepted that it had to pay Tita Radilla monetary compensation but it was very reluctant to reform the Military justice system. The Interior Minister justified Calderón's reluctance to obey the court's ruling with a sophisticated excuse: 'It is incorrect that the Inter-American Court judges Mexico for something that happened in the past, given that today's Mexico is very different from yesterday's Mexico' (Aguayo and Trevino-Rangel 2010). Calderón gave Ms Radilla a cheque payable to Rosendo Radilla – her father, who has been missing for thirty-five years. This odd operation was not a mistake. By doing so, Calderón's government sought to oblige Tita Radilla to accept that his father was not disappeared, but dead, if she wanted to cash the cheque.<sup>76</sup>

After ten years, Digna Ochoa's case was finally closed, when in September 2011 Mexican courts ruled that the cause of her death was suicide. At the time of writing this chapter (July 2012), former President Ernesto Zedillo – currently Director of the Centre for the Study of Globalisation at Yale University – is facing charges of 'crimes against humanity' in the United States. He is responsible for the killing of forty-five members of a Mayan community in Acteal, Chiapas, in 1997. However, he has blocked the case claiming that his presidential status gives him immunity from any legal action. Simultaneously, Acosta Chaparro, one of the three military generals accused of

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<sup>76</sup> In Argentina, President Alfonsín offered monetary reparations to victims. Like in Mexico, in Argentina these compensations were predicated on a presumption of the death of the victim (Moon 2012).

participating in the death flights, became President Felipe Calderón's assessor in security issues (Carrasco 2012). In April 2012, he was shot dead by an unidentified gunman as he dropped off his car at a garage in Mexico City.

I wrote most of this thesis in the British Library. For almost three years, former President Carlos Salinas, responsible for the massacre of Zapatistas sympathisers in 1994, sat at a desk, close to where I conducted much of this research. Exiled in London, Salinas went to the library every day to write his memoirs. He has never faced justice. In July 2012, Enrique Peña Nieto, Salinas' political disciple, won the presidential election bringing the PRI back to power. Paradoxically, during the 2012 electoral campaigns, former President Vicente Fox publicly supported Peña Nieto's candidacy. The same president who made history twelve years ago by ousting the PRI was now requesting Mexicans to 'close ranks' behind the PRI.

According to Finnegan, 'in Mexico, it is often impossible to know who is behind something – a massacre, a candidacy, an assassination, the capture of a crime boss, a "discovery" of high-level corruption. Either the truth is too fluid and complex to define or it remains opaque to anyone not directly involved in manipulating events.' That is why, 'when Mexicans discuss the news, they talk often about *pantallas* – screens, illusions, behind which are more screens, all created to obscure the facts' (Finnegan 2012). Was the SPO simply a *pantalla*? Ultimately, Mexico's 'transitional justice' process represented an exercise, *par excellence*, in political denial. To paraphrase Cohen once again, it offered an example of 'knowledge without acknowledgment; suffering without compensation; violation without accountability; horrors that are not exorcised' (Cohen 2005: 247).



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