

ICL BY ANALOGY—THE ROLE OF INTERNATIONAL CRIMINAL LAW  
IN THE CHILEAN HUMAN RIGHTS PROSECUTIONS

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## I. INTRODUCTION

In recent years, Chilean courts have seen an explosion of criminal prosecutions for serious human rights violations committed during the country's dictatorship, which spanned 1973 to 1990. At the same time, international courts have seen the rebirth of the field of international criminal law through the works of the *ad hoc* tribunals,<sup>1</sup> hybrid courts, and the International Criminal Court (ICC). These courts have produced a bevy of judicial decisions fleshing out the contours of international criminal law (ICL) and the Rome Statute, the treaty creating the ICC and a template of ICL.<sup>2</sup> This Article examines the use of ICL, in particular the ICL of the ICC, in the post-Pinochet human rights trials in Chile.

Drawing on a review of Chilean judicial decisions and case materials, interviews with judges, lawyers, academics, and human rights groups in Chile, the Article concludes that ICL has played a role in Chilean human rights prosecutions by bolstering arguments to remove hurdles, particularly the

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<sup>1</sup> The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda are known as “ad hoc tribunals” due to their temporally-constrained and conflict-specific mandate. UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org> (last visited Oct. 30, 2019) (noting that the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda are known as “ad hoc tribunals” due to their temporally-constrained and conflict-specific mandate); UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://unictr.irmct.org> (last visited Oct. 30, 2019)

<sup>2</sup> The Rome Statute states that it should not be read to limit interpretation of ICL elsewhere, but it nevertheless offers one easily-consulted statement of ICL translated into a wide variety of languages, including Spanish. Rome Statute of the International Criminal Court, art. 10, July 18, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“Nothing in this part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”). The ICC expanded on the ICL definitions set out in the Rome Statute in the companion document, the Elements of Crimes. Rep. of the Prep. Comm. for the Int’l Crim. Court, Addendum: Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter Elements of Crimes].

amnesty the regime conferred on itself and domestic statutes of limitations. Upon acknowledging the crimes as crimes against humanity or war crimes, courts could then invoke international law norms requiring states to prosecute and punish and prohibiting using amnesties or statute of limitation to block prosecutions for crimes against humanity. This crimes against humanity argument was not the only argument presented in favor of allowing prosecutions to go forward, but it came to be a central one. Litigants and courts also invoked ICL to reframe the crimes in order to argue for “proportional,” meaning greater, punishment. To a more limited degree, courts have engaged with ICL to help interpret substantive legal questions about the meanings of crimes. More recently, defendants are turning to ICL to craft exculpatory arguments or, at least, to mitigate sentences.

The Chilean courts’ use of ICL in cases for dictatorship-era human rights violations is in some ways a one-off. While the Geneva Conventions and the World War II tribunals preceded the crimes of the Chilean dictatorship, the Rome Statute of the ICC and even the modern ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), post-date them. Thus, Chilean courts’ use of ICL, particularly ICL norms emanating from the ICC, to interpret dictatorship-era crimes will differ from how they might use it for crimes committed today. The legality principle complicates the use of law stemming from these courts, but has not precluded their use altogether. This article examines the ways Chilean courts have navigated these waters and used ICL to inform their decisions dealing with crimes that clearly rise to the level of international crimes.<sup>3</sup>

The Chilean courts’ use of ICL in domestic prosecutions for atrocity crimes warrants exploration due to Chilean courts’ quite extensive experience in adjudicating atrocity cases and Chile’s role on the world stage as a participant in international criminal justice efforts like the ICC. Chile, once a world “leader” in human rights abuses, arguably is now a world leader in domestic atrocity prosecutions. Despite a slow start, Chilean courts have extensively adjudicated past human rights abuses. Only Argentina leads Chile in the number of convictions for dictatorship-era atrocities.<sup>4</sup> In Chile, there are some 1500

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<sup>3</sup> I use the term “international crimes” here to signify acts that have been made crimes under international law. See Frédérique Mégret, *In Defense Of Hybridity: Towards A Representational Theory Of International Criminal Justice*, 38 CORNELL INT’L L. J. 725, 733 (2005) (“At the substantive level, we know that crimes are properly called ‘international’ by virtue of their source and foundation being international. Crimes are international because they are proclaimed as such and according to the international community’s modes of norm production (treaty, custom). Thus international crimes are unmistakably international regardless, for example, of the fact that they may also be incorporated into domestic law.”).

<sup>4</sup> Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary’s Human Rights Turn*, 35 LAW & SOC. INQUIRY 99, 100 (2010) [hereinafter *Judging from a Guilty Conscience*] (noting that as of 2010, Chilean “[j]udges ha[d] . . . sentenced more former officials

pending criminal cases for dictatorship era human rights violations, with some 350 cases having reached final resolution.<sup>5</sup> This number far eclipses the number of defendants tried before any international criminal tribunal.<sup>6</sup> Chile is also a player in international criminal justice efforts elsewhere. It participated in negotiating the Rome Statute, the treaty creating the ICC, and is an ICC State Party. An examination of Chilean caselaw therefore offers a look at the courts of a State Party turning to the ICC to guide its own domestic processes relating to past abuses. The use of ICL in Chilean courts likewise may be instructive for other jurisdictions dealing with human rights abuses in their own countries and figuring out how to incorporate modern ICL arguments, even in the face of legality constraints or tensions with domestic law. Thus, exploring the Chilean invocations of ICL offers a comparative international law perspective from a country in the global south with significant experience in transitional justice matters and engagement in international criminal justice efforts on the international level.<sup>7</sup>

Perhaps most importantly, examining the Chilean courts' use of ICL is illuminating for those concerned with optimizing international criminal justice efforts. Due to the manifest inability of the ICC to adjudicate all international crimes worldwide and the decentralized "complementarity" model upon which it is premised, the success of domestic forums in adjudicating human rights abuses is perhaps the most important sign of the ICC's success.<sup>8</sup> As Michael Newton notes, the "Rome Statute implicitly concedes that states will remain

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of the military regime than judges of any other country in Latin America."'). As of November 2017, Argentine courts had convicted over 800 people for dictatorship-era crimes, with some 754 persons on trial. Daniel Politi and Ernesto Londoño, *29 Argentines Sentenced to Life in Prison in 'Death Flights' Trial*, N.Y. Times, (Nov. 29, 2017).

<sup>5</sup> See *Procesos en Acción*, Expedientes de la Represión, <http://expedientesdelarepresion.cl/procesos-en-chile/> (2019) (stating that there are around 1500 pending cases and 350 convictions). A report from the Ministry of Justice and Human Rights shows that, as of August 2018, 174 people were serving sentences at Punta Peuco, the detention center for people convicted of dictatorship-era human rights crimes. Another 18 detainees died during their time in detention. Juan José Ossa Santa Cruz, *Responde requerimiento del H. Diputado Sr. Osvaldo Urrutia Soto* (Aug. 22, 2018) (notes on file with author).

<sup>6</sup> See KEY FIGURES OF CASES, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/cases/key-figures-cases> (last visited Oct. 30, 2019); See <https://www.icc-cpi.int/Pages/defendants-wip.aspx#Default=%7B%22k%22%3A%22%22%2C%22s%22%3A31%7D#c6cbd0da-cc12-4701-a455-cb691df92bfd=%7B%22k%22%3A%22%22%7D> (discussing how and the ICC has indicted forty people and convicted only three for international crimes, five others have been convicted of offenses related to the administration of justice for witness tampering and the like).

<sup>7</sup> See Anthea Roberts et al., *Comparative International Law: Framing the Field*, 109 AM. J. INT'L L. 467, 469 (2015) (defining comparative international law as an inquiry aimed at "identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law").

<sup>8</sup> Rome Statute, *supra* note 2, art. 17 (under the complementarity principle, the ICC only has jurisdiction if domestic courts are unwilling or unable to investigate or prosecute crime).

responsible for prosecuting the vast majority of offenses even in a mature ICC regime.”<sup>9</sup> The Chilean experience with using ICL in domestic adjudications of gross human rights violations thus offers insights into the process of incorporation and iteration of ICL into domestic law.

This article makes several novel contributions to scholarship on ICL and transitional justice. First, to my knowledge, it is the first to explore the issue of language and accessibility of ICC judgments and other materials in ensuring the efficacy of the Rome Statute’s complementarity regime. Although there has been some scholarship on the challenges of in-court translation of witnesses at international criminal tribunals,<sup>10</sup> scholars have overlooked the severe limitations for norm dissemination inherent in ICL judicial decisions available in only two or three languages. This article demonstrates that an important contribution of international tribunals, NGOs or governments to international criminal justice efforts would be the translation of important ICL judgments, whether from international tribunals or national courts, in as many languages as possible, particularly languages in countries where there are possible atrocity crime trials on the horizon. Second, although there is a rich discussion on fragmentation of the law in the ICL literature,<sup>11</sup> the literature has focused principally on fragmentation among and within different international courts.

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<sup>9</sup> Michael Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent With The Rome Statute Of The International Criminal Court*, 167 MIL. L. REV. 20, 37-38 (2001). See also Frédérique Mégret, *supra* note 3, at 730 (arguing that “international community has gradually moved towards asserting a strong bias in favor of domestic prosecutions” and that this preference is far more fundamental than just the ICC’s complementarity or, in his words, “the ICC’s receivability rule”).

<sup>10</sup> Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT’L. L. 1 (2008) (discussing the challenges of flawed courtroom interpretation at international criminal tribunals); Leigh Swigart, *Linguistic and Cultural Diversity in International Criminal Justice: Toward Bridging the Divide*, 48 U. PAC. L. REV. 197, 198 (2017) (discussing linguistic and cultural diversity challenges of investigations and trials at international criminal tribunals). More has been written about translation issues with EU courts. See, e.g., Karen McAuliffe, *Hidden Translators: The Invisibility of Translators and the Influence of Lawyer-Linguists on the Case Law of the Court of Justice of the European Union*, LANGUAGE AND LAW/LINGUAGEM E DIREITO 3(1) 3, 29 (2016); Karen McAuliffe, *Translating Ambiguity*, J. COMPAR. L. 9(2) (2015); Karen McAuliffe, *The Limitations of a Multilingual Legal System*, INT’L J. SEMIOTICS L. 26(4) (2013).

<sup>11</sup> See, e.g., CARSTEN STAHN & LARISSA VAN DEN HERIK, ‘Fragmentation’, *Diversification and ‘3D’ Legal Pluralism: International Criminal Law as the Jack-in-The-Box?*, in THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW (Carsten Stahn ed., 2012) (“International criminal law is thus a blended branch of law that is founded upon internal inconsistencies or tensions (‘internal fragmentation’). It is further shaped by the interplay of different layers of jurisdiction, including a pronounced role for domestic jurisdictions”); See also Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L. J. 1063, 1073 (2011). See ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,’ Report of the study group of the International Law Commission, UN. Doc A/CN.4/L.682, Apr. 13, 2006, (hereinafter ILC Fragmentation Report) for a discussion of the fragmentation of international law generally.

This Article offers examples of fragmentation of ICL upon its use in a domestic legal system and suggests a need to distinguish between conscious departures from or adaptations of the law and errors.

Finally, this article adds a new and compelling argument for greater attention to regional human rights courts. Recently, regional human rights courts have garnered some valuable scholarly attention.<sup>12</sup> However, none of the scholarship, to my knowledge, has focused on the role, potential or realized, of regional human rights courts in distilling and translating ICL norms for domestic courts. This article shows that the Inter-American Court of Human Rights has not only, as Alexandra Huneus has argued, played a quasi-criminal role by ordering domestic jurisdictions to investigate and prosecute crimes and monitoring their progress, it also has played the role of flagging and distilling for domestic courts relevant ICL norms.

This Article proceeds in three Parts. In an effort to contextualize the Chilean human rights prosecutions, the first Part offers a brief history of the Chilean dictatorship and subsequent efforts to address gross human rights violations from the dictatorship. The second Part sets out the research methodology—case review and interviews—and describes findings on the different arguments for which courts and litigants deployed ICL. The third Part explores the implications of the Chilean experience for international criminal justice from international tribunals. These include understanding the domestication of ICL as showing the transformative value of ICL, but also its fluidity. ICL, once it enters the domestic legal arena, may be used in a variety of contexts and to support a variety of arguments, and not only those that favor accountability. ICL applied domestically also may not look the same as the ICL of international courts. Some changes may be intentional—adaptation and innovation—others less so. Critically, the Chilean experience demonstrates the importance of the accessibility of ICL, in terms of dissemination, distillation and translation, in order for ICL to play a meaningful role in domestic jurisdictions grappling with gross human rights abuses and atrocity crimes. Relatedly, it shows the critical role played by regional human rights bodies, such as the Inter-American Court of Human Rights, in introducing ICL norms and the utility of the ICC regime in

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<sup>12</sup> See, e.g., Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1 (2013) [hereinafter *International Criminal Law by Other Means*] (arguing that the Inter-American Court, though a human rights court has come to take on quasi-criminal functions, by ordering states to investigate and prosecute human rights abuses and then supervising their compliance with those orders); Daniel Abebe, *Does Human Rights in African Courts Make a Difference*, 56 VA. J. INT'L L. 527 (2017) (examining the efficacy of different African fora for adjudicating human rights); Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L. 179 (2019) (describing various ways in which states, overtly or covertly, are pushing back against the authority of the Inter-American human rights system and the implications for reform of the system); Matiangai V.S. Sirleaf, *Regionalism, Regime Change, and the Crisis in International Criminal Justice*, 54 COLUM. J. TRANSNAT'L L. 699 (2016) (considering ICL through the lens of regionalism and regime change).

increasing the legitimacy of using ICL norms in the domestic arena.

## II. BACKGROUND ON CHILEAN HUMAN RIGHTS PROSECUTIONS FOR DICTATORSHIP ERA CRIMES

In order to set the stage for an examination of the use of ICL in the Chilean human rights prosecutions, this Part offers a very brief sketch of the events that gave rise to gross human rights violations in Chile and the transitional justice context giving rise to contemporary human rights prosecutions.

On September 11, 1973, a U.S.-backed military junta ousted democratically-elected President Salvador Allende.<sup>13</sup> In short order, General Augusto Pinochet became the dominant figure of the junta.<sup>14</sup> After the coup, agents of the new government rounded up all potential opponents, including, among others, members of the former Allende government, socialists, communists, union-leaders, and student leaders.<sup>15</sup> Many were executed. Others sent into exile.<sup>16</sup> Still others were taken to detention and torture centers. Helping the government in this repressive enterprise were various security organs, including, as of 1974 the Dirección Nacional de Inteligencia (known as the DINA).<sup>17</sup> Although most of the worst human rights abuses occurred in the immediate wake of the coup and during the term of the DINA, but human rights abuses including enforced disappearances, political executions, torture, and sexual violence persisted throughout Pinochet's rule.<sup>18</sup>

During the dictatorship, the judicial system did next to nothing to protect victims of the regime. As Cath Collins notes: “[t]he judiciary’s single most glaring omission was its stubborn rejection of habeas corpus complaints. Of the

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<sup>13</sup> See generally PAMELA CONSTABLE & ARTURO VALENZUELA, A NATION OF ENEMIES, 9, 10, 15-20, 29-39, 52-57, 174 (2013).

<sup>14</sup> *Id.* at 46-49.

<sup>15</sup> *Id.* at 29-39.

<sup>16</sup> *Id.* at 149-52.

<sup>17</sup> *Id.* at 90-117. See also UNITED STATES INSTITUTE OF PEACE, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 8, 22 (May 1, 1990) <https://www.usip.org/publications/1990/05/truth-commission-chile-90> [hereinafter Rettig Report]; NATIONAL COMMISSION ON POLITICAL PRISON AND TORTURE, INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA 42-43, 78, 179-82 (Nov. 10, 2004), <https://www.usip.org/publications/2003/09/commission-inquiry-chile-03> (“Valech Report”) (The DINA was disbanded in 1977 but was replaced with another repressive organ, the Centro Nacional de Información (CNI).)

<sup>18</sup> See Rettig Report, *supra* note 17. See also FUNDACIÓN INSTITUTO DE LA MUJER CORPORACIÓN LA MORADA, INFORME DE INVESTIGACIÓN LAS MUJERES VÍCTIMAS DE VIOLENCIA SEXUAL COMO TORTURA DURANTE LA REPRESIÓN POLÍTICA EN CHILE 1973-1990: UN SECRETO A VOCES, 26 (2004) (“La política represiva se ha dividido en la bibliografía chilena, de acuerdo al tipo de represión, los métodos, la lógica y los organismos coordinadores de la misma, en 3 periodos. El primero, de septiembre a diciembre de 1973, el segundo, bajo el control de la DINA que va del 74 al 77, y el tercero coordinado por la CNI que va del 77 al 90.”).

thousands submitted after 1973, no more than ten were accepted by the courts.”<sup>19</sup> In 1978, the regime passed a self-serving amnesty law that granted amnesty for crimes committed between September of 1973 and March of 1978.<sup>20</sup>

In 1989, Chileans voted Pinochet out in a plebiscite.<sup>21</sup> To address the gross human rights abuses of the previous regime, the newly elected democratic government created a truth commission. President Patricio Aylwyn convened the National Commission for Truth and Reconciliation, typically referred to as the “Rettig Commission,” to document the truth about deaths and disappearances under the dictatorship.<sup>22</sup> As Sebastian Brett notes, the Rettig Commission “performed the task of documentation with professionalism, assiduity and speed. In the wake of public discussion over the Commission's findings in April 1991, there were few prepared to challenge their veracity.”<sup>23</sup> Nevertheless, torture fell outside the purview of the commission.<sup>24</sup> More than ten years later, President Ricardo Lagos created the National Commission on Political Imprisonment and Torture, known as the “Valech Commission,” to recognize victims of imprisonment and torture.<sup>25</sup>

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<sup>19</sup> CATH COLLINS, *POST-TRANSITIONAL JUSTICE: HUMAN RIGHTS IN CHILE AND EL SALVADOR*, 69 (2010) (hereinafter Collins, *Post-Transitional Justice*). See also Collins, *Human Rights Trials in Chile during and after the 'Pinochet Years'*, *INT'L J. TRANSITIONAL JUST.* 1, 2 (2009) (“After an initial purge, most Chilean judges proved to be highly reliable regime collaborators.... Habeas corpus writs were rejected in their thousands, with rote denials by security forces taken at face value.”).

<sup>20</sup> Law No. 2191, *Amnesty Law Decree*, Abril 18, 1978, *DIARIO OFICIAL [D.O.]* (“Concédese amnistía a todas las personas que, en calidad de autores, cómplices o encubridores hayan incurrido en hechos delictuosos, durante la vigencia de la situación de Estado de Sitio, comprendida entre el 11 de Septiembre de 1973 y el 10 de Marzo de 1978, siempre que no se encuentren actualmente sometidas a proceso o condenadas.”). See also Collins, *POST TRANSITIONAL JUSTICE*, *supra* note 19, at 68.

<sup>21</sup> Apparently, believing he would win, Pinochet agreed to the plebiscite, and only reluctantly accepted the result when he lost. See generally, PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES*, 297, 309 (2013) (discussing the lead up to the referendum, Pinochet’s conviction that he would win, and his initial refusal to accept the result).

<sup>22</sup> Law No. 355, art. 1, Abril 25, 1990, *DIARIO OFICIAL [D.O.]* (“Let there be created a National Truth and Reconciliation Commission for the purpose of helping to clarify in a comprehensive manner the truth about the most serious human rights violations committed in recent years in our country (and elsewhere if they were related to the Chilean government or to national political life), in order to help bring about the reconciliation of all Chileans, without, however, affecting any legal proceedings to which those events might give rise.”).

<sup>23</sup> SEBASTIAN BRETT, *CHILE: A TIME OF RECKONING: HUMAN RIGHTS AND THE JUDICIARY* 114 (1992) (“Those that did [dare to challenge the Rettig report], like the former director of the DINA, retired General Manuel Contreras, were met with public incredulity and derision, and were questioned even by conservative former supporters of the military government.”).

<sup>24</sup> Law No. 355, art. 1, Apr. 25, 1990, *DIARIO OFICIAL [D.O.]*.

<sup>25</sup> Law No. 1040, art. 1, Sept. 26, 2003, *DIARIO OFICIAL [D.O.]* (Artículo Primero: Créase, como un órgano asesor del Presidente de la República, una Comisión Nacional sobre Presión Política y Tortura, en adelante La Comisión, que tendrá por objeto exclusivo

For many years, the truth commissions and the accompanying reparatory measures were the extent of the Chilean transitional justice process. Prosecutions for human rights went nowhere,<sup>26</sup> but in the late 1990s there were some signs of progress on human rights prosecutions. In July 1996, Pinochet was the subject of a criminal complaint in Spain for “genocide, terrorism and other offenses against Spanish and (eventually) Chilean citizens.”<sup>27</sup> In January 1998, the Communist Party of Chile filed a criminal complaint against Pinochet in Chile, and lawyers filed a series of complaints against Pinochet related to the Caravan of Death throughout 1998.<sup>28</sup>

Chilean courts began to see criminal complaints against other alleged human rights violators from the dictatorship. In September 1998, in the landmark *Poblete Cordoba* case, the Chilean Supreme Court overturned the lower court’s dismissal of the case for enforced disappearance based on the argument that Chile was a party to the Geneva Conventions at the time of the offenses and the Conventions not only prohibited “attempts against life and physical integrity” and “attempts against personal dignity,” but also obligated states party to take legislative actions necessary to find and punish those who engage in “grave breaches” of the principles of the Geneva Conventions.<sup>29</sup> In finding that an armed conflict existed at the time of the crimes, the court deemed it significant that the regime itself had declared a state of siege.<sup>30</sup> Chile had signed the Geneva Conventions prior to the dictatorship, and therefore the theory was appealing to judges and government attorneys from a legality perspective as a non-retroactive

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determinar, de acuerdo a los antecedentes que se presenten, quiénes son las personas que sufrieron privación de libertad y torturas por razones políticas, por actos de agentes del Estado o de personas a su servicio, en el período comprendido entre el 11 de septiembre de 1973 y el 10 de marzo de 1990.”) *See also* INSTITUTO NACIONAL DE DERECHOS HUMANOS, INFORME ANUAL (2017) (providing statistics on the numbers of victims recognized by each commission).

<sup>26</sup> *Judging from a Guilty Conscience*, *supra* note 4 (“[T]here was no purge of the judiciary after the 1990 transition to democracy, and judges remained loath to pursue Pinochet-era claims. While a few high-profile cases managed to inch forward, and one reached sentencing, the bulk of Pinochet-era claims remained in legal limbo—temporarily stayed, delayed, or yet to be filed until 1998.”).

<sup>27</sup> Collins, *Post-Transitional Justice*, *supra* note 19, at 81.

<sup>28</sup> *Id.* at 82, 104-5. *See also* EDUARDO CONTRERAS MELLA, *EL DESAFORADO: CRÓNICA DEL JUICIO A PINOCHET EN CHILE* (2013).

<sup>29</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 9 septiembre 1998, “Pedro Poblete Cordova,” Rol de la causa: 469-1998, human rights (Chile). *See* Sebastian Brett & Cath Collins, *The Pinochet Effect—Ten Years on from London 1998*, 28 (2008). *See also* Cath Collins, *Post-Transitional Justice*, *supra* note 19, at 132 (explaining that from very early days, lawyers cited Geneva Conventions, which courts ignored, but over time courts grew more receptive to international arguments, and arguing that arguments rooted in Chilean law nevertheless still “more effective”).

<sup>30</sup> Corte Suprema de Justicia [C.S.J.], 469-1998 “Pedro Poblete Cordova,” 9 septiembre 1998. *See also* Brett & Collins, *supra* note 29, at 32; Cath Collins, *Human Rights Trials in Chile During and After the ‘Pinochet Years’*, 4 INT’L J. OF TRANSITIONAL JUST. 1-20 (2010).

application of the law.<sup>31</sup>

Just a month later, in October 1998, Pinochet traveled to London for back surgery and was arrested on a Spanish arrest warrant. English courts found that Pinochet was not immune from prosecution, but Pinochet was ultimately permitted to return to Chile based on his purported poor health.<sup>32</sup> (His triumphant walk off the plane seemed to suggest a somewhat more robust version of the former dictator than had been presented in the U.K. courts.<sup>33</sup>) As part of its opposition to Pinochet's extradition to Spain, however, Chile had argued that Chilean courts would prosecute Pinochet themselves.<sup>34</sup> Thus, Pinochet's arrest in London put an international spotlight on Chilean domestic prosecutions for human rights abuses.

International scrutiny notwithstanding, the early 2000s saw some judges moving forward with investigations while many others continued to dismiss cases based on the regime's self-amnesty and statutes of limitation.<sup>35</sup> The judge assigned to the Caravan of Death case against Pinochet, Judge Juan Guzmán, assiduously investigated the cases against Pinochet, despite his conservative background and in the face of significant political pressure domestically. The case eventually ended with the Court of Appeals of Santiago deciding that Pinochet was unfit to stand trial, but litigants at least had the satisfaction of seeing Pinochet stripped of official immunity, indicted and detained.<sup>36</sup> In 2001, the Supreme Court gave nine ministers a docket made up exclusively of human rights cases, with another 51 judges giving priority to human rights cases.<sup>37</sup>

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<sup>31</sup> Interview with Lawyer, Consejo de Defensa del Estado in Santiago, Chile (Nov. 20, 2017) (noting that “the Geneva Conventions have been fundamental” because they were the “only conventions to which Chile had subscribed”/ “las Convenciones de Ginebra han sido fundamentales [porque eran] los únicos convenios suscritos en Chile” and that they were “more convincing because they were already law”/ “más convencientes porque ya era ley”) (notes on file with author).

<sup>32</sup> NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS*, 63-64 (2005) (discussing Jack Straw's decision to permit Pinochet to return to Chile on health grounds).

<sup>33</sup> *See id.* at 67-68 (“Pinochet descended from the plane. But the decrepit, pitiable figure of Jack Straw's invocation had disappeared. Instead a rosy-cheeked Pinochet left his wheelchair behind, walked from the plane, lifted his cane to show he could walk unaided, and strolled through the crowd, greeting supporters by name.”).

<sup>34</sup> *See id.*

<sup>35</sup> *See id.* at 67-70.

<sup>36</sup> Collins, *Post-Transitional Justice*, *supra* note 19, at 92; CONTRERAS MELLA, *supra* note 28.

<sup>37</sup> OBSERVATORIO DE DERECHOS HUMANOS UDP, *PRINCIPALES HITOS JURISPRUDENCIALES EN CAUSAS DDHH EN CHILE 1990-2018* 7 (2018) [hereinafter UDP] (notes on file with author) (“La Corte Suprema designa 9 ministros de dedicación exclusiva, y 51 jueces de dedicación preferente, para investigar causas ddhh”). In 2017, the Supreme Court consolidated cases to a handful of Court of Appeals judges, sitting by designation as first instance human rights judges, one in Santiago and three others in different regions of the country. Centro De Derechos Humanos, Universidad Diego Portales, *Informe Anual Sobre Derechos*

Nevertheless, many cases continued to be dismissed on statute of limitations and amnesty grounds.

In 2004, the Supreme Court added another argument to support proceeding on human rights cases, notwithstanding the statute of limitation and amnesty, for cases of enforced disappearance. In the *Sandoval Rodriguez* case, the court noted that the aggravated kidnapping charges amounted to the international crime of enforced disappearance and, since aggravated kidnapping is an ongoing crime until a person has been found, dead or alive, the amnesty did not apply (since it covered crimes only up until 1978) and the statute of limitations could not toll.<sup>38</sup> This rationale had its limitations, as it applied only to cases of enforced disappearance and not to executions or torture.

2005 saw a step backward for human rights cases when the Supreme Court retreated from its holding in *Poblete Cordoba*. In a case of extrajudicial execution of 22-year-old and 15-year-old students, the court found that there had been no armed conflict in Chile during the dictatorship and thus the Geneva Conventions did not apply. It then dismissed the homicide case on statute of limitation grounds.<sup>39</sup>

In 2006, the pendulum swung again. The Inter-American Court of Human Rights (Inter-American Court) gave the Chilean judiciary another big push to advance on human rights cases. In an embarrassment to Chilean courts and the government, the Inter-American Court found Chile in violation of the Inter-American Convention on Human Rights (American Convention) based on its failure to prosecute those responsible for killing Mr. Almonacid in *Almonacid v. Chile*.<sup>40</sup> The court held that Chile had an obligation to prosecute and that statutes of limitation and self-granted amnesties were not valid barriers to prosecution of war crimes or crimes against humanity under international criminal and human rights law. Later, in *Garcia Lucero*, the Inter-American Court held that Chile had breached its obligations to investigate facts and identify and, as appropriate, punish those responsible (whether or not a victim or victim's family member asks for it).<sup>41</sup>

Scholars debate the leading cause of Chilean courts' opening to criminal prosecutions, and many emphasize that international pressure is not the only

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Humanos en Chile 2018 55 (Tomás Vial eds., 1st ed., 2018) (noting the consolidation of human rights cases to five judges but that, in 2018, thirteen judges in Chile issued judgments in dictatorship-era human rights cases).

<sup>38</sup> See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 17 noviembre 2004, "Caso Miguel Ángel Sandoval Rodríguez," Rol de la causa: 517-2004; See also UDP, *supra* note 37, at 7-8.

<sup>39</sup> See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 4 agosto 2005, "Caso Ricardo Rioseco y Luis Cotal," Rol de la causa: 457-2005; UDP, *supra* note 37, at 7-8.

<sup>40</sup> *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 93-101 (Sept. 26, 2006).

<sup>41</sup> *García Lucero et al. v. Chile*, Preliminary Objection, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser C) No. 267, ¶ 220 (Aug. 28, 2013).

reason or even the main reason for progress on human rights cases.<sup>42</sup> Whatever the reason, Chilean courts have been making their way through cases for dictatorship-era violence. They include prosecutions for enforced disappearance (charged as kidnapping or homicide, often aggravated) and political execution (charged as murder or aggravated murder), unlawful association (*asociación ilícita*) and, more recently, torture, charged under the closest approximation to torture in the criminal code at the time of the crimes as unlawful pressure (*apremio ilegítimo*) or use of force (*aplicación de tormentas*). In 2017, the judiciary reported some 1,328 pending human rights cases relating to dictatorship human rights violations.<sup>43</sup>

The dictatorship-related human rights cases are handled under the old Chilean procedural system.<sup>44</sup> There are three ways for cases to be initiated. First, survivors or family members of deceased victims can file criminal complaints (*querrelas*).<sup>45</sup> Judges may also open investigations *sua sponte*.<sup>46</sup> Finally, the Human Rights Program of the Ministry of Justice, formerly of the Ministry of Interior, may initiate cases through criminal complaints.<sup>47</sup> After a complaint or on their own initiative, the judge investigates and, if there is enough evidence,

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<sup>42</sup> *Judging from a Guilty Conscience*, *supra* note 4, at 136 (noting that among explanations given for why courts became more receptive to human rights cases are “international pressure, executive leadership (coupled with judicial deference), civil society, and institutional change within the judiciary” but arguing that the real reason was the Chilean judiciary’s desire for redemption after its gross failings in protecting the rule of law and human rights during the dictatorship).

<sup>43</sup> CENTRO DE DERECHOS HUMANOS (UDP), INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2017 (2017), <http://www.derechoshumanos.udp.cl/derechoshumanos/images/InformeAnual/2017/1-verdad,%20justicia,%20reparación%20y%20memoria.pdf> (“El Poder Judicial informó que al 4 de septiembre de 2017, existía un total de 1.328 causas penales por crímenes contra los DDHH en tramitación (1.005 de ellas en estado de sumario, 132 en plenario, 191 falladas al menos en primera instancia, pero sin ejecutoriarse, habiendo aún posibles apelaciones o casaciones pendientes), a cargo de 15 ministros en visita, siete de ellos para Santiago.”).

<sup>44</sup> Chile enacted a new procedural code, which was gradually rolled out from 2000 to 2005, that incorporated more features of the adversarial system and eliminated this single judge proceeding. *See generally* Claudio Pablo Véliz, *Criminal Procedure Reform: A New Form of Criminal Justice for Chile*, 80 U. CIN. L. REV. 1363 (2012) (explaining changes made to Chilean criminal procedure after the passage of a new Code of Criminal Procedure).

<sup>45</sup> *See interviews infra* note 56.

<sup>46</sup> *See* Minister 3 & Minister 4 interviews *infra* note 57.

<sup>47</sup> Decreto 1005, Reglamenta Función Asumida por el Ministerio en Materias que Indica, de Competencia de La Ex Corporación de Reparación y Reconciliación que creó la Ley No 19.123, 25 Abril 1997 (Chile). *See also* art. 10, Ley Transitorio, Ley 20.405, 10 Dic. 2009 (Chile) (authorizing the Human Rights Program to initiate complaints). Skype Interview with Rodrigo Lledó Vasquez, Lawyer and former Head of Legal Area—Human Rights Program, Ministry of the Interior and Public Security (Apr. 3, 2018) (noting that prior to 2009 the Human Rights Program could only assist in complaints brought by family members, but that starting in 2009 they could initiate cases for enforced disappearance and political execution) (notes on file with author).

issues an indictment (acusación). Most of the process occurs behind closed doors, with the judge collecting evidence and witness statements (sumario).<sup>48</sup> A single judge investigates and then decides the case on the merits.<sup>49</sup> At the end, the judge issues a written judgment (sentencia or fallo) describing the evidence, stating findings, and issuing a sentence.

Although the exact place of international law in the Chilean normative hierarchy is contested in Chile, Chile follows a monist tradition.<sup>50</sup> Article 5 of the Chilean Constitution, which recognizes “essential rights emanating from human nature” (human rights) as a restraint on Chilean sovereignty, requires all state organs to respect and promote such rights, guaranteed by th[e] Constitution, as well as by international treaties ratified by Chile and that are in force.”<sup>51</sup>

### III. INVOCATIONS OF ICL IN CHILEAN CASES

This Part explores the ways in which Chilean lawyers and courts have invoked ICL, with a focus on courts’ references to the ICC. A review of Chilean judicial decisions reveals that Chilean lawyers and courts use the terms “derecho penal internacional” (ICL) and “Corte Penal Internacional” (ICC) principally to

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<sup>48</sup> Interview with human rights lawyer in Temuco, Chile (Jun. 12, 2018) (notes on file with author).

<sup>49</sup> Perceived inefficiencies and unfairness in the old system led to the enactment of a new procedural code in 2000. Pavlic, *Criminal Procedure Reform: A New Form of Criminal Justice for Chile*, 80 U. CIN. L. REV. 1363, 1365-66 (2018) (“The system did not provide objective conditions of impartiality because the judge performed the functions of deciding if there was cause to initiate a criminal investigation, directing the investigation by issuing direct orders to police, then evaluating the results of the investigation and deciding whether or not to bring charges. In the event a decision was made to file charges and after allowing an opportunity for a purely formal defense, an evidentiary period was initiated, which was practically non-existent as the results of the written investigation file were considered sufficient. Finally, it was the same judge that issued a ruling convicting or absolving the accused of the crime.”). However, the new code does not apply to the dictatorship-era cases.

<sup>50</sup> Francisco Orrego Vicuña & Francisco Orrego Bauzá, *National Treaty Law and Practice: Chile*, in NAT’L TREATY L. & PRAC., 138-39 (Duncan B. Hollis et al. eds., 2005) (explaining that some interpret Article V of the Constitution to mean that human rights treaties rank higher than statutes and are on par with the Constitution and others read it to mean that treaties rank below the Constitution); see also David Sloss, *Domestic Application of Treaties*, OXFORD GUIDE TO TREATIES, 368 (Duncan B. Hollis ed., 2012) (noting that Chile follows a monist tradition, meaning that “some treaties have the status of law in the domestic legal system, even in the absence of implementing legislation”).

<sup>51</sup> Chile Const., art. V (“La soberanía reside esencialmente en la Nación. Su ejercicio se realiza por el pueblo a través del plebiscito y de elecciones periódicas y, también, por las autoridades que esta Constitución establece. Ningún sector del pueblo ni individuo alguno puede atribuirse su ejercicio. *El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana. Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes.*”) (emphasis added).

justify circumventing domestic barriers to prosecution, including, most importantly, Chile's amnesty law and statute of limitations. By reframing domestic crimes as war crimes and, later, crimes against humanity, courts could invoke international norms that prohibit using self-serving amnesties or statutes of limitations as a barrier to prosecution for grave international crimes. Litigants and courts later employed the same reframing device to argue for proportional punishment and reparations. ICL and the ICC were also invoked in a variety of ways to discuss principles of retroactivity. Finally, litigants and, in a few instances, courts invoked ICL to justify addressing previously overlooked forms of wrongdoing, such as sexual violence. Courts also used ICL and the Rome Statute as a rhetorical device to emphasize the gravity of the crimes and the importance of the rights at stake.

Some invocations of ICL and the Rome Statute are defendant-friendly. Judges justifying the dismissal of criminal cases for dictatorship-era human rights violations, also invoked ICL for a host of reasons. In particular, in scores of decisions, a few Supreme Court judges, first in the majority, later in the minority, cited the Rome Statute's definition of an internal armed conflict as illustrative support for the proposition that Chile was not in armed conflict during the dictatorship, meaning that the Geneva Conventions did not apply and therefore domestic statutes of limitations did. The very same judges would then argue that the Rome Statute's norms on the inapplicability of statutes of limitation to international crimes did not apply, because the Rome Statute and the Chilean legislation implementing it post-dated the crimes. Defendants and courts have also invoked ICL for the proposition that minors are not prosecuted at the ICC (and therefore defendants who were minors at the time also ought not to be in Chile), that ICL on command responsibility precludes liability in their cases, and for reductions in punishment.

The vast majority of the cases discussing ICL or the ICC dealt with dictatorship-era human rights abuses, but a few are contemporary cases. In these cases, courts have recast cases as crimes against humanity and invoked the ICL doctrine of command responsibility to justify prosecution or extradition. Defendants in contemporary drug trafficking and bankruptcy cases in turn have also invoked ICL to argue against alleged retroactive application of laws, to justify application of the rule of lenity, and to attempt to inject a gravity requirement into cases.

#### A. *Methodology*

This Article's examination of the role of ICL in the Chilean human rights prosecutions relies on a review of Chilean judicial decisions and interviews conducted in Chile. First, I collected all decisions available on Westlaw Chile using the terms "derecho penal internacional" (international criminal law) or

“Corte Penal Internacional” (International Criminal Court). As of July 2018,<sup>52</sup> the term “derecho penal internacional” yielded 58 judicial decisions (excluding one case captured which was a decision of the Inter-American Court and duplicate decisions). As of July 2018, the term “Corte Penal Internacional” appeared in 151 decisions (excluding two Inter-American Human Rights Court decisions and duplicates).<sup>53</sup> I then reviewed the decisions to ascertain how and why ICL or the ICC were being invoked. The breakdowns offered below are not intended as quantitative analysis but rather represent an attempt to give a rough sense of the contours of the ICL arguments found in Chilean caselaw. It bears noting that, although Westlaw’s coverage of appellate decisions in the human rights cases purports to be quite comprehensive, its coverage of trial judgments is almost certainly underinclusive.<sup>54</sup>

To supplement my reading of Chilean caselaw, I conducted interviews of attorneys involved in human rights cases, including private attorneys who represent or have represented family members and survivors, government attorneys from several different offices,<sup>55</sup> and lawyers from the feminist human rights organization, Corporación Humanas. I also interviewed Court of Appeals judges sitting by special designation as human rights judges (Ministros de visita), located throughout the country,<sup>56</sup> as well as three justices of the Chilean Supreme

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<sup>52</sup> The author’s access to Westlaw Chile through the University of Chile’s library worked only in Chile and ended in July 2018.

<sup>53</sup> I was unable to do a search for the terms “international criminal law” or “international criminal court” because Westlaw Chile does not permit the “or” function. Cross-referencing based on date, case number and parties revealed thirteen decisions that appeared on both the ICL list and the ICC list: one from 2002 in which the Constitutional Court addressed the constitutionality of the Rome Statute, one first instance decision from 2006 in Santiago, one Supreme Court decision and one Santiago Court of Appeals decision from 2007, two Supreme Court decisions from 2008, two Supreme Court decisions from 2009, one Supreme Court decision from 2010, one Constitutional Court decision from 2015, one Supreme Court decision from 2016, one Supreme Court decision and one Constitutional Court decision from 2017.

<sup>54</sup> Email from Denise Lizana, Key Account Manager, Thomas Reuters, to Caroline Davidson, Author (Oct. 3, 2018) (notes on file with author) (discussing coverage of Westlaw Chile which was comprehensive when it came to appellate decisions, but limited on first instance decisions) (“Las sentencias de DDHH se suben en un alto porcentaje, por su importancia. Son las que se tramitan en Cortes de Apelaciones y Suprema.”).

<sup>55</sup> These included attorneys who worked or had worked in the Human Rights Program (currently under the Ministry of Justice and Human Rights and formerly the Ministry of Interior), the Sub-Secretariat for Human Rights, the Section on Human Rights and Sexual and Gender Violence of the Public Prosecutor’s Office (Ministerio Público), the Women’s Ministry, the Consejo del Estado (which formerly helped prosecute cases and now principally defends the state against civil indemnity claims), and the public defender’s office. Throughout this article, pseudonyms are used for government attorneys and any private attorneys who requested it.

<sup>56</sup> The specialist human rights judges are Court of Appeals judges sitting by designation as first instance judges in criminal cases related to dictatorship-era human rights violations. They are based in the capitol, Santiago, as well as in regions throughout the country. The Supreme Court is based in Santiago, Chile. *See generally Tribunales del País*, PODER JUDICIAL REPUBLICA DE CHILE, <http://pjud.cl/tribunals-del-pais> (last visited Feb. 25, 2019). I

Court.<sup>57</sup> To complement these interviews with judicial actors, I also interviewed activists, heads of survivor groups, and academics. It would be fair to say that all the interviewees favored criminal accountability for human rights violations,<sup>58</sup> and more so than Chilean society as a whole. Thus, their views should not be taken as indicative of any kind of a Chilean consensus on any point. Nevertheless, they offer useful insider perspectives on the role ICL has played in the prosecution for dictatorship-era human rights abuses in Chile.

*B. Views of Interviewees on the Role of ICL*

Interviewees had differing views on the centrality of ICL to the Chilean prosecutions. Some believed that ICL had played a critical role in bringing about prosecutions. As one Supreme Court Justice explained:

We were a long time with the reality that nobody was going to get punished. We didn't have a way to solve it. Then somebody thought of international law—"This is called crimes against humanity." Article 5 of the Constitution, paradoxically introduced by Pinochet, says that the state should respect all international treaties.<sup>59</sup>

By contrast, another Supreme Court Justice said judges did not need to look to ICL, at least to find applicable crimes, since the acts were criminal under

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interviewed three Supreme Court justices. *See* Interview with SC1, Justice, Supreme Court of Chile, in Santiago, Chile (June 2018); Interview with SC2, Justice, Supreme Court of Chile, in Santiago, Chile (May 2018); and Interview with SC3, Justice, Supreme Court of Chile, in Santiago, Chile (Mar. 2018). Names of those interviewed have been removed. Interview recordings and notes on file with the author.

<sup>57</sup> *See* Interview with Minister 1, First Instance Human Rights Judge/Judge of the Court of Appeals, in Chile (Nov. 2017); Interview with Minister 2, First Instance Human Rights Judge/Judge of the Court of Appeals, in Chile (May 2018); Interview with Minister 3, First Instance Human Rights Judge/Judge of the Court of Appeals, in Chile (June 2018); Interview with Minister 4, First Instance Human Rights Judge /Judge of the Court of Appeals, in Chile (July 2018); Interview with Minister 5, First Instance Human Rights Judge/Judge of the Court of Appeals, in Chile (July 2018). Names of those interviewed have been removed. Interview recordings and notes on file with the author.

<sup>58</sup> Although they may agree on the need for prosecutions, interviewees had widely varying notions about the appropriate punishment for people convicted of human rights violations and the success of prosecutions to date.

<sup>59</sup> SC3, *supra* note 56 (noting that "estuvimos mucho tiempo con esto [la amnistía] no se iba a sancionar a nadie. No teníamos como solucionarlo. A alguien se le ocurrió el derecho internacional—esto se llama delitos de lesa humanidad. El artículo 5 de la Constitución, paradójicamente introducido por Pinochet, dispone entonces que el Estado debe respetar todos los tratados internacionales"). A first instance human rights minister echoed this sentiment saying that ICL played "an essential role in the orientation and the demand to investigate, sanctions and repair." Minister 4, *supra* note 57 ("[Jugaron un papel esencial en la orientación y la exigencia en la [de] investigar, las sanciones y reparar.").

domestic law anyway.<sup>60</sup>

Perhaps even more than the judges, views of the lawyers interviewed varied on the centrality of ICL to the Chilean prosecutions. Most found it to be a somewhat helpful framing tool. One government human rights lawyer cautioned that the role of international law in Chilean law is not entirely clear. With international law, the lawyer explained, “it depends on the judge you get and their receptivity... But it’s notable—there is more receptivity with this type of case, otherwise the statute of limitation would apply. We can’t deny it.”<sup>61</sup> Another human rights lawyer argued that ICL “has been good for something. It’s one more tool ... that permits understanding of the participation.”<sup>62</sup> This lawyer indicated that it is useful in the criminal complaints “even if it doesn’t appear, it helps you to go configuring a concept that in Chilean law does not exist, giving it content. In court, I don’t know if it has helped much.”<sup>63</sup> Human rights lawyer, Cristian Cruz, stated that ICL played “a relevant role. The judge uses it as a tool.”<sup>64</sup> From the perspective of the state, a lawyer from the Consejo de la Defensa del Estado, explained: “the state invokes it as obiter dicta to show that the state is trying to comply [with international obligations].”<sup>65</sup>

Veteran human rights lawyer, Eduardo Contreras gave ICL more credit. He viewed ICL as critical to the Chilean human rights prosecutions—“nothing that is happening today in Chile on these issues would have occurred if ICL did not exist.”<sup>66</sup> He explained that around 2000 to 2001, when Pinochet was in London, “judges began to talk for the first time about the principles of international law.”<sup>67</sup> Contreras noted that human rights lawyers happened upon the international law argument when a friend brought him a copy of the Geneva Conventions, and he started leafing through it. He added: “ICL opened the door

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<sup>60</sup> SC2, *supra* note 56.

<sup>61</sup> Interview with Human Rights Lawyer, formerly of the Human Rights Program, Ministry of the Interior, in Santiago, Chile (Oct. 17, 2017) (noting arguments over the interpretation of Article V of the Constitution and stating “depende del juez que te toca y la receptividad.” Pero es “notable—[hay] más receptividad en este tipo de causa, sino serian prescriptas. No podemos negarlo.”) (notes on file with author).

<sup>62</sup> Interview with Lawyer, Human Rights Program, Ministry of the Interior and Public Security, Chile (Oct. 4, 2017) (“[H]a servido algo. Es una herramienta más . . . que permite entender la participación.”) (notes on file with author).

<sup>63</sup> *Id.* (“[E]s útil en las querellas . . . mismo si no aparece, te permite ir configurando un concepto que en la ley chilena no existe, dándole contenido. En la corte no sé si sirve mucho.”).

<sup>64</sup> Interview with Cristian Cruz, Human Rights lawyer, in Santiago, Chile (Oct. 18, 2018) (notes on file with author).

<sup>65</sup> Interview with Lawyer, Consejo de la Defena del Estado, *supra* note 31 (“El estado [lo] invoca obiter dicta para mostrar que el estado está tratando de cumplir”).

<sup>66</sup> Interview with Eduardo Contreras, Human Rights lawyer, in Santiago, Chile (Oct. 26, 2017) (“[N]ada de lo que ocurre hoy en Chile por [estos] temas hubiera ocurrido si no existiera el derecho penal internacional”) (notes on file with author).

<sup>67</sup> *Id.* (“[L]os jueces empezaron a hablar por primera vez de los ‘principios’ de derecho internacional.”).

for us.”<sup>68</sup> Here, Contreras appears to be speaking broadly of IHL and ICL.

Others interviewed explained that the utility and centrality of ICL may have changed over time. One human rights judge explained that there was an evolution in caselaw. In the first judgments, you could see that international law, was not “specified,” but “with time it became a consideration.”<sup>69</sup> Later on, he explained, ICL came to be seen as “jus cogens.”<sup>70</sup> He said, “we are heading toward domestic criminal law informed by international criminal law.”<sup>71</sup> As for the Geneva Conventions and the Rome Statute, he says “it’s not debated. They are applicable.”<sup>72</sup>

Thus, judges and lawyers interviewed viewed ICL as something between a useful additional tool and an essential ingredient in the Chilean human rights prosecutions. The case analysis below offers a closer look at how judges incorporated ICL arguments.

### C. Breakdown of Cases

As the table below shows, of the fifty-eight decisions in the “jurisprudencia” (caselaw) database of Westlaw Chile using the term “international criminal law,” twenty-eight were Supreme Court cases.<sup>73</sup> Three were decisions from the Constitutional Court. Fourteen came from the Court of Appeals of Santiago. Five appeared in decisions from various courts of appeals around the country, and eight appeared in decisions of first instance judges.<sup>74</sup> The number of decisions citing ICL more than doubled in 2006, the year the Inter-American Court issued its decision in *Almonacid v. Chile*. References to ICL tapered off in 2010, but may have been replaced with increased discussion of the Rome Statute, as seen below.

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<sup>68</sup> *Id.* (“[N]os abrió la puerta el derecho penal internacional . . .”). Contreras is including Geneva Conventions-based arguments in his conception of ICL, thus his comments arguably speak more to the utility of international humanitarian law and ICL in conjunction than to ICL alone.

<sup>69</sup> Minister 1, *supra* note 57 (“[N]o se especificaba . . . [con el] tiempo se fue decantando”).

<sup>70</sup> *Jus cogens* norms are peremptory norms of international law. *See generally* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 292 (2006).

<sup>71</sup> Minister 1, *supra* note 57. (“[V]amos hacia un derecho penal internacional que trasciende el tema de la normativa nacional.”).

<sup>72</sup> *Id.* (“[No] se discute . . . “ya está vinculado”).

<sup>73</sup> The Supreme Court in Chile is a court of cassation, meaning a final appellate court, not a constitutional court. ESSENTIAL ISSUES OF THE CHILEAN LEGAL SYSTEM, <https://www.nyulawglobal.org/globalex/Chile.html>, (last visited Oct. 30, 2019).

<sup>74</sup> Again, Westlaw Chile’s coverage of first instance (trial) courts is less robust, so first instance decisions are likely significantly underrepresented here. *See* discussion at *supra* note 54.

Figure 1 REFERENCES TO “DERECHO PENAL INTERNACIONAL” IN WESTLAW CHILE JURISPRUDENCIA THROUGH JULY 2018\*

YEAR	Supreme Court	Constitutional Court	Court of Appeals (CA) Santiago	CA Concepción	CA San Miguel	CA Arica	CA Copiapó	Ministro de Fiero/ Juzgado de Crimen	TOTAL/ YR
2018	1								1*
2017	3	1							4
2016	1		1						2
2015	2	1							3
2014									0
2013									0
2012	1								1
2011									0
2010	1		1						2
2009	6		3						9
2008	4		2	1	1			2	10
2007	5		5						10
2006	1		2			1	1	4	9
2005	2					1		2	5
2004									0
2003	1								1
2002		1							1
TOTAL	28	3	14	1	1	2	1	8	58

\*Excluding Inter-American Court decision and duplicates.

\*\*Figures from 2018 end in mid-July.

Of the 150 Chilean judicial decisions citing “International Criminal Court,”<sup>75</sup> 102 were Supreme Court decisions, sixteen Constitutional Court

<sup>75</sup> The results turned up 163 judicial decisions, two of which were decisions of the Inter-American Court and eleven of which were duplicates.

decisions,<sup>76</sup> and eighteen were decisions of the Court of Appeals of Santiago. Most years, there were one to two decisions per year in various other Courts of Appeals throughout Chile. As with cites to ICL, there was a spike in courts' references to the ICC after the Inter-American Court's decision in *Almonacid*. The apex of citations to the ICC was in 2009, the same year Chile passed legislation to align Chilean law with the Rome Statute.<sup>77</sup> Unlike with the term ICL, cites to the ICC have remained fairly steady. They tapered off a little in 2013 and 2014, but increased again in 2014 and 2015. Again, the numbers from 2018 are lower, because they end in mid-July 2018.

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<sup>76</sup> The bulk of these dealt with the constitutionality of various laws, including the Rome Statute itself or discussing the constitutionality of other laws and referring to the process for deciding the constitutionality of the Rome Statute framework by comparison.

<sup>77</sup> The legislation does not track the Rome Statute exactly, but comes close. Cf. Claudia Cárdenas Aravena, *Los crímenes de lesa humanidad en el derecho chileno y en el derecho internacional. Sus requisitos comunes, además de referencias a los actos inhumanos en particular*, 27 R.D. 169 (2014) (arguing that Chilean legislation on crimes against humanity comports with ICL in broad strokes, and Chile is permitted to tweak its domestic legislation to make it better) (“Tanto para los requisitos comunes como para los actos inhumanos en particular se requiere de la concurrencia de aspectos objetivos y de aspectos subjetivos. Estos, grosso modo, coinciden con los requisitos asentados en el derecho penal internacional. La existencia de variaciones está dentro de las facultades del Estado de Chile de darse el derecho penal que considere más adecuado.”).

Figure 2 REFERENCES TO “CORTE PENAL INTERNACIONAL” IN WESTLAW CHILE JURISPRUDENCIA THROUGH JULY 2018\*

YEAR	Supreme Court	Constitutional Court	Court of Appeals (CA) Santiago	CA San Miguel	CA Valdivia	CA Valparaiso	CA Rancagua	CA Temuco	CA Concepción	CA Punta Arenas	Ministro de Fureo/ Jurgado de Crimen	TOTAL/ YR
2018	6			1								7**
2017	10	2	1			1	1					15
2016	11	1	3									15
2015	8	3	1	1				1		1		15
2014	2	2	2			1						7
2013	7	1										8
2012	14											14
2011	7	1						1				9
2010	7	1										8
2009	15	3	1									19
2008	4		2								3	9
2007	8		3									11
2006	1		4								2	7
2005	1											1
2004	1		1								1	3
2003		1										1
2002		1										1
TOTAL	102	16	18	2	0	2	1	2	0	1	6	150

\*Excluding Inter-American Court decision and duplicates.

\*\*Figures from 2018 end in mid- July.

As the tables below indicate, Chilean courts invoked ICL and the ICC to a variety of ends. Far and away the most common explicit use was to reframe the crimes as crimes against humanity to avoid application of statutes of limitation or the amnesty, but judges also invoked ICL to defend against charges of

retroactive application of the law, to argue for proportional punishment, to support a duty to punish to ensure respect for human rights, to express the gravity of the crimes, and to support an obligation to provide reparations. Notably, almost as frequent as pro-accountability arguments to circumvent the amnesty and statutes of limitation are pro-defendant arguments citing the Rome Statute to support the claim that there was not a non-international armed conflict in Chile at the time of the crimes (and therefore the Geneva Conventions do not apply and thus there is no obligation to prosecute under international law) and that the Rome Statute could not be applied retroactively to the dictatorship-era human rights violations.

*Figure 3 REFERENCES TO “DERECHO PENAL INTERNACIONAL” AND “CORTE PENAL INTERNACIONAL” IN WESTLAW CHILE JURISPRUDENCIA THROUGH JULY 2018 BY ARGUMENT*

*ARGUMENTS IN DECISIONS INVOKING “INTERNATIONAL CRIMINAL LAW” (DERECHO PENAL INTERNACIONAL)\**

Definition of crimes against humanity	8
Statute of Limitations/Amnesty	32
Retroactivity	15
Duty to punish/ensure respect for human rights	10
Gravity/proportionality	6
Modes of participation	2

\*These figures do not match the number of cases, because several cases invoked ICL for multiple arguments.

*ARGUMENTS IN DECISIONS INVOKING “INTERNATIONAL CRIMINAL COURT”  
(CORTE PENAL INTERNACIONAL)\**

Definition of crimes against humanity	36
Statute of Limitations/Amnesty	41
Retroactivity (pro-complainant)	2
Duty to punish/ensure respect for human rights	4
Gravity/proportionality	8
Modes of participation	0
Retroactivity (pro-defendant)	42
Lack of Non-International Armed Conflict (pro-defendant)	37

\*These figures do not match the number of cases, because several cases invoked the ICC for multiple arguments.

The next Part explores the different invocations of ICL and the ICC in greater detail. As Part D reveals, ICL’s crimes against humanity doctrine has figured prominently in Chilean discussions of ICL, but courts have turned to ICL and the Rome Statute to bolster a variety of other arguments rooted in international human rights law (“IHRL”) and domestic law too.

*D. The Crimes Against Humanity Overlay*

The principal way in which ICL has entered the Chilean human rights prosecutions is through the concept of “lesa humanidad” (crimes against humanity). Courts convict for a domestic crime but note that the acts amount to crimes against humanity under ICL. This reframing has been used to a number of ends. First and foremost, by reframing the acts as crimes against humanity, courts fold in international norms requiring investigation, prosecution, and punishment, which supplies a justification for ignoring the amnesty and statutes of limitation. The crimes against humanity gloss has also been used to support arguments for proportional punishment and against the Chilean doctrine of “media prescripción” (partial statute of limitation), to justify civil reparations, and as a general rhetorical tool for emphasizing the gravity of offenses.

It is worth noting that crimes against humanity is a concept that is invoked even without discussion of the terms “international criminal law” or the ICC. While there are some 220 decisions on Westlaw Chile citing “international

criminal law” or “International Criminal Court,” there are over 700 decisions using the term “crimes against humanity.”<sup>78</sup> This discrepancy indicates that there are a large number of decisions in which Chilean courts are invoking the concept of crimes against humanity without tethering it to any discussion of ICL as a field or the Rome Statute.<sup>79</sup>

### 1. Defining Crimes Against Humanity

Courts frequently invoked ICL and the ICC to define crimes against humanity.<sup>80</sup> Courts cited the ICL or the ICC as part of discussions on the elements of crimes against humanity. In particular, courts cited ICL or the ICC for the requirements that the act be committed as part of a widespread or systematic attack with knowledge of the attack, or for the types of acts that can amount to a crime against humanity.<sup>81</sup>

A recent Supreme Court case finding that a police officer’s shooting of the victim for violation of the curfew laws constituted a crime against humanity cited the Rome Statute’s definition of the crime, noting the requirements for a widespread or systematic attack and a state policy, as the hallmarks of crimes against humanity. The court found both to be met, as the shooting was part of a “state policy of repression of political views contrary to the regime, that authorized use of firearms, the terrorizing of civilians, and, above all, the guarantee of impunity that the regime generated regarding criminal responsibility and of all rules, among other conduct.”<sup>82</sup> However, as discussed in

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<sup>78</sup> A search for the term “lesa humanidad” in the Westlaw Chile caselaw (jurisprudencia) database on May 25, 2018 yielded 718 results. An excellent thesis written by two University of Chile law students, now graduates, offers a helpful taxonomy of the Chilean courts use of the concept of crimes against humanity (lesa humanidad) in cases from 2006 to 2013. *See* María Fernanda Gil Herrera & Valentina Manzur Toro, *Crímenes de lesa Humanidad en Chile: Sistematización de Argumentos de los Fallos Emitidos Por los Tribunales Superiores del País (2006-2013)* (Aug. 2017) (unpublished thesis) (on file with the author).

<sup>79</sup> Some of these cases may include citations to other modern international tribunals, but likely not all. A search of Westlaw Chile using the term, Yugoslavia, for example, yielded only 64 decisions, of which more than half appeared in the searches for the terms ICL and ICC captured in this study.

<sup>80</sup> Eight of fifty-eight cases using the term ICL discuss the ICL definition of crimes against humanity, in particular the requirement of a widespread or systematic attack against a civilian population and the types of acts that constitute crimes against humanity, such as murder and extermination. 36 of 158 cases using the term ICC invoke the Rome Statute’s definition of crimes against humanity.

<sup>81</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 junio 2018, “Unidad del Programa de Derechos Humanos de la Subsecretaría de Derechos Humanos y otros c. Pedro Alvarez Campos,” Rol de la causa: 39660-2017, penal (“El Estatuto de la Corte Penal Internacional en su artículo 7 define los crímenes de lesa humanidad como aquellos actos que enumera la norma que se comentan como parte de un ataque generalizado o sistemático contra una población civil y con conocimiento de dicho ataque.”).

<sup>82</sup> *Id.* (“[E]n la época de la agresión se implementó una política estatal que consultaba la

Part IV below, in other cases, defendants have argued and sometime courts have agreed, including in previous cases involving killings for curfew violations, that the facts do not meet ICL's chapeau requirements for crimes against humanity.

Courts also have cited ICL to illustrate the types of conduct that can amount to a crime against humanity. In a relatively early citation to ICL from 2006, the Court of Appeals of Santiago cited Article 7 of the Rome Statute, along with human rights conventions, for the proposition that "enforced disappearance is a grave offense against the intrinsic dignity of the person."<sup>83</sup> The court then noted that the Rome Statute's definition of crimes against humanity included murder, extermination, and enforced disappearance.<sup>84</sup>

Courts' articulation of ICL does not always track most commonly understood ICL doctrine. In the Villa Grimaldi mega-case, for example, the trial judge stated that the 2009 Chilean legislation incorporating the Rome Statute into Chilean law recognized that, "[T]here is a general agreement on the inhumane acts that constitute crimes against humanity, which are essentially the same as those recognized for almost 80 years. In light of the current development of international law, customary and treaty-based, acts like genocide, apartheid and slavery are crimes against humanity."<sup>85</sup> It is debatable whether crimes against humanity have remained "essentially" the same for the past 80 years.<sup>86</sup>

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represión de posiciones ideológicas contrarias al régimen, la seguridad al margen de toda consideración por la persona humana precisamente el "toque de queda" que autorizaba el empleo de las armas de fuego, el amedrentamiento a los civiles y, sobre todo, la garantía de impunidad que el mismo régimen generó ante las responsabilidades penales y de todo orden, entre otras actuaciones.")

<sup>83</sup> Corte de Apelaciones (C. Apel.) (Court of Appeals), 2 junio 2006, Rol de la causa:

14567-2004 ("Que, la desaparición forzada de personas constituye, desde hace tiempo una gravísima ofensa a la dignidad intrínseca de la persona humana, de carácter inderogable, tal como está consagrada en diversos instrumentos internacionales de carácter obligatorio para Chile: Carta de las Naciones Unidas, Carta de la Organización de los Estados Americanos, Convención Americana sobre Derechos Humanos o Carta de San José de Costa Rica, Pacto de Derechos Civiles y Políticos de las Naciones Unidas, entre otros, así como también en la Declaración Universal de los Derechos Humanos . . .").

<sup>84</sup> Corte de Apelaciones (C. Apel.) (Court of Appeals), 2 junio 2006, Rol de la causa: 14567-2004 ("[Y], lo que es más importante, constituye un crimen de lesa humanidad, tal como está definido en el Estatuto de la Corte Penal Internacional, que ya se encuentra vigente internacionalmente, en su artículo 7: A los efectos del presente Estatuto se entenderá por crimen de lesa humanidad, cualquiera de los actos siguientes cuando se cometa como parte de un ataque generalizado o sistemático contra una población civil y con conocimiento de dicho ataque...").

<sup>85</sup> Ministro de Fuero [M.D.F.], 21 julio 2017, "Episodio Villa Grimaldi Cuaderno Iván Insunza Bascuñán y otros," Rol de la causa: 2182-1998 ("[E]xiste un acuerdo generalizado sobre los tipos de actos inhumanos que constituyen crímenes contra la humanidad, que esencialmente son los mismos reconocidos desde hace casi ochenta años. A la luz del desarrollo actual del derecho internacional tanto consuetudinario como convencional, constituyen crimen contra la humanidad actos como el genocidio, el apartheid y la esclavitud.") (quoting from the law).

<sup>86</sup> See generally Leila Nadya Sadat, *Crimes Against Humanity In The Modern Age*, 107 AM. J. INT'L L. 334 (2013) (describing the shifting chapeau elements of crimes against humanity among the different international and hybrid criminal tribunals and the recognition of new forms

Moreover, genocide is a distinct crime from crimes against humanity under ICL, though both are grave international crimes.<sup>87</sup> Some of the crimes on the list also are relatively recent additions to the crimes against humanity catalog. Apartheid, for example, is a crime against humanity recognized by the Rome Statute, but not by the statutes of the ad hoc tribunals.<sup>88</sup>

Since its passage, courts now often cite Chile's law incorporating, more or less,<sup>89</sup> Rome Statute crimes into domestic law in addition to the Rome Statute. In the Villa Grimaldi case, for example, the court cited the Chilean legislation for a list of crimes that can amount to crimes against humanity, even though the legislation, like the Rome Statute, does not apply retroactively to dictatorship-era offenses:

[T]he practice of systematic or large-scale killings, torture, enforced disappearance, arbitrary detention, the reduction to a state of servitude or forced labor, persecution for political, racial, religious or ethnic reasons, rapes and other forms of sexual abuse and arbitrary deportation or forced transfer of populations have been considered crimes against humanity.<sup>90</sup>

Thus, Chilean courts have cited the Rome Statute, as well as the domestic legislation implementing it, to illustrate the types of crimes that constitute crimes against humanity, even though these instruments post-date the crimes.

## 2. Avoiding the Amnesty and Statute of Limitation

ICL, in conjunction with international humanitarian law ("IHL") and IHRL, has served as a central justification for ignoring domestic statutes of limitation and the Chilean amnesty law, which remains on the books. Again, until 1998, the amnesty and statutes of limitation were firm bars to prosecution, as courts routinely dismissed human rights cases based on both grounds.

However, litigants have slowly succeeded in poking holes in these legal

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of crimes against humanity at the Special Court for Sierra Leone and the ICC); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY* (Kluwer Law International, 2nd ed., 1999). (describing the evolution in understandings of crimes against humanity and the new forms of crimes against humanity recognized in the Rome Statute).

<sup>87</sup> Compare Rome Statute, *supra* note 2, art. 6 (defining genocide), with Rome Statute, *supra* note 2, art. 7 (defining crimes against humanity).

<sup>88</sup> See *id.*

<sup>89</sup> See *supra* note 80.

<sup>90</sup> Ministro de Fuego [M.D.F.], 21 julio 2017, "Episodio Villa Grimaldi Cuaderno Iván Insunza Bascuñán y otros," Rol de la causa: 2182-1998 ("Asimismo, han sido considerados crímenes contra la humanidad la práctica sistemática o a gran escala del asesinato, la tortura, las desapariciones forzadas, la detención arbitraria, la reducción en estado de servidumbre o trabajo forzoso, las persecuciones por motivos políticos, raciales, religiosos o étnicos, las violaciones y otras formas de abusos sexuales y la deportación o traslado forzoso de poblaciones con carácter arbitrario" (ob.cit., pag.26)).

barriers to prosecution, albeit with courts employing shifting rationales. First, judges tried to at least name perpetrators (the truth commissions had detailed abuses but had not identified perpetrators) and expose deeds even if they could not be sentenced. Starting in 1998, the “prevailing doctrine” was that “crimes must be specified, and perpetrators identified, before amnesty can be properly applied.”<sup>91</sup> A few prosecutions even made it to sentencing. As Cath Collins has observed, courts initially “focused on cases where [the amnesty] didn’t apply,”<sup>92</sup> including the prosecution of agents involved in the assassination of Orlando Letelier in Washington, DC. Courts then moved to crimes from the 1980s which fell outside of the timeframe of the amnesty. Later, courts created exceptions, for example, relying on the ongoing crime theory for kidnapping.<sup>93</sup>

As noted above, in *Poblete Cordoba*, the Supreme Court justified ignoring the amnesty and statute of limitations based on Chile’s obligations under the Geneva Conventions to prosecute and punish war crimes, but retreated from this position in 2005. Until around 2009, Chilean courts (and even the Supreme Court itself, since differently composed chambers would reach different results) went back and forth on the applicability of the Geneva Conventions.<sup>94</sup> At least early on, Chilean courts invoked the Geneva Conventions directly and argued its applicability as an IHL and IHRL norm, not one of ICL, even though grave breaches of the Geneva Conventions also violate ICL. In *Poblete Cordoba*, for example, the court never uses the term ICL and nor does it cite to the statutes or caselaw of any international criminal tribunal. In these early cases, courts may have been unaware of developments in ICL at the ICC or other modern international criminal tribunals or, more likely, simply chose to ground their decisions in pre-existing IHL norms out of concern over retroactive application of ICL.<sup>95</sup>

Eventually, however, courts began to use ICL to reframe the crimes as “lesa humanidad” (crimes against humanity) in order to justify non-application of the amnesty and statute of limitations, particularly following the Inter-American Court decision in *Almonacid* condemning Chile for its failures in ensuring justice for Mr. Almonacid. In *Almonacid*, the Inter-American Court included several paragraphs describing the history and concept of crimes against humanity from Nuremberg to the present<sup>96</sup> and explicitly held that the execution of Mr.

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<sup>91</sup> Collins, Post-Transitional Justice, *supra* note 19, at 124.

<sup>92</sup> *Id.*

<sup>93</sup> Cath Collins & Boris Hau, *Chile: Incremental Truth, Late Justice*, in TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY 126, 130-35 (Elin Skaar et al. eds., 2016) [hereinafter Collins, *Incremental Truth*].

<sup>94</sup> See *supra* Part III.F.1

<sup>95</sup> See Lawyer, Consejo de la Defensa del Estado, *supra* note 31 (explaining that citing the Geneva Conventions was an appealing source of international law because Chile had already subscribed to the conventions at the time of the crimes).

<sup>96</sup> *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs,

Almonacid was a crime against humanity.<sup>97</sup> In addition, the Inter-American Court found that crimes against humanity are not subject to statutes of limitations, and that, under international law and the American Convention, states have an obligation to investigate, prosecute, and punish those who commit crimes against humanity.<sup>98</sup> *Almonacid* itself cited not only United Nations Security Council resolutions related to the ad hoc tribunals and the Special Court for Sierra Leone, but also caselaw from Nuremberg and the ICTY in support of its arguments.<sup>99</sup>

Chilean courts began relying on the ICL crimes against humanity rationale in addition to the Geneva Convention and continuing crime theories. Of the fifty-eight cases using the term ICL on Westlaw Chile, thirty-two of them invoked ICL for the proposition that ICL prohibited using amnesties or statutes of limitation as barriers to prosecution for crimes against humanity. Of the 150 cases using the term ICC, forty-one cases used it for the proposition that the Rome Statute prohibits using the amnesty or statutes of limitations as barriers to prosecution for crimes within the ICC's jurisdiction, in particular crimes against humanity. Some thirty-six of decisions cite the Rome Statute for the definition of crimes against humanity.<sup>100</sup>

#### *E. Other Pro-Accountability ICL Arguments*

Over time, courts began citing ICL and the Rome Statute for a wide array of arguments. These included arguments related to proportional punishment, a

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Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 93-101 (Sept. 26, 2006) (describing the genesis of crimes against humanity in Nuremberg, subsequent articulations of the doctrine and caselaw of the European Court of Human Rights dealing with retroactivity issues).

<sup>97</sup> *Id.* ¶¶ 103-104 (“As it is evident from the chapter of Proven Facts (*supra* paras. 82(3) to 82(7)), between September 11, 1973 and March 10, 1990 Chile was ruled by a military dictatorship which, by developing a state policy intended to create fear, attacked massively and systematically the sectors of the civilian population that were considered as opponents to the regime. This was achieved by a series of gross violations of human rights and of international law, among which there are at least 3,197 victims of summary executions and forced disappearances, and 33, 221 detainees, most of whom were tortured. Likewise, the Court considered proven that the most violent time of that repressive period was that of the first months of the de facto government. Approximately 57 percent of all deaths and disappearances occurred during the first months of the dictatorship. The execution of Mr. Almonacid-Arellano took place precisely during that time. Considering the aforesaid, the Court determines that there is sufficient evidence to reasonably state that the extra-legal execution committed by State agents in detriment of Mr. Almonacid-Arellano, who was a member of the Communist Party and a candidate to preside the said party, as well as the Provincial Secretary of the Central Unitaria de Trabajadores (Labor Central Union) and Magisterio (SUTE) Union Leader—all of which was considered a threat to the dictatorship doctrine—was committed following a systematic and generalized pattern against the civilian population, and thus, it is a crime against humanity.”) (internal citations omitted).

<sup>98</sup> *Id.* ¶¶ 106-11.

<sup>99</sup> *Id.* ¶¶ 120-27.

<sup>100</sup> See Figure 3, *supra* Part III.C.

right to reparations, special protection for minors, double jeopardy, legality (non-retroactivity), and expressing condemnation for the crimes. Using ICL to help interpret domestic crimes proved less successful.

### 1. Proportionality of Punishment

The recasting of domestic crimes as crimes against humanity later was used to support arguments for proportional punishment, in particular to reject the Chilean doctrine of “media prescripción” (partial statute of limitations). For several years after courts began recognizing that, as crimes against humanity, the dictatorship-era crimes of kidnapping and murder could not be blocked by the amnesty or statutes of limitations, they nevertheless gutted penalties based on a domestic doctrine of “media prescripción.” The Chilean criminal code contains a provision that allows courts to reduce the grade of punishment for crimes prosecuted long after the commission of the offenses.<sup>101</sup> For many people convicted of dictatorship-era crimes, this doctrine meant that their sentences, already low due to inadequate domestic penalties (particularly for torture), would be reduced such that they never spent any time in prison.<sup>102</sup>

For years, the Supreme Court, with some dissenters, distinguished “media prescripción” from a statute of limitations, by arguing that it was a doctrine related to mitigation of punishment and, unlike a statute of limitations, did not completely extinguish criminal responsibility in contravention of ICL and international human rights norms.<sup>103</sup> The dissenters, who later became the majority, argued that the greater of prescripción (statute of limitations) included the lesser of “media prescripción” and that, just as ICL and the Rome Statute precluded the use of a statute of limitations in war crimes and crimes against humanity cases, they also precluded reducing punishment on this basis.<sup>104</sup> As

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<sup>101</sup> CÓDIGO CIVIL [CÓD. CIV.], art. 103 (Chile).

<sup>102</sup> See Karina Fernández, *Breve análisis de la jurisprudencia chilena, en relación a las graves violaciones a los derechos humanos cometidos durante la dictadura militar*, 8 ESTUDIOS CONSTITUCIONALES 467, 468-69 (2010) (describing “el actual período jurisprudencial, en el que se declara gradualmente prescrita la comisión de ilícitos que en su carácter de delitos de lesa humanidad son previamente definidos como imprescriptibles, como resultado de lo cual en gran parte de los últimos fallos se observa una disminución considerable y desproporcionada de las penas impuestas a los responsables, que se traduce en la concesión de libertad de vigilada a los autores de tan graves crímenes.”).

<sup>103</sup> See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], 11 diciembre 2008, “Oscar Humberto Medina c. Consejo Superior de la Corporación Nacional de Reparación y Reconciliación,” Rol de la causa: 2422-2008.

<sup>104</sup> See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 mayo 2016, “Ministerio del Interior y otros c. José Torres Riquelme y otros,” Rol de la causa: 14283-2015 (emphasis added); Corte de Apelaciones [C. Apel] [court of appeals], 27 octubre 2014, “Programa Continuación de la Ley 19123 y otros c. Krassnoff Martchenko Miguel y otros,” Rol de la causa: 1190, Recurso de Apelación (“debe también desecharse como regla de atenuación la prescripción gradual de la acción penal, siguiendo el adagio que si se prohíbe lo más, con mayor razón se prohibirá lo menos, aplicando la regla minor ad maius”).

the Supreme Court explained in 2018:

The consistent caselaw of this Criminal Chamber has used two arguments to reject the present argument, relating to the violation of Article 103 of the Criminal Code: first, the classification of crimes against humanity given the criminal acts committed, compels consideration of the norms of IHRL, which exclude application of statute of limitation as well as statute of limitation-light for this type of crime, understanding the bases for these institutions as tightly connected, and consequently, contrary to the rule *jus cogens* emanating from the world of ICL, which rejects impunity and the imposition of penalties that are not proportional to the intrinsic gravity of the crimes, based on the passage of time.<sup>105</sup>

The Court was right that this was the consistent argument of the Supreme Court justices who opposed media prescripción, but opposition to media prescripción was far from the consistent position of the Supreme Court or even the Criminal Chamber of the Supreme Court to this point. As lawyers interviewed noted, although recent decisions seem mostly to reject media prescripción, whether a defendant benefitted from media prescripción largely depended on the composition of the court that heard its case.<sup>106</sup>

Bolstering arguments rooted in the prohibition of statute of limitations for war crimes and crimes against humanity found in international law, courts cited ICL's mandate to ensure punishment proportional to the gravity of crimes as another reason to reject the doctrine of media prescripción. As the Supreme Court explained in a 2016 case rejecting the defendant's argument that he should have benefited from a reduced sentence pursuant to media prescripción:

Among the characteristics that distinguish this type of transgressions, the non-applicability of statutes of limitations, the impossibility of granting amnesty for them and consecrating barriers to responsibility that aim at impeding the investigation

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<sup>105</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 14 mayo 2018, "Programa Continuación Ley N 19.123 y otros c. César Manríquez Bravo y otros," Rol de la causa: 39732-2017 ("[L]a jurisprudencia constante de esta Sala Penal ha utilizado dos argumentos para desestimar la causal de que se trata, afincada en la vulneración del artículo 103 del Código Penal: a) por una parte, la calificación de delito de lesa humanidad dada al hecho ilícito cometido, obliga a considerar la normativa del Derecho Internacional de los Derechos Humanos, que excluye la aplicación tanto de la prescripción como de la llamada media prescripción en esta clase de delitos, por entender tales institutos estrechamente vinculados en sus fundamentos y, consecuentemente, contrarios a las regulaciones de *ius cogens* provenientes de esa órbita del Derecho Penal Internacional, que rechazan la impunidad y la imposición de penas no proporcionadas a la gravedad intrínseca de los delitos, fundadas en el transcurso del tiempo.").

<sup>106</sup> See Interview with Francisco Ugas, Human Rights lawyer and former Head of the Human Rights Program of the Min. of the Interior, in Santiago, Chile (Sept. 8. 2017) (notes on file with author); Lawyer, Human Rights Program, *supra* note 62.

and punishment of those responsible for such grave violations of essential rights as torture, summary execution, extra-legal or arbitrary enforced disappearances, all of which are prohibited by IHRL. In this manner, keeping in mind the nature of the facts investigated in the present case and how they were presented in the judgement under review, as well as the context in which they undoubtedly belong and the participation members of the state had in them, there can remain no doubt that they should be viewed under the light of IHL within the category of crimes against humanity and that they should be punished, as they *deserve an energetic condemnation of the universal conscience*, as attempts against fundamental human values, that no treaty, agreement, or *positive law* can derogate, weaken, or conceal.<sup>107</sup>

The positive law needing to be ignored in this instance was the law providing for *media prescripción*.

The court's logic is interesting for a few reasons. First, it provides a sample of the arguments made to recast the crimes. Second, it illustrates the demand for strong condemnation, which precludes application of *media prescripción*. Third, it is illustrative of courts' tendency to conflate doctrines of ICL, IHL and IHRL. Here, crimes against humanity is listed as a doctrine of IHL (the law of war), whereas it is typically thought of as an ICL doctrine.<sup>108</sup>

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<sup>107</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 mayo 2016, "Ministerio del Interior y otros c. José Torres Riquelme y otros," Rol de la causa: 14283-2015 ("Entre las características que distinguen este tipo de transgresiones se destacan la imprescriptibilidad, la imposibilidad de amnistiarlos y de consagrar excluyentes de responsabilidad que *pretendan impedir la investigación y sanción de los responsables de tan graves violaciones* a los derechos esenciales tales como la tortura, las ejecuciones sumarias, extra legales o arbitrarias y las desapariciones forzadas, todas ellas prohibidas por el derecho internacional de los derechos humanos. De este modo, teniendo en cuenta la naturaleza de los hechos investigados en la presente causa y tal como fueron presentados en el fallo que se revisa, así como el contexto en el que indudablemente deben inscribirse y la participación que miembros del Estado han tenido en ellos, no cabe duda alguna que deben ser subsumidos a la luz del derecho internacional humanitario dentro de la categoría de *crímenes contra la humanidad y que se deben penalizar, pues merecen una reprobación tan enérgica de la conciencia universal*, al atentar contra los valores humanos fundamentales, que ninguna convención, pacto o norma positiva puede derogar, enervar o disimular...") (emphasis added).

<sup>108</sup> By ICL, I mean the imposition of criminal liability for violations of certain international law norms, including norms drawn from international human rights law and international humanitarian law (also known as the law of war or the law of armed conflict). As Roger O'Keefe has explained: "[I]t is the explicit provision for individual criminal responsibility that distinguishes international criminal law from international human rights law and from the main body of international humanitarian law (or the law of armed conflict). As for international humanitarian law, this intersects with international criminal law insofar as certain breaches of its rules, namely war crimes, implicate the individual criminal responsibility of the perpetrator. But not every violation of international humanitarian law is punishable as a war crime. Many implicate only state responsibility." ROGER, O'KEEFE, INTERNATIONAL CRIMINAL LAW, 48, § 2.8 (2015) (distinguishing ICL from IHL).

## 2. Right to Reparations

The use of ICL-based arguments to support reparations have followed a similar trajectory. At first, courts resisted application of ICL norms to a new context, but eventually embraced ICL and ICC-based arguments to further accountability and reparation. Even after the Chilean Supreme Court consistently began to accept the principle that statutes of limitations could not serve as a barrier to criminal prosecutions, the Supreme Court, and in particular the Constitutional Chamber of the Supreme Court, rejected claims for civil indemnity from the state for crimes against humanity. The Court found in decision after decision, that the prohibition on using a statute of limitations as a barrier to accountability for crimes against humanity and war crimes extended only to criminal cases.<sup>109</sup>

Supreme Court Justice Sergio Muñoz, who repeatedly dissented from the Supreme Court decisions that dismissed civil claims based on domestic statute of limitation grounds, argued that claims for civil indemnity ought to be viewed as arising out of the underlying crimes against humanity.<sup>110</sup> He also cited Article 75 of the Rome Statute as evidence of an obligation under international law to provide reparations.<sup>111</sup> Judges in the Court of Appeals of Santiago and Temuco in 2014 and 2015, also accepted the crimes against humanity argument to avoid application of statute of limitations to civil claims relating to crimes against humanity or war crimes.<sup>112</sup>

By 2015, the argument invoking the prohibition on using statutes of limitations to block civil cases involving claims rooted in crimes against humanity and recognition of an obligation to provide reparations for crimes against humanity (citing as support Article 75 of the Rome Statute) became the majority position of the Supreme Court.<sup>113</sup> Several decisions thereafter repeated this position.<sup>114</sup> This change in tack coincided with a change in the chamber

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<sup>109</sup> See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], 30 septiembre 2013, “Abarzúa Rivadeneira Eduardo c. Fisco de Chile” Rol de la causa: 2737-2013; Corte Suprema de Justicia [C.S.J.] [Supreme Court], 16 octubre 2013, “Fisco de Chile c. González Plaza Luis Abraham y otros” Rol de la causa: 14-2013; Corte Suprema de Justicia [C.S.J.] [Supreme Court], 24 octubre 2013, “Wilma de Castro Saavedra y otros c. Fisco de Chile,” Rol de la causa: 1577-2013.

<sup>110</sup> See *id.* (Muñoz, J., dissenting).

<sup>111</sup> Rome Statute, *supra* note 2, art. 75 (“The court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation;” also authorizes the court to order reparations).

<sup>112</sup> See Corte de Apelaciones de Temuco [C. Apel.] [Court of Appeals], 16 junio 2015, “Joaquín Rifo Muñoz y otros c. Fisco de Chile,” Rol de la causa: 769-2014; Corte de Apelaciones de Santiago [C. Apel.] [Court of Appeals], 26 mayo 2014, Partes: Fisco de Chile c. Sin Identificar,” Rol de la causa: 6581-2012.

<sup>113</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 3 diciembre 2015, “Carolina Gabriela Cortés Valenzuela c. Fisco de Chile,” Rol de la causa: 13154-2015, penal.

<sup>114</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 mayo 2016, “Ministerio del Interior y otros c. Carlos Ramírez Aguilar,” Rol de la causa: 9335-2015, penal; Corte Suprema

responsible for hearing the cases. Around the same time, appeals relating to civil claims based on dictatorship-era crimes started to be sent to the Second Chamber of the Supreme Court, the Criminal Chamber, rather than the Third Chamber, the Constitutional Chamber.<sup>115</sup>

### 3. Special Protection for Minors

In at least one decision, Supreme Court Justice Sergio Muñoz also appended to this international law-based argument in favor of reparations an argument that the Geneva Conventions and Rome Statute demand special protection for minors. This special protection, he contended, provides an additional argument in support of reparations and the rejection of any statute of limitation for civil crimes stemming from a crimes against humanity against a minor.<sup>116</sup> As noted below in Part III(F), defendants have also made arguments invoking the Rome Statute for the special treatment of minors.

### 4. Avoiding Double Jeopardy

In at least one case, a complainant represented by the government's Human Rights Program argued against application of double jeopardy by analogy to the Rome Statute. In a prosecution for murder, the complainant argued that double jeopardy ought not to bar another prosecution, because the previous case in the military court had been for unlawful use of force rather than murder as a crime against humanity. (The defendant had been convicted of unlawful use of force, but his conviction had been overturned on appeal.) The complainant invoked Article 20 of the Rome Statute for the proposition that a sham prosecution does not bar another prosecution for crimes against humanity. The relevant Rome Statute provision addresses admissibility before the court, not double jeopardy, but implicates double jeopardy, since it provides that a prior domestic prosecution designed to shield a defendant from the ICC would not render a case

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de Justicia [C.S.J.] [Supreme Court], 29 junio 2016, "Andrés Pinto Nanjari c. Fisco de Chile," Rol de la causa: 796-2016, penal; Corte Suprema de Justicia [C.S.J.] [Supreme Court], 21 julio 2016, "Belarmino Sepúlveda Bueno y otros c. Fisco de Chile," Rol de la causa: 20580-2015, penal.

<sup>115</sup> See, e.g., C.S.J., 18 mayo 2016, "Ramírez Aguilar," Rol de la causa: 9335-2015; C.S.J. "Andrés Pinto Nanjari," Rol de la causa: 769-2016; C.S.J., 21 julio 2016, "Belarmino Sepúlveda Bueno," Rol de la causa: 20580-2015.

<sup>116</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 16 octubre 2013, "Fisco de Chile c. González Plaza Luis Abraham y otros," Rol de la causa: 14-2013 (Muñoz, dissenting).

inadmissible before the court.<sup>117</sup> The Supreme Court rejected this argument.<sup>118</sup>

### 5. Interpretive Aid

The importance of ICL as an interpretive tool is somewhat unclear. As noted above, judges interviewed indicated that ICL, while not controlling, could serve as an interpretive aid. However, a review of caselaw in fact suggests that direct use of ICL to interpret domestic crimes, as opposed to reframing them, was infrequent and largely unsuccessful.<sup>119</sup> Judges may have used international law to guide their thinking on whether to adopt a narrow or expansive reading of a crime or to assess potential penalties, but seldom did judges cite international law explicitly to guide interpretations of domestic crimes, defenses or theories of responsibility.

One justice of the Chilean Supreme Court explained that judges use “domestic law but when there is a very brutal contradiction,” they look to international law.<sup>120</sup> Similarly, one first instance human rights judge explained that judges can turn to international law for persuasive authority.<sup>121</sup> The judge noted that the Supreme Court had done a tremendous amount of work on the international legal principles and had largely sketched out the international law landscape for lower courts.<sup>122</sup> Another human rights judge likewise suggested that ICL helped as a guide. Speaking in particular about the crime of torture, where the inadequacies in the Chilean law of the time are perhaps most acute,<sup>123</sup> the judge explained that the international law on torture “gave them an

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<sup>117</sup> Rome Statute, *supra* note 2, art. 17(2) (“In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”).

<sup>118</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 13 septiembre 2017, “Agrupación de Familiares de Ejecutados Políticos y otros c. Patricio Cancino,” Rol de la causa: 1655-2017, penal.

<sup>119</sup> See discussion *infra* notes 120–122, 124.

<sup>120</sup> SC3, *supra* note 56 (noting that they rely on “derecho interno pero cuando hay una contradicción brutal, . . . internacional.”). This Justice noted that “en Chile, hoy día la jurisprudencia de los tribunales es de aplicar las normas nuestras pero en consonancia con las internacionales.” *Id.*

<sup>121</sup> Minister 5, *supra* note 57 (stating that decisions from international courts “puedo citar como orientación interpretativa. . . lo que obliga como ley en Chile son convenios”).

<sup>122</sup> *Id.*

<sup>123</sup> See discussion *infra* notes 145–146.

outline.”<sup>124</sup> A young human rights lawyer, Francisco Jara Bustos, likewise noted “it served to show that this torture is a crime.”<sup>125</sup>

Chilean human rights lawyers say Chilean judges have been reluctant to use ICL to interpret norms on criminal participation under domestic law. In the Jorge Grez case, for example, the trial judge convicted scores of agents of aggravated kidnapping of Grez based on their membership in the DINA (the Chilean secret police) and participation in the activities of the clandestine torture center, Londres 38, at the time of Grez’s detention. Although the trial court decision does not explicitly invoke ICL doctrine on complicity or joint criminal enterprise (JCE), it employs a logic that is reminiscent of JCE. By participating in the activities of the detention center, Londres 38, and the unit running it the agents were responsible as principles or accomplice’s for Grez’s disappearance.<sup>126</sup> This argument resembles joint criminal enterprise liability, based on a system of mistreatment, as recognized at the ICTY and with origins in caselaw from Nuremberg.<sup>127</sup>

The Court of Appeals later rejected this reasoning and overturned the convictions of forty-six of the convicted agents.<sup>128</sup> The court found that belonging to a particular organization, without evidence of actual participation in the torture or disappearance of Grez, was not sufficient to convict agents of aggravated kidnapping.<sup>129</sup> The court noted that perhaps the defendants could

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<sup>124</sup> Minister 1, *supra* note 57 (explaining that torture gave them a shape or template, “figura”).

<sup>125</sup> Interview with Francisco Jara Bustos, Human Rights Lawyer, in Santiago, Chile (Oct. 20, 2017) (“ha servido para mostrar que tal tortura es crimen”) (notes on file with author).

<sup>126</sup> Corte de Apelaciones [C. Apel.] [Court of Appeals], 7 mayo 2014, “Jorge Grez Aburto,” Rol de la causa: 2182-98. An example of the logic used with one defendant and repeated in large part for many others was: “Que la confesión calificada de Luis Eduardo Mora Cerda, unida a los elementos de juicio reseñados en el considerando anterior, que reúnen las condiciones del artículo 488 del Código de Procedimiento Penal, se encuentra comprobada la participación que le ha correspondido en el delito sub-lite, la que se calificará en esta sentencia. En efecto no obstante haber sido acusado como autor del mismo, cabe señalar que es en esta, la sentencia, la ocasión de calificar en definitiva la calidad con la que a tenido participación. En este ámbito este sentenciador calificará su participación como Cómplice en el delito sub lite, puesto que sin estar acreditado que haya estado concertado su ejecución, cooperó en la ejecución del mismo por actos simultáneos, como analista, de agrupaciones de inteligencia que tenían por objeto reprimir a personas afines agrupaciones políticas que la autoridad gobernante consideraba como enemigas de su doctrina.” (emphasis added)

<sup>127</sup> See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 203 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (reviewing Nuremberg precedent and outlining liability based on “active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates”).

<sup>128</sup> C. Apel., 17 junio 2017, “Jorge Grez Aburto,” Rol de la causa 2182-08 at ¶ 14.

<sup>129</sup> *Id.* ¶4 (“Que, ahora bien, en el entendido apuntado en el fundamento Segundo de esta sentencia, no parece razonable imputar responsabilidad personal de carácter penal a un sujeto determinado por el solo hecho de existir certeza de que perteneció al organigrama que conformó

have been charged with the Chilean crime of unlawful association (asociación ilícita) but had not been.<sup>130</sup> Magdalena Garcés, a human rights lawyer who specializes in dictatorship-era cases, claims that this case is an example of the refusal of Chilean judges to use ICL to think of theories of participation broadly and is typical.<sup>131</sup> As noted below in Part III(F) discussing defense-friendly uses of ICL, the one instance of a court using ICL doctrine to define a criminal defense was likewise overturned on appeal.

Thus, Chilean courts, while perhaps inspired by international law, ICL and the ICC in their interpretations of domestic law, have only rarely and with little success explicitly relied on ICL to establish the contours of liability under domestic law. These findings are consistent with Naomi Roht-Arriaza's contention that "where international law is invoked in a [domestic] criminal setting, it is often used for its norm-establishing and reaffirming value rather than as a basis for the precise statutory definitions required for valid criminal conviction."<sup>132</sup>

## 6. Justification for Expansion into Other Crimes

Although it is not always apparent from the judgments, advocates also invoke ICL to urge courts to address previously overlooked forms of abuses. The briefs in cases involving sexual violence, for example, are replete with references to ICL norms on sexual violence and calls for courts to address the issue in their judgments.<sup>133</sup>

This approach appears to have borne some fruit. After years of judicial neglect, Chilean courts have recently recognized sexual violence crimes as crimes against humanity. In 2018, the Supreme Court overturned the dismissal of a case for civil indemnity on statute of limitations grounds. It held for the first time held that rape was a crime against humanity.<sup>134</sup> The court stated that the

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el aparato represivo del Estado, pues en dicha lógica, más bien parece que lo que se objeta es la existencia misma de tal organización, atendida la inaudita e inadmisibile finalidad para la cual fue creada, reproche que aunque puede naturalmente ser entendido, bastando para ello tener únicamente en cuenta la más elemental distinción entre lo bueno y lo malo, lo cierto es que de aceptarse tal razonamiento en orden a hacer extensiva la responsabilidad personal en la perpetración de un crimen en función de las mencionadas consideraciones, podríamos incluso afirmar que tal factor de imputación incumbe también hacerlo aplicable a todos quienes formaban parte de la administración del Estado y, aún más, a la sociedad toda, que permaneció silente e inactiva frente tal proceder ilícito.”)

<sup>130</sup> *Id.* ¶5.

<sup>131</sup> Interview with Magdalena Garcés, Human Rights Lawyer, in Santiago, Chile (Nov. 8 & No. 30, 2017) (notes on file with author).

<sup>132</sup> *Cf.* Collins, Post-Transitional Justice, *supra* note 19, at 17 (quoting ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, 295 (1995)).

<sup>133</sup> See Caroline Davidson, *Nunca Mas Meets #NiUnaMenos — Accountability for Pinochet-Era Sexual Violence in Chile*, 51 COLUM. H.R. REV. 99 (2019).

<sup>134</sup> This case was a civil case for indemnity from the Chilean government.

case met the widespread requirement for crimes against humanity based on the number of victims of sexual violence under the dictatorship.<sup>135</sup> In 2019, Minister Mario Carroza convicted several state agents for “aggravated kidnapping of a sexual connotation” and acknowledged that the acts were crimes against humanity.<sup>136</sup>

## 7. Retroactivity

Court and litigants in Chilean human rights cases have invoked ICL in varying and sometimes contradictory ways to grapple with the issue of legality and retroactive application of the law. At the time of the crimes, Chile did not have domestic legislation that defined crimes against humanity or provided for their punishment. These retroactivity arguments are particularly salient in that Chile has a very formal legalist tradition. Professor Paulina Vergara, a law professor at Universidad Católica who worked as a young lawyer on the Rettig Commission, notes Chile is “a very legalistic culture.”<sup>137</sup> Kenneth Gallant also ranks Chile’s legal system as among the world’s strictest on the principle of *nullum crimen sine lege*.<sup>138</sup>

Chilean courts have used the fact that conduct was both an international crime and a domestic one, albeit not the exact same crime, at the time of its commission as a sufficient basis to ensure respect for legality principles. For example, in one case, the Court of Appeals for Santiago stated:

Given the above reasoning, it follows that the crimes of aggravated homicide committed against the persons of three victims assassinated in the month of October of 1973 by state agents, the subject of these facts, can be classified as crimes against humanity which, in the judgement of this Court, does not

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<sup>135</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 23 enero 2018, Rol de la causa: 17900-2014 (“La exigencia de la generalidad se satisface, como consta del Informe de la Comisión Nacional sobre Prisión Política y Tortura, dada la gran cantidad de mujeres que dijo haber sido víctima de esta clase de ataques. El requisito de sistematicidad también se cumple, ya que este método de tortura fue utilizado durante toda la dictadura militar chilena con el objeto de minimizar la resistencia al régimen imperante...”).

<sup>136</sup> Corte de Apelaciones [C. Apel.] [Court of Appeals], 26 Abril 2019, Rol de la causa: 629-2010.

<sup>137</sup> Interview with Paulina Vergara, Professor of Law, Universidad Católica, in Chile (Jan. 10, 2018) (notes on file with author).

<sup>138</sup> KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* 254 (2010) (ranking Chile among countries that demand not only *nullum crimen sine lege*, but also *nullum crime sine lege scripta*). *See also* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19(3). [https://www.constituteproject.org/constitution/Chile\\_2012.pdf](https://www.constituteproject.org/constitution/Chile_2012.pdf). (“No crime will be punished with a penalty other than that specified by a law promulgated prior to its perpetration, except where a new law favors the affected [person]. No law can establish penalties unless the conduct that [the law] penalizes is expressly described in it.”).

contravene the principle of legality of criminal law, because the conduct attributed to the defendants were already crimes in domestic homicide law and in international law, in accordance with the context developed in the grounds above.<sup>139</sup>

In other instances, courts have argued that principles of legality under ICL are more flexible, such that unwritten customary norms, at least in conjunction with a previously defined domestic crime, satisfied legality concerns:

In international criminal law, retroactivity cannot be applied in a strictly formal manner, that is, as a principle that demands a criminal definition written at the moment of the commission of the crime, sufficing, for our purposes, that the acts be punishable according to unwritten principles of customary law. This, because the facts in question ‘crimes of war and crimes against humanity are already punishable at the moment of committing the alleged acts according to customary international law and also in accordance with internal law, with respect to aggravated homicide.’<sup>140</sup>

Thus, a domestic crime plus a customary international law norm sufficed to justify reliance on ICL.

Finally, courts have also cited ICL and even the Rome Statute as evidence of a *jus cogens*, or customary international law norms, in particular the norm that war crimes and crimes against humanity cannot be subject to a statute of limitations. Effectively, courts have argued that even if Chile had not yet ratified the Convention on Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity at the time of the offenses, ICL, along with IHRL, has made this a *jus cogens* norm, or at least a general principle of international law that binds Chile. For example, in a 2007 case, the Court of Appeals of

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<sup>139</sup> Corte de Apelaciones [C. Apel.] [Court of Appeals], 16 agosto 2007, “Eduvina Bedi Ríos c. Augusto Pinochet Ugarte et al.,” Rol de la causa 7668-2006, appeal (“Que atendido a lo señalado en los basamentos que anteceden, es dable concluir que los delitos de homicidio calificado cometidos en las personas de las tres víctimas asesinadas en el mes de octubre de 1973 por funcionarios del Estado de Chile, materia de estos antecedentes, permiten denominarlos como crímenes contra la humanidad lo que, a juicio de esta Corte, no se opone al principio de legalidad penal, porque las conductas imputadas a los encausados ya eran delitos en el derecho nacional homicidio y en el derecho internacional, de acuerdo al contexto desarrollado en los motivos que anteceden.”)

<sup>140</sup> Ministro de Fuero [M.D.F.] [trial court], 13 agosto 2008, “Patricia Violeta Paredes Parra c. Fisco de Chile, Juan Francisco Opazo Guerrero y otros,” Rol de la causa 2182-1998, penal (“Que en el Derecho Penal Internacional la irretroactividad no puede ser entendida de un modo estrictamente formal, esto es, como un principio que exige un tipo penal escrito al momento de la comisión del hecho, siendo suficiente, para estos efectos, con que la acción sea punible según los principios no escritos del derecho consuetudinario. Ello, porque los hechos en cuestión “crímenes de guerra y crímenes contra la humanidad ya eran punibles en el momento de cometerse los ilícitos de autos según la costumbre internacional y también acorde al derecho interno, en cuanto homicidios calificados.”).

Santiago noted:

It bears keeping in mind as well that the Convention on the Non-Application of Statutes of Limitations for War Crimes and Crimes Against Humanity of 1968, adopted by the General Assembly of the United Nations, in effect since 1970, which even if not then ratified by the State of Chile, emerges today as a *jus cogens* norm or general principle of international criminal law.<sup>141</sup>

This argument thus looks to Chile's obligations today and avoids the question of whether this norm was *jus cogens* at the time of the offense.

#### 8. Expressing Condemnation/Better Labelling

ICL also fills an expressive function in the Chilean human rights prosecutions. This use of ICL is attractive, because it reaps some of the rhetorical benefits of ICL without the retroactivity problems of relying directly on ICL. Particularly early on, the Supreme Court took pains to clarify that convictions were not based on retroactive applications of international law, but rather domestic law contextualized by ICL. Nevertheless, some judges insisted on adding the international labels to offenses, even if just illustratively, in order to more properly name the conduct and emphasize the gravity of the crimes.

In a 2007 decision, the Supreme Court rejected a defendant's argument that he was being subjected to retroactive punishment by highlighting the lower court's expressive purpose in invoking ICL:

Regarding the issue raised by the appellants, arguing that the appealed judgment applied legislation not in force in our country at the time the crimes occurred, this should also be rejected, because the appeals judgement is not resting on these norms to convict the accused, rather it is... [convicting] based on Article 141 of the Criminal Code [aggravated kidnapping], *illustrating* their decision with the rules of the Inter-American Convention on Enforced Disappearance of Persons, the Declaration on the Protection of all persons against enforced disappearance, Resolution 3.074 of the United Nations General Assembly of December 3, 1973, as well as the Statute of the International Criminal Court.<sup>142</sup>

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<sup>141</sup> C. Apel., 16 agosto 2007, "Eduvina Bedi Ríos c. Augusto Pinochet Ugate et al.," Rol de la causa 7668-2006 ("Que cabe tener presente también la llamada Convención sobre Imprescriptibilidad de los Crímenes de Guerra y de los Crímenes de Lesa Humanidad de 1968, adoptada por la Asamblea General de las Naciones Unidas, en vigor desde el año 1970, que aunque no ha sido ratificada por el Estado de Chile, surge en la actualidad con categoría de norma de *jus cogens* o principios generales del derecho penal internacional.").

<sup>142</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 10 mayo 2007, "Fernando Castro Alamos," Rol de la causa: 3452-2006, penal ("Que en lo que atañe a la cuestión planteada por

Thus, the court emphasized, the conviction was for the domestic crime of aggravated kidnapping, and international law,<sup>143</sup> including the Rome Statute, is only used *illustratively*. The court explains that international law sources only serve to:

[S]how the importance of the crime committed and how, over time, the idea of respecting individual liberty as a legal right of the utmost importance, as well as the recognition of the life and dignity of person and who have the just and legitimate right to know the resting place of those who were detained.<sup>144</sup>

The invocation of international law, including ICL, serves to highlight the importance of the rights and transgressions at stake. In another example, in a judgement in a case brought by torture survivors relating to abuse they suffered in the notorious torture center, Villa Grimaldi, the court referred to the crimes again and again as “torture,” not “application of torments” or “illegitimate pressure,” the crimes for which the defendants were actually convicted.<sup>145</sup>

This expressive use of ICL is made more important by the inadequate domestic charges available in the Chilean criminal code at the time of the acts and, in many instances, the very light sentences imposed. Again, enforced disappearance is charged as “secuestro” or “secuestro calificado” (kidnaping or aggravated kidnapping), murder is “homicidio simple” or “homicidio calificado” (murder or aggravated murder), and, worst of all, torture is “aplicación de tormentas” or “apremio ilegítimo” (application of torments or illegitimate pressure). Although there is the possibility for a high sentence on kidnapping or homicide charges, the charge of “aplicación de tormentas” provides for a

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los oponentes, en cuanto a que el fallo sub lite aplicó legislación no vigente en nuestra Patria al momento de ocurrir los hechos, debe también ser denegada, porque el veredicto de segundo grado no se asila en dichas normas para condenar a su defendido, sino que lo hace en el artículo 141 del Código punitivo, *ilustrando su decisión* con las reglas de la Convención Inter-Americana sobre Desaparición Forzada de Personas, la Declaración sobre protección de todas las personas contra las desapariciones forzadas y la Resolución N° 3.074 (XXVIII) de la Asamblea General de las Naciones Unidas de tres de diciembre de mil novecientos setenta y tres, así como el Estatuto de la Corte Penal Internacional.”).

<sup>143</sup> *Id.* (“De lo anterior fluye claramente que la condena en comento se asentó en el artículo 141, incisos 1° y 3°, del catálogo de sanciones, que reprime el delito de secuestro calificado, lo que resulta evidente de la sola lectura del fundamento duodécimo del dictamen a quo no reformado por el de alzada, y no en las regulaciones que invoca el impugnante”).

<sup>144</sup> *Id.* (“las cuales sólo dan cuenta de la importancia del delito cometido y como, a través del tiempo, se ha tratado de reforzar aún más la idea del respeto a la libertad individual como un bien jurídico de la mayor importancia, así como el reconocimiento a la vida y dignidad de las personas y de quienes tienen el justo y legítimo derecho de conocer el paradero de los que han sido detenidos.”).

<sup>145</sup> Ministro de Fuego [M.D.F.], 21 julio 2017, “Episodio Villa Grimaldi Cuaderno Iván Insunza Bascuñán y otros,” Rol de la causa: 2182-1998 (using the term “torture” repeatedly in lieu of the names of the Chilean charges “illegitimate pressure” or “application of torments”).

maximum sentence of five years.<sup>146</sup> Thus, situating the crimes in the rubric of ICL is a way of correcting and contextualizing the crimes and expressing their gravity.

In sum, courts and litigants have invoked ICL repeatedly in the Chilean human rights cases. Many of the invocations favored accountability. In particular, courts reframed domestic crimes as crimes against humanity in order to avoid application of domestic barriers and to express more appropriate condemnation of the acts than domestic crime categories and sentences permitted. They also invoked ICL to address concerns about retroactivity, ensure proportional punishment, justify reparations, and justify turning to previously overlooked categories of crimes, such as sexual violence. As the next Part reveals, however, not all invocations of ICL have favored accountability.

#### F. Defendant-Friendly Uses of ICL

Defendants and judges have also coopted ICL and the Rome Statute in support of arguments to dismiss human rights cases based on statute of limitations or amnesty grounds or reduce punishment. In particular, they have cited the Rome Statute for arguments relating to the existence of a non-international armed conflict (to block arguments that there is an obligation to prosecute and punish under the Geneva Conventions), retroactivity, the non-fulfillment of requirements for a crime against humanity, the defense of superior orders, and mitigation of sentences.

##### 1. No Armed Conflict

The most frequent invocation of ICL that cuts in favor of defendants (and against criminal accountability for human rights violations) appeared in arguments that there was no internal armed conflict at the time of the crimes. As noted above, in 1998, the Supreme Court in *Poblete Cordoba* invoked the Geneva Conventions for the proposition that Chile was obligated to prosecute and punish war crimes and thus could not apply domestic statutes of limitations or the amnesty. In decision after decision of the Supreme Court, for a time in the majority and later in the dissent, certain justices of the Supreme Court, in particular Justices Ballesteros and Segura, argued that the requirements for a non-international armed conflict were not met and that the Geneva Conventions therefore did not apply.<sup>147</sup>

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<sup>146</sup> CÓDIGO PENAL [CÓD. PEN.] [criminal code], arts. 25, 141, 150. The complainant-appellant's argument was that the code provision for the crime of "application of torments" was for abuse of people serving a lawful sentence, and the tortured detainees here were not lawfully detained. *See id.*

<sup>147</sup> *Compare* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 22 enero 2009, "Resolución n° 2483," Rol de la causa 4329-2008, penal, and Corte Suprema de Justicia [C.S.J.] [Supreme Court], 03 mayo 2008, "Julio Humberto Salvador," Rol de la causa: 2872-2007

In doing so, the justices invoked not only sources on IHL, including the influential Commentary of Jean Pictet on the Geneva Conventions, but also the definition of an armed conflict contained in the Rome Statute. In some thirty-seven decisions captured in this study, justices of the Supreme Court or appeals court judges following their lead, invoked Article 8(2)(d) of the Rome Statute for the proposition that an “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature” do not amount to non-international armed conflicts.<sup>148</sup>

On the heels of this argument that there was no non-international armed conflict in Chile during the dictatorship (per, among other sources, the Rome Statute’s definition of one), the same justices of the Supreme Court again and again appended an argument about retroactivity. The justices contended that the Rome Statute’s norms on the non-applicability of statute of limitations to international crimes, like those of the Additional Protocols to the Geneva Conventions, did not apply because the Chilean Congress had not approved them at the time of the offenses.<sup>149</sup>

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(affirming the acquittal based on the same argument that the Geneva Conventions did not apply and therefore the statute of limitation did and invoking the Rome Statute for the proposition that internal disturbances do not amount to a non-international armed conflict), *with* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 29 septiembre 2009, “Loreto Meza Van Den Daele y Herminia Soto Almonacid c. Orlando José Manzo Duran,” Rol de la causa: 3378-2009, and Corte Suprema de Justicia [C.S.J.] [Supreme Court], 7 marzo 2012, “Figueroa Silva Carlos Dionisio y otros c. No se Consigna,” Rol de la causa 5720-2010 (making the same argument in the dissent).

<sup>148</sup> C.S.J., 22 enero 2009, “Resolución n° 2483,” Rol de la causa 4329-2008, penal (stating in the majority decision: “En el N° 2 del aludido artículo 1 del Protocolo se expresa que dicho protocolo no se aplicará a las situaciones de tensiones internas y de disturbios interiores, tales como motines, los actos esporádicos y aislados de violencia y otros actos análogos, que no son conflictos armados. Similar definición está contenida en el artículo 8.2.d del Estatuto de Roma de la Corte Penal Internacional. Si bien los Protocolos Adicionales a los Convenios de Ginebra entraron en vigencia en Chile con posterioridad a la comisión de los hechos y el Estatuto de Roma de la Corte Penal Internacional no ha sido aún aprobado por el Congreso, tales normas, junto a los comentarios del jurista Jean Pictet y lo expresado por la CIRC son ilustrativos para que esta Corte interprete que “conflicto armado sin carácter internacional” es aquel que tiene lugar en el territorio de una de las Altas Partes contratantes; entre las fuerzas armadas de esa Alta Parte contratante y fuerzas armadas o grupos armados que no reconocen su autoridad, siempre que tales fuerzas armadas o grupos armados estén bajo el mando de una autoridad responsable y ejerzan un dominio o control sobre una parte del territorio del Estado de que se trata, que les permita realizar las operaciones militares sostenidas y concertadas y aplicar las disposiciones de derecho humanitario.”)

*See also* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 3 mayo 2008, “Julio Humberto Salvador Alarcón Saavedra,” Rol de la causa: 3872-2007 (affirming the acquittal based on the same argument that the Geneva Conventions did not apply and therefore the statute of limitation did and invoking the Rome Statute for the proposition that internal disturbances do not amount to a non-international armed conflict).

<sup>149</sup> *See, e.g.*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], 11 enero 2012, “Programa de Continuación de la Ley 19123 y otro con no se consigna,” Rol de la causa: 7558-2011 (“Los Protocolos Adicionales a los Convenios de Ginebra entraron en vigencia en Chile

## 2. Crimes Against Humanity Requirements Not Met

Defendants are starting to push harder on the requirements of crimes against humanity to avoid the statutes of limitations, amnesty, and other implications that label carries. A Supreme Court decision of June 25, 2018, noted the defendant's argument that his actions did not meet the standard of ICL for crimes against humanity since they were not part of a widespread or systematic attack.<sup>150</sup> The defendant was the commander of a unit responding to a demonstration. He ordered that they either shoot in the air or shoot directly at protesters if in danger. One of his men shot and killed the victim. The defendant argued, unsuccessfully, that his acts were not part of a widespread or systematic attack. The defendant cited for support Article 7 of the Rome Statute and the Chilean legislation incorporating the Rome Statute into domestic law.<sup>151</sup>

## 3. Crimes Against Humanity Plus

As noted above, Chilean courts often recast domestic crimes as crimes against humanity to emphasize the gravity of the crimes. Defendants and judges at times have turned the gravity argument on its head by arguing that the defendant's conduct was insufficiently grave to be a crimes against humanity.

This more essentialist conception of crimes against humanity has operated in defendant's favor by setting the bar higher than the strict legal requirements for crimes against humanity. In *Ministro del Interior c. Bustamente Nuñez y otro*, for example, the court ostensibly rejected the appeal of the decision dismissing the case based on a lack of nexus to any widespread attack,<sup>152</sup> but it seemed to

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con posterioridad a la comisión de los hechos y el Estatuto de Roma de la Corte Penal Internacional es ley de la República sólo a contar de su publicación en el Diario Oficial efectuada con fecha uno de agosto del año 2009, por lo que no tenían vigencia a la época de los delitos investigados, en consecuencia, no eran aplicables a la fecha de su comisión, por tanto no han tenido la virtud de modificar ni tácita ni expresamente las normas sobre prescripción contempladas en el Código Penal”) and Corte Suprema de Justicia [C.S.J.] [Supreme Court], 5 mayo 2011, Gabriel Aldoney Vargas y otro con Ernesto Leonardo Huber von Appen y otros, Rol de la causa 4915-2009 (“Si bien los Protocolos Adicionales a los Convenios de Ginebra entraron en vigencia en Chile con posterioridad a la comisión de los hechos y que el Estatuto de Roma de la Corte Penal Internacional es ley de la República sólo a contar de su publicación en el Diario Oficial efectuada con fecha uno de agosto pasado, por lo que no existía a la época de los delitos investigados, en consecuencia, no era aplicable a la fecha de su comisión, por tanto no ha tenido la virtud de modificar ni tácita ni expresamente las normas sobre prescripción contempladas en el Código Penal.”).

<sup>150</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 25 junio 2018, “Programa de Derechos Humanos del Ministerio de Justicia y otros c. Carlos Matus Rojas,” Rol de la causa: 825-2018, penal.

<sup>151</sup> *Id.* ¶ 16.

<sup>152</sup> *See generally* Corte Suprema de Justicia [C.S.J.] [Supreme Court] “Ministro del Interior c. Bustamente Nunez y otro,” Rol de la causa 25639-2014, ¶¶ 12, 22-23 [decisión reproduced in Contreras Puelles, Roberto, Delito de homicidio calificado, R.C.P., vol. XLI, Epoca Sexta, 341 (2015)].

be primarily concerned about the more nebulous essence of a crime against humanity. The court described crimes against humanity as crimes which appear in “an evident and manifest way with the most basic concept of humanity”—something of an “I know it when I see it” approach to crimes against humanity.<sup>153</sup> The court also added that crimes against humanity involve “the negation of the moral personality of man.”<sup>154</sup> It suggested that the crime—state agents shooting the victim in a car for violation of curfew—did not rise to the level of a crime against humanity.

As to concrete elements of crimes against humanity, the court included some that, though not unprecedented in ICL, are far from uniformly required. For one, the court found that crimes against humanity required “cruelty against a particular class of individuals.”<sup>155</sup> Maybe. The law of Nuremberg, the ICTY and the ICC do not require discrimination against a particular class of individuals for crimes against humanity of the murder variety, but the ICTR statute did.<sup>156</sup> The court also required intent on the part of the state agent, not merely knowledge

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<sup>153</sup> Corte Suprema [C.S.J.] [Supreme Court], 01 julio 2015, “Ministerio del Interior y Seguridad Pública,” Rol de la causa: 25639-2014, ¶17 (“forma evidente y manifiesta con el más básico concepto de humanidad. Destacándose también la presencia del ensañamiento con una especial clase de individuos”).

<sup>154</sup> *Id.* (“Que como reiteradamente ha señalado esta Corte, se denominan crímenes de lesa humanidad aquellos injustos que no sólo contravienen los bienes jurídicos comúnmente garantizados por las leyes penales, sino que al mismo tiempo suponen una negación de la personalidad moral del hombre, de suerte tal que para la configuración de este ilícito existe una íntima conexión entre los delitos de orden común y un valor agregado que se desprende de la inobservancia y menosprecio a la dignidad de la persona, porque la característica principal de esta figura es la forma cruel con que diversos hechos criminales son perpetrados, los que se contrarían de forma evidente y manifiesta con el más básico concepto de humanidad; destacándose también la presencia del ensañamiento con una especial clase de individuos, conjugando así un eminente elemento intencional, en tanto tendencia interior específica de la voluntad del agente. En definitiva, constituyen un ultraje a la dignidad humana y representan una violación grave y manifiesta de los derechos y libertades proclamadas en la Declaración Universal de los Derechos Humanos, reafirmadas y desarrolladas en otros instrumentos internacionales pertinentes ...”) (emphasis added). Minister Brito dissented from this decision and would have found the acts to be a crime against humanity.

<sup>155</sup> *Id.* (“la característica principal de esta figura es la forma cruel con que diversos hechos criminales son perpetrados”).

<sup>156</sup> David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 103-04 (2004) (“Unlike crimes of the persecution type, Article 6(c) of the Nuremberg Charter attaches no requirement that crimes of the murder type be committed with discriminatory intent—that is, on the basis of the victim’s political, racial, or religious group—and neither does the subsequent formulation in the ICTY statute. But this issue became a matter of controversy: in the Tadic judgment, the ICTY imposed a discriminatory intent requirement for all crimes against humanity notwithstanding the contrary language in the Statute, only to be reversed by the Appeals Chamber. The corresponding definition in the ICTR Statute does require discriminatory intent for crimes of both the murder and persecution types. However, the Rome Statute contains no such requirement, and consequently ICC prosecutors will not have to prove discriminatory intent to secure convictions for crimes against humanity of the murder type.”).

as required by the Rome Statute.<sup>157</sup>

Human Rights Program lawyers pushed back on these heightened crimes against humanity requirements, but failed to convince the court in this case. They argued that a widespread or systematic attack against a civilian population, not gravity, was the hallmark of a crime against humanity under ICL.<sup>158</sup> The court concluded that the complainants lost on this ground too.

Despite its musings on the essence of crimes against humanity, the court purported to base its decision on the more technical elements of crimes against humanity saying that, even assuming the existence of a widespread attack, there was no evidence of a connection between the shooting and any attack.<sup>159</sup> The fact that the victim was shot by state agents because he was out in violation of the regime's curfew policy was deemed an insufficient connection.<sup>160</sup> Oddly, the fact that agents then took him to the hospital also was deemed to be evidence that the agents were not intending to be a part of a "widespread or indiscriminate attack,"<sup>161</sup> which is not required under ICL.<sup>162</sup>

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<sup>157</sup> C.S.J., 01 julio 2015, "Ministerio del Interior y Seguridad Pública," Rol de la causa: 25639-2014 ("conjugando así un eminente elemento intencional, en tanto tendencia interior específica de la voluntad del agente"). The Rome Statute requires knowledge as the mens rea for a crime against humanity, not intent. Rome Statute, *supra* note 2, art. 7(2) ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.").

<sup>158</sup> C.S.J., 01 julio 2015, "Ministerio del Interior y Seguridad Pública," Rol de la causa: 25639-2014, ¶19.

<sup>159</sup> The court said that there had been no systematic attack. *See id.* ¶ 20.

<sup>160</sup> *Id.* ¶ 22. ("Que con estas observaciones, aun de estimarse que la declaración de estado de sitio o el toque de queda constituyeron o integraron una política de Estado que deba calificarse de ataque generalizado e indiscriminado a la población civil, pero no sistemático como propone el recurrente, a juicio de estos sentenciadores igualmente habría de desestimarse la calificación de delito de lesa humanidad que se persigue, toda vez que no se ha establecido en el fallo elementos que permitan dar por concurrente el requisito de relación entre el acto particular motivo de autos y las referidas circunstancias, esto es que el homicidio de Roberto Castillo Arcaya hubiese sido cometido como parte de un ataque generalizado o sistemático constituido o integrado por la política estatal del estado de sitio o toque de queda. Al respecto, la sentencia impugnada establece (cons. 3° del a quo) sólo un acontecimiento circunstancial o coyuntural desencadenado por el no acatamiento de la orden para detenerse y someterse a control por la víctima Roberto Castillo Arcaya, quien transitaba en horario de toque de queda").

<sup>161</sup> *Id.* ¶ 24 ("Cabe observar además que, producto de los disparos practicados por los agentes policiales, Castillo Arcaya 'queda herido y es trasladado hasta la Posta Central, donde horas más tarde fallece', revelando esto último la ausencia en los agentes de un propósito o intención de dar muerte a los civiles como parte de un ataque generalizado e indiscriminado en contra de aquellos que no respeten el toque de queda y las limitaciones de desplazamiento que traía aparejado").

<sup>162</sup> The Rome Statute for example requires only knowledge of the attack, not intent. *See* Rome Statute, *supra* note 2, art. 7(1) ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.").

Thus, some judges have dismissed cases against defendants by invoking the essence of crimes against humanity and, in some instances, by setting a very high bar on the elements of the crime.

#### 4. Superior Orders

Perhaps the most striking instance of ICL being invoked in a defendant's favor appeared in the *Endesa* case.<sup>163</sup> The case involved the prosecution of three defendants, including the head of a detention center, Walter Klug Rivera, for their roles in the killing of 23 workers from the Endesa electricity plant in September of 1973.

The trial judge (Ministro de fuera) acquitted Klug of aggravated kidnapping and aggravated murder by invoking the ICL doctrine of command responsibility and superior orders, and specifically by invoking the Rome Statute's recognition of obedience of superior orders as a defense.<sup>164</sup> As the court noted, the Rome Statute recognizes superior orders as a defense, unlike the Nuremberg tribunal or the ad hoc tribunals, which viewed it only as a potential mitigating factor.<sup>165</sup>

Turning instead to domestic law on superior orders, the Court of Appeals overturned the decision on appeal.<sup>166</sup> It found that, though the elements of the defense of superior orders at the time of the offense under Chilean law were unclear, Klug had failed to meet Chilean military law's requirement for the defense of superior orders under any definition by failing to present evidence that there was an order from a superior.<sup>167</sup>

The trial court's invocation of ICL, and in particular the Rome Statute, is striking because it was one of the only instances of a Chilean court explicitly turning to ICL to decide the contours of the domestic law charge. Whereas with the instances of reframing discussed thus far, courts turned to ICL for the elements of crimes against humanity, the establishment of which precluded application of statutes of limitations or the amnesty, here the court was looking to define a defense to the underlying Chilean charge by borrowing one from the Rome Statute. In some ways, this move is less bold than the crimes against humanity reframing seen above because there is no prohibition on retroactive application of law more favorable to an accused under the legality principle and,

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<sup>163</sup> Ministro de Fuero [M.D.F.] [trial court], 15 noviembre 2010, "Episodio Endesa," Rol de la causa: 2182-1998, Sentencia.

<sup>164</sup> *Id.* ¶ 17 ("El Estatuto, en el artículo 33.1 a), b), y c), y 2, concordado con el artículo 28, letra b) en lo que respecta a las órdenes entre superiores subordinados, dispone que ellas pueden constituir una eximente cuando la persona que ha cometido el crimen estuviera obligado por ley a obedecer órdenes emitidas por el Gobierno o el superior de que se trate, no supiera que la orden era ilícita y, en el caso de los crímenes de guerra, que la orden no fuera manifiestamente ilícita (Estatuto de la Corte Penal Internacional).")

<sup>165</sup> *Id.* ¶ 18.

<sup>166</sup> Corte de Apelaciones [C. Apel.] [courts of appeals], 25 octubre 2013, "Episodio Endesa," Rol de la causa: 2182-1998, sentencia.

<sup>167</sup> *See id.*

indeed, human rights law favors the practice under the doctrine of *lex mitior*,<sup>168</sup> but in another it is very bold. It is a striking example of a Chilean court using international law to define a defense to Chilean charges. Nevertheless, this application of ICL did not stand for long, as it was reversed on appeal.

### 5. Sentencing Reductions

Supreme Court judges also have invoked the Rome Statute's provision on sentence reductions. In a couple of cases, justices cited Article 110 of the Rome Statute for the proposition that a judge "*may*" but not "*must*" consider sentencing reductions, and only after a person has done a third of the sentence or, in the case of a life sentence, twenty-five years.<sup>169</sup> In each case, the justices invoking this Rome Statute provision were in the dissent and were in favor of rejecting release based on the gravity of the crimes.<sup>170</sup> It appears, although it is not entirely clear from the decisions, that they were responding to a defense argument for a sentencing reduction based on the Rome Statute.

### 6. Immunity for Minors

At least one defendant has also invoked the Rome Statute for the proposition that ICL prohibits the prosecution of minors for crimes against humanity. The

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<sup>168</sup> See, e.g., ICCPR, art. 15 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."). In the realm of ICL, the Rome Statute adopts the principle of *lex mitior* for ICC cases. Rome Statute, *supra* note 2, art. 24(2) ("In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply."). The Appeal Chamber of the ICTY recognized the principle of *lex mitior* but flagged its applicability only when the new more lenient law was binding on the court. See *Prosecutor v. Dragan Nikolic*, ICTY-94-2-A, Judgement on Sentencing Appeal, (Feb. 2, 2005).

<sup>169</sup> See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 29 diciembre 2016, "Claudio Salazar Fuentes," Rol de la causa: 10604-2016, Sentencia (Min. Brito & Dahm dissenting) ("Que el carácter de delito de lesa humanidad por el cual fue condenado el solicitante impide concluir, en las actuales condiciones, que el tiempo efectivamente cumplido por él conduzca necesariamente a declarar la concurrencia de los elementos mínimos para que acceda a la libertad condicional. Lo anterior es así tanto por lo ya razonado por la Comisión de Libertad Condicional en la resolución que motivo el recurso de amparo, como por lo previsto en el Estatuto de Roma promulgado por Chile con fecha 1 de agosto de 2009, que si bien contempla la posibilidad de reducir la pena de presidio perpetuo por delitos de lesa humanidad sólo cuando 'el recluso haya cumplido las dos terceras partes de la pena o 25 años de prisión en caso de cadena [sic] perpetua' (artículo 110, regla 3ª), no previene la obligatoriedad."); Corte Suprema de Justicia [C.S.J.] [Supreme Court], 31 julio 2017, "Armando Edmundo Cabera Aguilar," Rol de la causa: 35710-2017, Sentencia (Min. Juica Dissent).

<sup>170</sup> See *id.*

litigant in a habeas corpus (recurso de amparo) action argued that if he was to be tried for international crimes, the Chilean courts ought to also be restricted by international norms governing the prosecution of minors. He claimed that these norms included a ban on the prosecution of minors, as evidenced by Article 26 of the Rome Statute.<sup>171</sup> The merits of this argument are debatable, as the Rome Statute's provision is generally considered jurisdictional,<sup>172</sup> though some have argued that it is evidence of a customary international law norm against prosecuting minors.<sup>173</sup> It is unclear what Chilean courts made of the argument as they did not reach the merits.

Thus, in the Chilean human rights prosecutions, ICL has proved a useful tool for defendants too. The main pro-defense argument has been that, per the Rome Statute, there was no armed conflict at the time of the crime and thus the Geneva Conventions and international human rights and IHL norms requiring prosecution, do not apply. Courts and litigants also have used ICL concepts to attack the ICL and IHL-based pro-accountability arguments by arguing that the requirements for crimes against humanity were not met, sometimes setting those requirements high. ICL has also found its way into arguments in favor of recognizing the defense of superior orders, sentencing reductions, and immunity for crimes committed by minors.

### G. *Invocations of ICL in Contemporary Cases*

Not all invocations of ICL or the ICC occur in cases adjudicating dictatorship era human rights violations. Unsurprisingly, a few cases in the Constitutional Court relate to the constitutionality of the Rome Statute itself or the Chilean legislation implementing the Rome Statute. (The Court held that both are constitutional.) However, ICL arguments have appeared in a variety of criminal cases outside of the context of the human rights abuses of the Pinochet regime.

First, ICL has come up repeatedly in the context of extradition of human rights violators from neighboring countries. Most notably perhaps, in litigation over the extradition of former Peruvian dictator, Alberto Fujimori. In the decision that approved Fujimori's extradition, the Supreme Court noted the gravity of the

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<sup>171</sup> Rome Statute, *supra* note 2, art. 26 ("The court shall have no jurisdiction over any person who was under the age of 18 at the alleged commission of a crime.").

<sup>172</sup> See MARK A. DRUMBL, REIMAGING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 100-01, (2012) (arguing based on the drafting history and commentary that the provision is "jurisdictional" and not "jurisprudential").

<sup>173</sup> Cf. Alice S. Debarre, *Rehabilitation & Reintegration of Juvenile War Criminals: A De Facto Ban on Their Criminal Prosecution*, 44 DENV. J. INT'L L. & POL'Y 1, 20 (2015) (acknowledging that "there is, as yet, no customary international norm banning the prosecution of child soldiers for war crimes" but arguing that "states do have a customary obligation to rehabilitate and reintegrate children who have been recruited and used in armed conflicts," which amounts to a *de facto* "bar to the criminal prosecution of juveniles accused of having committed war crimes").

crimes for which Fujimori was allegedly responsible, including notorious massacres, and invoked the ICL doctrine of command responsibility.<sup>174</sup>

ICL again became a focal point in an extradition case involving an Argentine defendant wanted for crimes related to the country's Dirty War.<sup>175</sup> The defendant argued that he should not be extradited because his crimes were insufficiently grave in light of Article 1 and the preamble of the Rome Statute.<sup>176</sup> The court rejected the defendant's argument stating that deprivation of liberty in violation of a person's human rights was sufficiently grave.<sup>177</sup> It also noted that, under the Rome Statute, quantity is not the controlling indicator of gravity (though the Argentine defendant had been accused of involvement in ninety-eight counts of unlawful detentions, torture, and disappearance), but rather "the motivations, nature of the acts, population affected and consequences that the acts have in fact caused."<sup>178</sup>

The prosecutor seeking extradition, by contrast, relied on an argument seen in the Chilean dictatorship cases above that the defendants' crimes fell in the category of *jus cogens* violations:

Regarding the applicability of the Inter-American Convention on Forced Disappearance and the Rome Statute of the International Criminal Court, instruments of international treaty law that Chile has signed and ratified, the Judicial Prosecutor considers that they are applicable in the present case especially with respect to the principles of International Law considered "jus cogens."<sup>179</sup>

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<sup>174</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 21 septiembre 2007, "Alberto Fujimori," Rol de la causa: 3744-2007, extradición ("Cuando se trata de graves delitos contra los Derechos Humanos fundamentales, el Derecho Penal Internacional añade un argumento adicional: el principio de la responsabilidad del superior o la responsabilidad por el mando").

<sup>175</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 junio 2013, "Otilio Romano Ruiz," Rol de la causa: 290-2012, extradición.

<sup>176</sup> Rome Statute, *supra* note 2, art. 1 ("An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.").

<sup>177</sup> C.S.J., 18 junio 2013, "Otilio Romano Ruiz," Rol de la causa: 290-2012 ("Es así como la privación de libertad de una persona o un delito de tortura por motivos políticos puede ser relevante, debe ser investigado y por lo mismo no hacerlo constituye una conducta grave, con mayor razón si la cantidad de casos llega a 98 y forma parte del actuar de la autoridad estatal con todo los recursos a su disposición, la que actúa en contra de la población civil que carece de una protección judicial efectiva").

<sup>178</sup> *Id.* ("se ha dicho que la gravedad no está relacionada con la cantidad, sino que con las motivaciones, naturaleza del hecho, población afectada y consecuencias que efectivamente ha generado el hecho").

<sup>179</sup> *Id.* ("Respecto de la aplicabilidad de la Convención Inter-Americana sobre Desaparición Forzada de Personas y el Estatuto de Roma de la Corte Penal Internacional, instrumentos de Derecho Internacional Convencional que Chile ha suscrito y actualmente

The court repeated the prosecutor's argument that these *jus cogens* principles are nonderogable, obligatory, and binding, independent of and superior to any treaty.<sup>180</sup>

Lawyers in cases outside the human rights context have also made arguments rooted in ICL. A defendant in a contemporary drug trafficking case argued that ICL made Chilean forms of criminal participation obsolete.<sup>181</sup> In a human trafficking case, in response to a defendant's argument that the Chilean law on trafficking was unconstitutional based on vagueness grounds, a court cited the Rome Statute's provision on slavery for the proposition that slavery is adequately defined, can constitute a crime against humanity, and is a *jus cogens* norm under international law.<sup>182</sup>

In a contemporary criminal bankruptcy fraud case, the defendant argued the unconstitutionality of the law under which he was prosecuted. He invoked the Rome Statute, and the ICC case, *Prosecutor v. Lubanga*, for the proposition that, although the ICL had enshrined the principle of non-retroactivity, it established that defendants should benefit from subsequent changes in the law, if favorable, and the rule of lenity.<sup>183</sup> This case is notable in that it is a rare instance, where a court mentions a judicial decision from an international tribunal,<sup>184</sup> rather than the statute of the court.

Finally, in a contemporary case stripping a senator of immunity based on fraud allegations, the lawyer seeking the revocation of immunity invoked the Rome Statute for the proposition that immunities do not shield public officials from liability.<sup>185</sup> This invocation of ICL reveals a misunderstanding of ICL, since

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ratificado, estima la señora Fiscal Judicial que ellos van a resultar aplicables en el presente caso especialmente en cuanto digan relación con los principios de Derecho Internacional considerados como 'jus cogens'").

<sup>180</sup> *Id.* ("Estos principios son las normas imperativas del Derecho Internacional Público universalmente aceptadas por la comunidad internacional, inderogables, obligatorias y vinculantes en forma independiente de la existencia de un Tratado e incluso superiores de los Tratados como lo señala y define el Art. 53 de la Convención de Viena sobre el Derecho de los Tratados vigente en nuestro país desde el 22 de Junio de 1981.")

<sup>181</sup> *See* Corte de Apelaciones [C. Apel.] [Court of Appeals], 31 agosto 2005, "González Elgueta, Mario Raúl c. Ministerio Público," Rol de la causa: 120-2005.

<sup>182</sup> Tribunal Constitucional [T.C.] [Constitutional Court], 30 octubre 2014, "María Paz Fuenzalida," Rol de causa: 2615-2014, recurso de inaplicabilidad.

<sup>183</sup> Tribunal Constitucional [T.C.] [Constitutional Court], 1 octubre 2015, "Roberto, Besoain c. Ministerio Público y Petroquim S. A.," Rol de causa: 2673-2014, recurso de inaplicabilidad.

<sup>184</sup> *See infra* note 213.

<sup>185</sup> Corte de Apelaciones [C. Apel.] [courts of appeals], 5 junio 2015, "Ministerio Público c. Carlos Chelech," Rol de la causa 48-2015 ("Hace presente, además que el fuero parlamentario ni siquiera es hoy día una cuestión absoluta. En nuestro ordenamiento se trata de una institución jurídica a su modo de ver en absoluto decaimiento porque es Ley de la República hoy día el artículo 27 del Estatuto de Roma que en su numeral segundo señala, las inmunidades y las normas de procedimiento especiales que conlleve el cargo de una persona con arreglo al derecho interno o al derecho internacional no obstarán a que la corte ejerza competencia sobre ellas, esta

immunities of a public official vis-à-vis an international court for charges of international crimes differ from immunities of officials within their own domestic legal systems for ordinary crimes. The argument did not prosper. The court ultimately stripped the senator of immunity, but based on domestic legal grounds.<sup>186</sup>

Thus, ICL arguments and, in particular, references to the ICC, appear not only in the context of the Chilean prosecutions for dictatorship-era human rights abuses, but also in contemporary cases, some human rights-related and others not. These invocations of ICL in new contexts seem to suggest that once judicial actors gain familiarity with ICL and view it as a viable source of arguments, it will be marshalled in new and varied contexts.

#### IV. LESSONS FROM THE CHILEAN HUMAN RIGHTS PROSECUTIONS FOR INTERNATIONAL CRIMINAL JUSTICE

The Chilean human rights trials offer an example of a domestic judiciary acquainting itself and coopting ICL norms to assist in domestic prosecutions for atrocity crimes. The varying ways in which judges have turned to ICL are instructive. They indicate that, at least where crimes precede the Rome Statute, judges appear more comfortable using ICL and Rome Statute-based arguments for contextual and rhetorical purposes, rather than to interpret or define domestic crimes. The Chilean experience reveals transformation of ICL as it hits the domestic arena, sometimes with adjustment later on to realign with international doctrine. It also indicates the importance of the accessibility of ICL sources, in particular international judgments, in facilitating the dissemination of ICL norms from international tribunals. Finally and relatedly, it demonstrates the critical role being played by the Inter-American Court as the gateway for ICL norms, as well as the utility of the ICC regime in providing a more solid foundation for the invocation of ICL norms.

##### A. *Overall Increased, but Not Linear, Incorporation of ICL*

For one, the Chilean experience demonstrates the messiness of domestic accountability processes and implementation of ICL norms. Although courts turned increasingly to ICL arguments, and in particular used the crimes against humanity reframing device to an ever-wider variety of ends over time, it was not a straight path towards more accountability or greater acceptance of ICL

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norma que fue ya promulgada y es Ley de la República . . . Lo cual significa que al alero de los tratados internacionales suscritos por Chile que se incorporan en la Constitución Política por medio de su artículo quinto el fuero constitucional no es ni siquiera hoy en día en el siglo veintiuno una cuestión de carácter absoluto es ese el prisma que debe en definitiva debe otorgársele a este ante juicio.”)

<sup>186</sup> *Id.*

norms.<sup>187</sup>

Courts flip-flopped repeatedly on most issues, including the existence of a non-international armed conflict, whether IHRL and ICL precluded application of a civil statute of limitations and the permissibility under international norms, including ICL norms, of the doctrine of media prescripción. Lawyers interviewed emphasized that, for example, whether a court would apply media prescripción depended in large part on the composition of the chamber of the Supreme Court.<sup>188</sup> Likewise, whether the international law prohibition on statutes of limitations for crimes against humanity applied to civil cases appeared in large part to depend on whether the case had been sent to the Criminal Chamber (yes) or to the Constitutional Chamber (no) of the Supreme Court. Courts also justified the legality (in the sense of non-retroactivity) of reliance on ICL and international human rights norms in a wide variety of manners.

ICL incorporation does not occur in a vacuum. As many commentators have noted, many advances in human rights cases have depended on a changing judiciary more willing to press for accountability and more open to international norms.<sup>189</sup> This observation appears to hold true in the Chilean judgements invoking ICL and the ICC. In many instances, it is the very same justices making the very same arguments over and over, and all that shifts is the composition of the court and a majority argument becoming a minority one or a minority a majority.<sup>190</sup>

Moreover, a review of the Chilean judicial decisions discussing ICL indicates that, although ICL is playing a role in the human rights cases, it is not doing the work alone. For one, judges had been making arguments, sometimes successful, for avoiding barriers based on domestic law for some time.<sup>191</sup> Even

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<sup>187</sup> Cf. Collins, *Incremental Truth*, *supra* note 93, at 135 (observing that the phases of judicial interpretation of the amnesty “were not a tidy, inexorable ratcheting up towards further accountability, nor do they represent consistent planning or strategy on the part of one identifiable key actor or set of actors. Only the fourth phase, moreover, rests explicitly on principles of international, rather than solely domestic, law. Each phase contained internal setbacks, and none is irreversible.”).

<sup>188</sup> Ugas, *supra* note 106.

<sup>189</sup> See Naomi Glassman, *International Human Rights Treaties and the Chilean Dictatorship: Legal Applications and Judicial Receptions After the Fall of the Pinochet Military Regime*, 23 U.C. DAVIS J. INT’L L. & POL’Y 193, 208-09 (2017).

<sup>190</sup> See discussion *supra* notes 42 & 101. For example, the Supreme Court’s arguments regarding the absence of a non-international armed conflict that would trigger the application of the Geneva Conventions effectively was a copy and paste from decision to decision (majority and later dissent) by Justices Ballesteros and Segura.

<sup>191</sup> Cf. Alexandra Huneus, *Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA, 123 (Javier Couso, et al. eds. 2010) (“It is important to note, however, that this is the direction that the Chilean courts have been heading since 1998. Rare was the judge who applied the Amnesty Decree in cases of disappearance and extrajudicial killing. Some had even allowed torture cases to move forward, an action that could only be justified under international law. The few cases to which the Amnesty Decree was applied were

when judges do invoke ICL, they do not invoke ICL exclusively, but rather ICL, IHRL, IHL, and domestic law. Thus, the Chilean human rights cases indicate that ICL is but one source from which judges draw to help justify arguments under international law.

### B. *Invocation, Conflation, and Mutation of ICL*

The Chilean human rights cases also demonstrate the process of mutation of ICL norms in domestic cases. As discussed above, in a number of decisions courts seemed to insert extra requirements into the definition of crimes against humanity, relating to such things as gravity, cruelty or discriminatory intent, not present in the ICC's definition of crimes against humanity. Likewise, there are repeated instances of judges conflating distinct international crimes and the fields of ICL, IHRL, and IHL.<sup>192</sup> The Chilean example of migration and mutation of ICL norms echoes that of other domestic judiciaries wrestling with often unfamiliar, at least initially, questions of international law.<sup>193</sup>

Pluralism (glass half full) or fragmentation (half empty) in ICL rightly has received a great deal of attention.<sup>194</sup> The different fora in which ICL is used—different international criminal tribunals (some ad hoc, one permanent), hybrid domestic-international criminal tribunals, domestic courts—combined with the different legal traditions of actors within any given international court, makes the emergence of divergent norms almost inevitable.<sup>195</sup> The multiplication of norms presents a challenge to the purported universality of ICL norms,<sup>196</sup> but there is

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usually reversed at the Supreme Court level. The reliance on international law was a milestone, but one in a string of many. Thus, it is impossible to attribute this switch to the Inter-American Court's single decision, or even its line of decisions. Rather, the Inter-American Court provided one more tool in the kit of those arguing against the Amnesty Decree, and it made it that much more inconceivable for the Supreme Court to apply the Amnesty Decree in the cases that it had not already closed.”).

<sup>192</sup> See discussion *supra* note 106 and accompanying text.

<sup>193</sup> See generally Mark A. Drumbl, *Extracurricular International Law*, 16 INT'L CRIM. L. REV. 412, 413-27 (2016) (discussing the migration of legal norms from international criminal courts and tribunals to U.S. courts in the Alien Tort Statute cases); Yahli Shereshevsky, *International Decisions: Yesh Din v. Chief of General Staff, IDF*, 113 AM. J. INT'L L. 361 (2019) (arguing that Israeli judges' unfamiliarity with international law led to overreliance on the arguments of parties and terminological vagueness). The Chilean human rights cases, however, are somewhat distinct in that, due to the high numbers of the cases, there is now a strong cadre of judges and lawyers who are repeat players, who have thus had the opportunity to turn repeatedly to ICL and other international law norms.

<sup>194</sup> See STAHN & VAN DEN HERIK, *supra* note 11.

<sup>195</sup> *Id.* at 87.

<sup>196</sup> See Drumbl, *supra* note 193, at 444 (“On the one hand, these migrations [of international law] facilitate wider awareness, recognition, and internalization of international criminal law. It is not assured, however, that the content of the law thusly diffused is accurately appreciated by national judges, or is even capable of predictable appreciation, thereby imperiling international law's general aspirations of doctrinal consistency, universalism, and legitimacy.”).

an upside. These different fora can serve as laboratories of experimentation.<sup>197</sup> As Carsten Stahn and Larissa van den Herik have noted: “Inconsistencies and legitimate differences are part of this logic.”<sup>198</sup> Indeed, the International Law Commission (ILC) Report on Fragmentation cautions that conscious departures from an international law norm should not be viewed as “technical errors.”<sup>199</sup> The report notes: “Normative conflicts do not arise as technical “mistakes” that could be “avoided” by a more sophisticated way of legal reasoning. New rules and legal regimes emerge as responses to new preferences, and sometimes out of conscious effort to deviate from preferences as they existed under old regimes.”<sup>200</sup>

Some of the Chilean departures from ICL norms may fall within this zone of expression of new preferences, or at least the expression of preferences in a new judicial context. For example, although, in contrast to the interpretation of the crime seen in several Chilean judgments,<sup>201</sup> the Rome Statute’s definition of crimes against humanity does not include a gravity requirement, the ICC itself does recognize gravity as an admissibility criterion for the court and a discretionary consideration for the prosecutor.<sup>202</sup> Thus, the Chilean ‘crimes against humanity plus’ argument can be viewed as an error in transplanting the crimes against humanity norm or as an adaptation of these ICC admissibility/discretion-guiding doctrines to the Chilean context. It is less obvious, however, that a gravity threshold makes sense in a domestic jurisdiction.

The Chilean caselaw on crimes against humanity also demonstrates course correction or, perhaps, changes of preference. For example, in recent curfew cases, courts have backed away from these ‘crimes against humanity plus’

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International jurisprudence – no different than any sources of law or precedent – may be misapplied, or wishfully applied, in national contexts. International judgments involving the specifics of a conflict or of a state with which national judges may have little familiarity may be particularly susceptible to error in terms of subsequent extracurricular application.”)

<sup>197</sup> *Id.* at 88 (Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1190-91 (2007)).

<sup>198</sup> *Id.*

<sup>199</sup> ILC Fragmentation Report, *supra* note 11, ¶ 484.

<sup>200</sup> *Id.*

<sup>201</sup> Most recent cases, particularly in the context of curfew violations, seem to have done away with this requirement. *See supra* Part III.D.

<sup>202</sup> Rome Statute, *supra* note 2, art. 17(1)(d) (stating that the court shall find a case inadmissible before the ICC if it finds “the case is not of sufficient gravity to justify further action by the Court”); *Id.* art. 53 (requiring the prosecutor to consider the gravity of the case in deciding whether to proceed on an investigation). On the role of gravity in ICL, *see generally* Margaret deGuzman, *How Serious are International Crimes? The Gravity Problem in International Criminal Law*, 51 COLUM. J. TRANS. L. 18 (2012); Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L. J. 1400, 1405 (2009).

requirements.<sup>203</sup> These shifts may suggest a domestic judiciary that is becoming friendlier to accountability for human rights violations or it may suggest one that is, over time, gaining expertise in ICL, or both.

Although this article has focused on Chilean courts' use of ICL from international tribunals, and in particular the ICC, it is worth remembering that this study captures only one direction of legal flow. Mutations and transformation of ICL in Chile may feed back into ICL in a variety of ways.<sup>204</sup>

### C. *Role of the Regional Human Rights Institutions in Bringing ICL to Domestic Jurisdictions*

The Chilean human rights cases also reveal the critical role played by the Inter-American Court as a gateway for ICL. There is a burgeoning of literature on the rise of regional human rights institutions. Alexandra Huneeus has made a compelling argument that the Inter-American Court of Human Rights is playing a quasi-criminal role by demanding that states investigate and prosecute human rights abuses.<sup>205</sup> The Chilean human rights cases offer an example of this dynamic, but they illustrate more. They reveal that the Inter-American Court has also provided a template for domestic courts to incorporate ICL arguments in the face of legality constraints and has distilled and translated relevant ICL norms.

Judges and lawyers interviewed emphasized the importance of the Inter-American Court and *Almonacid*. One human rights judge explained that “the Inter-American Court has marked my generation greatly.”<sup>206</sup> He later reiterated: “I again insist...the Inter-American Court and *Almonacid*, for the national judiciary (above all the Supreme Court) [had a] tremendous effect.”<sup>207</sup> The Minister notes, that even though the Inter-American Court of Human Rights is not technically a criminal court, eighty to ninety percent of the cases address criminal issues.<sup>208</sup> Eduardo Contreras explained that human rights advocates had

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<sup>203</sup> See discussion *supra* notes 81 and 83.

<sup>204</sup> Anthea Roberts, *Comparative International Law - The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L. Q. 57, 62 (2011) (“National court decisions play a distinctive dual role in the doctrine of sources: as evidence of State practice, relevant to the interpretation of treaties and the formation of custom (where domestic judgments play a role in law creation), and as a subsidiary means of determining the existence and content of international law (where domestic judgments can be characterized as law enforcement)). See also Drumbl, *supra* note 193, at 445-47 (noting in his examination of US courts' citations of caselaw from international tribunals in Alien Tort Statute (ATS) cases that international tribunals themselves have also looked to US ATS cases for guidance and positing that the migration of international law to domestic courts “might also imply a return of sorts”).

<sup>205</sup> See *International Criminal Law by Other Means*, *supra* note 12.

<sup>206</sup> Minister 3, *supra* note 57 (“la generación mía nos ha marcado mucho la corte Inter-Americana”).

<sup>207</sup> Minister 3, *supra* note 57 (“vuelvo a insistir... el Corte Inter-Americana/Almonacid, para la judicatura nacional, sobre todo la Corte Suprema, tuvo un efecto tremendo”).

<sup>208</sup> Minister 3, *supra* note 57 (“aun si no es una corte penal, 80-90% [de los] temas [son]

made a mistake in failing to appreciate the value of the Inter-American Court earlier.<sup>209</sup>

The Chilean human rights decisions likewise show the importance of the Inter-American Court's template for handling retroactivity issues surrounding ICL. The Inter-American court decisions involving Chilean human rights cases, in particular *Almonacid* and *Lucero*, acknowledged that judges could not apply the Inter-American Convention or modern ICL directly to the facts, since these laws post-dated the abuses, but instead injected them into the case as part of an argument about the "context" in which abuses occurred and Chile's obligations with respect to investigation, punishment, and reparations today. As Karinna Fernández notes, the first case in which the Chilean Supreme Court refused to enforce the amnesty or statute of limitations on the basis of international law (rather than a purely domestic law theory that kidnapping is a continuing crime) quoted extensively from a decision of the Inter-American Court of Human Rights.<sup>210</sup>

As discussed above with respect to retroactivity, statute of limitations and amnesty, proportionality of punishment, and reparations, Chilean judges have employed a similar logic to invoke modern ICL norms. Rather than convicting directly for Rome Statute crimes, judges cite ICL and the Rome Statute as evidence of Chile's obligations today. As Eduardo Contreras noted, "today, judgements are full of citations to international conventions and treaties, including treaties not ratified by Chile."<sup>211</sup>

As the next Part illustrates, the Inter-American Court is also a place to translate and distill relevant ICL principles for domestic judges and lawyers who may lack the time and often the language skills to follow developments at the ICC or other international tribunals systematically.

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penales"). Likewise, Alexandra Huneus has argued that the Inter-American Court, though a human rights court has come to take on quasi-criminal functions, by ordering states to investigate and prosecute human rights abuses and then supervising their compliance with those orders. *See generally International Criminal Law by Other Means, supra* note 12.

<sup>209</sup> Contreras, *supra* note 66 ("no habíamos prestado atención a la Corte Inter-Americana. [hasta tenían] una visión mala de la corte. . . . Cuando salió el caso *Almonacid* nos dimos cuenta de la importancia del la Corte Inter-Americana. La Corte declaró malos todos los consejos de guerra para que las familias pudieran pedir indemnización.").

<sup>210</sup> Fernández, *supra* note 102, at 479 ("La Corte Suprema calificó los homicidios como delitos de lesa humanidad, afirmando que dicha calificación no se opone al principio de legalidad penal porque las conductas imputadas ya eran delitos al momento de su comisión, tanto en el derecho nacional, como en el derecho internacional y agregó, que la prohibición de cometer estos crímenes es una norma de ius cogens, cuya penalización es obligatoria, conforme al derecho internacional general. Para fundar esta afirmación la Corte, en un hecho inédito, cita los párrafos 96 y 99 del fallo *Almonacid Arellano vs. Chile*, que había sido pronunciado por la Corte Inter-Americana de Derechos Humanos el 26 de septiembre de ese año.").

<sup>211</sup> Contreras, *supra* note 66 ("hoy día, [hay] referencias a convenciones internacionales. Sentencias llenas de citas de tratados, convenios internacionales (San Jose de Costa Rica) . . . incluso tratados no ratificados por Chile.").

#### D. Accessibility of ICL

A related theme that emerges from interviews and judgments is the importance of the accessibility of ICL. The ICL arguments discussed in Parts III above are either general references to general principles of ICL or *jus cogens* norms or to the Rome Statute itself or a citation to one text on crimes against humanity in Spanish written by Kai Ambos.<sup>212</sup> There are very few references to caselaw of the international tribunals, and where they appear they are largely verbatim repetition of cites to the same few cases.<sup>213</sup> Some of this tendency to cite conventions or the statutes of tribunals (and Kai Ambos) likely stems from Chile's civil law tradition which prioritizes statutes and "doctrina" (academic writings) over caselaw. However, it is not uncommon to see lower court decisions citing cases of the Chilean Supreme Court for support, so the use of caselaw at least as persuasive authority appears to be acceptable.<sup>214</sup>

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<sup>212</sup> The Westlaw results for "International Criminal Court" include sixteen almost identical references to one text (in Spanish) by Kai Ambos for the proposition that crimes against humanity must be committed pursuant to a state or other organizational policy. *See, e.g.*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], 26 de enero 2016, Programa Continuación Ley N 19.123 y otro con Carlos Abatte Gago, Rol: 8704-2015 ("Este elemento de la política deja claro que es necesario algún tipo de vínculo con un Estado o un poder de facto y, por lo tanto, la organización y planificación por medio de una política, para categorizar de otro modo los delitos comunes como crimen de lesa humanidad (Ambos, Kai. "Crímenes de Lesa Humanidad y la Corte Penal Internacional)").

<sup>213</sup> Several cases cite the ICTY's Tadic Interlocutory Decision on Jurisdiction, *see* Prosecutor v. Tadic, Case No. IT-94-1, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) and the ICTR's Akayesu trial judgment, *see* Prosecutor v. Akayesu, ICTR-96-4-T, Judgement (Int'l Crim. Trib. For Rwanda Sept. 2, 1998) for the proposition that crimes against humanity do not require a nexus to an armed conflict. The following language is used in several judgments: "Siempre en el ámbito internacional, pero ya frente a decisiones concretas, los principios del Tribunal de Nuremberg han orientado la jurisprudencia de las naciones para determinar los delitos de lesa humanidad, pero en la actualidad ciertos presupuestos de procesabilidad ya no son exigibles, como es la existencia de la actualidad o inminencia de un conflicto armado en el territorio donde se perpetran dichos ilícitos, conforme se expresa en el fallo Prosecutor con Tadic, nota 88, par.141, el Tribunal Penal Internacional para la ex-Yugoslavia y en la sentencia de 2 de septiembre de 1988, recaída en el caso The Prosecutor con Jean Paul Akayesu del Tribunal Penal Internacional para Ruanda, parágrafos 578 y siguientes." *See, e.g.*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], 24 octubre 2013, "Plaintiff c. Fisco de Chile," Rol de la causa: 1577-2013; Corte Suprema de Justicia [C.S.J.] [Supreme Court], 21 enero 2013, "Figueroa c. Gonzalez," Rol de la causa: 10665-2011. In each decision, the cite to the *Tadic* decision lacks a date or any other identifying information (and includes a cross-reference to a footnote not present in the judgments), and the cite to the *Akayesu* decision bears the wrong year—the Rwandan genocide occurred in 1994 and the ICTR did not exist in 1988—which seems to suggest that either judges are taking this language from prior Chilean caselaw, secondary literature, or some compendium of caselaw available to them, as opposed to the judgments themselves.

<sup>214</sup> *See, e.g.*, Corte de Apelaciones [C. Apel.] [Court of Appeals], 18 julio 2017, "Juanita Contesse González c. Héctor Rubén Orozco Sepúlveda," Rol de la causa: 5898-2017 (citing Supreme Court caselaw on presumptions and evidence law); Corte de Apelaciones [C. Apel.]

The preference for citing conventions and a single academic text over caselaw may also stem, at least in part, from the difficulty judges have in accessing ICL caselaw. Although the Rome Statute is translated into Spanish, decisions from international criminal courts are not.<sup>215</sup> A significant number of the lawyers and judges interviewed did not read or speak any other languages fluently.<sup>216</sup> Minister 1, said on the one hand that “ICL is not so far away,” but on the other that, “we don’t have the cases from Yugoslavia.”<sup>217</sup> Given the relative paucity of ICC judgments to date, the caselaw of the ICTY and the ICTR represents the vast majority of modern ICL jurisprudence.

One human rights judge noted that the same barrier existed with precedent from other countries. In one of the judge’s past cases, there was a French case that had addressed a similar issue, but, the judge, noted that “if something doesn’t arrive translated it’s difficult to rely on it.”<sup>218</sup> The judge explained, however, that the situation was better at the Supreme Court level because they had foreign legal experts advising on cases.<sup>219</sup>

The central role of the Inter-American Court as the vehicle for importing ICL likely relates at least in part to language. The decisions of the Inter-American Court are available in Spanish and thus ICL arguments that appear in Inter-American Court decisions are readily available to Spanish-readers. Decisions and judgments of international criminal tribunals, by contrast, typically are not.<sup>220</sup> Although most judges indicated that, if they really wanted something they could get it, language barriers notwithstanding,<sup>221</sup> it is naturally harder review the terrain of international criminal caselaw when decisions are only available in

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[Court of Appeals], 25 mayo 2017, “Agrupación de Familiares de Ejecutados Políticos c. Jorge Miranda Faure,” Rol de la causa: 78951-2016 (citing Supreme Court caselaw setting out ICL’s widespread or systematic attack against a civilian population).

<sup>215</sup> The decisions of the ICTY are available in English, French and Serb-Croatian. The decisions of the ICTR are available in English, French, and Kinyarwanda. The website of the Residual Mechanism for the Criminal Tribunals (for the ICTY and ICTR) appears in only those four languages.

<sup>216</sup> About half of the judges interviewed could read English or French. Interview notes on file with author.

<sup>217</sup> Minister 1, *supra* note 57 (“[N]o tenemos los casos de Yugoslavia.”).

<sup>218</sup> The Minister put the burden on the state to do the translating: “But it shouldn’t be that way. There should be some way. An obligation of the state.” Minister 1, *supra* note 57 (“it ought to be more permanent there should be some jurisprudence. Someone for judges/someone in the government alerting them. Some kind of summaries”).

<sup>219</sup> Minister 1, *supra* note 57 (“personas que le han dado unos antecedentes pero traen una normativa internacional. Faltaba este toque. Ha sido bueno”).

<sup>220</sup> Most decisions of international tribunals are published in English or French and the language of the affected region, such as Serbo-Croatian at the ICTY or Kinyarwanda at the ICTR.

<sup>221</sup> *See, e.g.*, SC2, *supra* note 56 (“siempre hay una solución”); Interview with Minister 4, *supra* note 57 (saying language not a barrier, adding that “Uno por sus esfuerzos... [hay] muchas cosas traducidas...” and the Minister asks someone); Minister 1, *supra* note 57 (“[U]no asume la globalización. Tu haces tu propia formación.”)

languages one does not read or read well. One human rights judge for example would look up cases from other international tribunals when they were cited in an Inter-American Court decision.<sup>222</sup>

Language matters for the lawyers too. Human rights lawyer, Cristián Cruz, said, for example, that he has cited the ICC and the ICTY, but he does not follow them. When asked whether language was a barrier, he joked “a little qualm.”<sup>223</sup> By contrast, a younger human rights lawyer, Francisco Jara Bustos, who speaks English and can read French, said that he tries to keep up on ICL through subscriptions to the Grotius Center out of Leiden and the Ibero-American Institute in the Hague, but noted that “it is not a daily thing.”<sup>224</sup>

Language is not the only barrier, of course. Judges also face heavy caseloads. Many have many dozens if not hundreds of cases before them, often involving multiple victims and multiple perpetrators.<sup>225</sup> A few lawyers interviewed indicated that they simply did not have time to keep tabs on the latest ICL caselaw coming from international courts.<sup>226</sup> Again, this lack of time may be tied to legality constraints on the potential uses of ICL in the dictatorship-era cases. If courts relied more heavily on ICL to define the crimes at issue or the parameters of criminal liability, judges and lawyers might make time to track ICL developments more closely.

Nevertheless, the experience of Chilean advocates and judges with ICL suggests the importance of language. It indicates that a potentially useful tool for ICL norm dissemination is in translation of judgments. ICL caselaw should be translated into as many languages as possible, with an eye to selecting languages and judgments that could have the greatest impact in domestic jurisdictions. The Chilean example also shows the potentially critical role to be played by academics in fleshing out doctrine from caselaw in different languages, particularly in civil law jurisdictions.

Finally, the Chilean courts’ heavy reliance on conventions also suggests the potential utility of international instruments, such as the International Law Commission’s (ILC) Draft Articles on Crimes Against Humanity.<sup>227</sup> The ILC’s Draft Articles, unlike the Rome Statute, have been drafted with a primary objective of providing guidance to national courts.<sup>228</sup> Although perhaps of

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<sup>222</sup> Minister 1, *supra* note 57 (“No es algo sistemático”).

<sup>223</sup> Cruz, *supra* note 64 (“[U]n pequeño reparo”).

<sup>224</sup> Jara Bustos, *supra* note 125 (“[N]o es una cosa diaria”). Jara Bustos noted that he was writing an article on the ICC’s *Lubanga* case, because he is interested in principles of reparation. *See id.*

<sup>225</sup> Minister 5, *supra* note 57 (for example, has some eighty active human rights cases, some with more than a hundred complainants.).

<sup>226</sup> Cruz, *supra* note 64 (“no puedo pasar todo el día leyendo”).

<sup>227</sup> Thanks to Sean Murphy for this observation. *See generally* [http://legal.un.org/ilc/guide/7\\_7.shtml](http://legal.un.org/ilc/guide/7_7.shtml).

<sup>228</sup> *See, e.g.*, Int’l Law Comm’n, Second Rep. on Crimes Against Humanity, U.N. Doc. A/CN.4/690 (2016) (noting “This chapter discusses the establishment of criminal responsibility

greatest utility if they lead to an international convention on crimes against humanity, even in their current form,<sup>229</sup> the ILC's Draft Articles and supporting reports offer condensed guidance on ICL for domestic jurisdictions which, like the Rome Statute, can be made available in a variety of languages.<sup>230</sup>

#### *E. The Legitimizing Function of the Rome Regime*

The use of ICL in the Chilean human rights prosecutions also demonstrates the utility of the ICC regime in providing judges a more solid footing to use ICL arguments. Although Chilean judges have been willing to use ICL to circumnavigate domestic obstacles to prosecution or as rhetorical support for the gravity of the crimes, judges have been very reluctant to use ICL to interpret crimes, defenses or forms of participation for acts that preceded the Rome Statute, likely, at least in part, for legality reasons. In the rare instances in which judges either explicitly or implicitly used ICL to interpret crimes, in particular with respect to joint criminality and command responsibility, they were overturned on appeal.<sup>231</sup>

However, with each step towards adoption and incorporation of the Rome Statute, Chilean courts grew bolder in citing it. After Chile signed the Rome Statute, judges would make Rome Statute-based arguments noting that Chile had an obligation not to undermine the treaty's purpose. Upon the passage of domestic implementing legislation, judges began citing the Rome Statute, along with the domestic legislation, with greater frequency in support of ICL arguments.<sup>232</sup> Although it is likely unwise to read too much into the limited sample that is the subject of study here, it seems possible that the signing of the Rome Statute and domestic legislation translating international crimes into domestic law increased judicial confidence in invoking ICL doctrine to ascertain the contours of criminal responsibility, even when the Rome Statute technically

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under national law for persons who have committed crimes against humanity"); Int'l Law Comm'n, Fourth Rep. on Crimes Against Humanity, U.N. Doc. A/CN.4/725 (2019) (noting the comments of states on the project, including Chile's observation that the Project "intends to bolster the prosecution of these crimes at the national level, an objective which is plainly consistent with the complementarity principle governing the system of the International Criminal Court").

<sup>229</sup> The ILC "was established by the General Assembly, in 1947, to undertake the mandate of the Assembly, under article 13 (1) (a) of the Charter of the United Nations to 'initiate studies and make recommendations for the purpose of... encouraging the progressive development of international law and its codification.'" The ILC's Fourth Report on crimes against humanity notes that the project, though not a treaty, has benefited from comments from some 38 states, seven international organizations, and some 700 non-governmental organizations. See Int'l Law Comm'n Fourth Rep., *supra* note 228, ¶ 5-7.

<sup>230</sup> Many materials are already available in six languages. The Fourth Report, for example, is available in Chinese, Arabic, English, French, Russian, and Spanish. See *id.*

<sup>231</sup> See *supra* Part III.F.

<sup>232</sup> See Figure 2, *supra* Part III.C.

does not govern the acts, because the crimes precede its adoption.

But the Chilean experience with ICL arguably also cuts the opposite way and suggests the potential relevance of the Rome Statute even for non-States Party to the treaty. Although the Chilean caselaw may evince a greater judicial willingness to invoke ICL and the Rome Statute after Chile formalized its participation in the Rome regime through signing of the treaty and the passage of domestic implementing legislation, it also shows that the Rome Statute still has rhetorical force outside of contexts to which it technically applies. Long before any domestic implementing legislation, litigants and courts were citing ICL for the proposition that international law precluded application of the amnesty or statute of limitation for crimes against humanity or war crimes, as defined by the Rome Statute.<sup>233</sup> Thus, following the logical template of the Inter-American Court, Chilean courts used ICL to interpret Chile's obligations today, even if they believed themselves without authority to convict directly based on ICL. Courts adjudicating pre-Rome Statute crimes elsewhere could do much the same, as could courts of non-state parties.

#### *F. ICL Spillover Effects*

The use of ICL in Chilean human rights cases suggests that once ICL is on the table as a source of arguments and judges and lawyers become familiar with it, it will be used to support different ends and in different contexts. The cases discussed above illustrate an expansion in the use of ICL from merely an argument to avoid application of statutes of limitations and the amnesty, to an argument to support proportional punishment (i.e. no *media prescripción*), reparations (i.e. no statute of limitations for civil cases, not just criminal), and special protection for minors, among other arguments. It also has been used by the defense. Despite its initial pro-accountability uses, ICL has been marshalled by judges to block prosecutions and by defense attorneys to argue for reduced sentences and recognition of the doctrine of obedience to superior orders.

The invocations of ICL and the ICC in contemporary criminal cases also reveal that these ICL arguments may not be restricted to their most obvious applications. Although they are typically invoked in the dictatorship-era human rights prosecutions, litigants and judges in contemporary cases are likewise invoking ICL and the law of the ICC to support arguments related to extradition, the rule of lenity, retroactivity norms, and the definition of human trafficking.<sup>234</sup>

Interviewees also viewed the human rights cases as having affected the judiciary's openness to international law in other areas. Minister 2 explained that the "human rights cases opened the path for the protection of other human rights," including discrimination and gender, and for greater reliance on international law arguments and even a greater tendency to turn to the

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<sup>233</sup> See *supra* Part III.D.1 and III.D.2.

<sup>234</sup> See *supra* Part III.G.

fundamental rights provisions of the constitution in other contexts.<sup>235</sup> Human rights lawyer Eduardo Contreras says that, more broadly speaking, the human rights cases have generally raised the bar in the legal system: “the role of the trials has elevated the character of the judiciary—an ethical effect.”<sup>236</sup> Thus, the courts’ use of international law, including ICL, in the dictatorship-era cases may contribute to a greater openness to international law and rights-based arguments throughout the judiciary and in a variety of different areas of the law.

Still, the effects of the Chilean human rights cases on human rights in Chile is complicated. The promotion of ICL and human rights in criminal cases in a deeply divided society has a complex impact on promotion of these bodies of law in Chile going forward. On the one hand, Pandora’s box has been opened and there is far greater familiarity and acceptance among judicial actors with international norms. On the other, the use of ICL and human rights law in the dictatorship-era cases garners resistance even for new legislation from members of society who fear retroactive application of norms, who are tired of hearing about the human rights violations of the dictatorship, and who associate the issue with the left. As one Supreme Court Justice put it, “the issue of human rights has been tied to the crimes of the dictatorship . . . there are many forms of human rights violations today . . . it has complicated matters for us to isolate the issue of human rights.”<sup>237</sup>

## V. CONCLUSION

The Chilean human rights prosecutions illustrate the complicated interplay

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<sup>235</sup> Minister 2, *supra* note 57 (“en general yo creo que [lo de] las violaciones de los derechos humanos abrió el camino para la protección de otros derechos humanos... o sea primero fueron las violaciones de derechos humanos en la época de dictadura. Después llegamos a todo lo que es de violaciones de derechos humanos por vía de discriminación, por ejemplo. Ahora estamos en la hoja importante de todo lo que es violencia de género. Y yo creo que partido con algo y hemos seguido avanzando en las otras áreas. Además en el sistema reformado, todos entregan al juez tutelas de derechos fundamentales. Entonces se ha ido avanzando en otros ámbitos... En lo penal, el juez de garantía, es el juez que debe verificar que se respete derechos fundamentales. El juez jurado penal puede excluir prueba castigo... El juez laboral recurre también a tutelas de derechos fundamentales. El juez de familia ...recurre a derechos fundamentales por la vía de derechos de los niños...Y recurre a los tratados internacionales constantemente por esas vías....Y la constitución en la época en que nos estudiamos derecho, la constitución era algo casi inaplicable. Y ahora la constitución, artículos 20 y 21 [derechos fundamentales] se aplica todo el tiempo.”)

<sup>236</sup> Contreras, *supra* note 66 (“El rol de los juicios—ha elevado el carácter de la judicatura—[ha tenido un] efecto ético”).

<sup>237</sup> SC2, *supra* note 56. A young lawyer made the same point: “in Chile, the dictatorship has marked the human rights area, for good or ill... Human rights in Chile is held in a bit of disdain. . . . It’s politicized.” Interview with Lawyer, Public Defender’s office, in Santiago, Chile (Jul. 9, 2018) (“en Chile, la dictadura ha marcado la parte de derechos humanos, por bien o mal. Derechos humanos en Chile está un poco despreciado... está politizado”) (notes on file with author).

between ICL norms emanating from international tribunals, in particular the ICC, and domestic law in domestic prosecutions for gross human rights violations. ICL, in conjunction with IHL and IHRL, has played an important role in overcoming domestic barriers to accountability, expressing condemnation for gross human rights abuses, and in pushing judges to think more expansively about the types of harm that warrant judicial attention. ICL and the ICC have been invoked for a variety of propositions by complainants, defendants, and judges alike, sometimes in favor of accountability and sometimes against it. ICL doctrine has undergone some changes (intentional or not) in the domestic context, sometimes with subsequent realignment with ICL doctrine. ICL and the Rome Statute likewise have been coopted by contemporary litigants in contexts quite removed from atrocity crimes. The Chilean experience suggests as well that a number of ingredients factor into the incorporation of ICL and demonstrates the critical importance of an interrelated web of international law protections and institutions, in particular the critical role played by regional human rights institutions; the importance of accessibility and translation of ICL for domestic actors; and the utility of participation in the ICC regime for the incorporation of ICL norms domestically.