

INTERNATIONAL HUMAN RIGHTS TREATIES AND THE CHILEAN
DICTATORSHIP: LEGAL APPLICATIONS AND JUDICIAL RECEPTIONS
AFTER THE FALL OF THE PINOCHET MILITARY REGIME

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ABSTRACT

The increasing application of international human rights treaties has dramatically changed the transitional justice landscape. For example, the Chilean Supreme Court has applied treaties, such as the Geneva Conventions, as a way to solve legal hurdles and sentence perpetrators for dictatorship-era violations. This paper investigates the judicial-political factors that influenced the growing citation of human rights treaties first by Chilean human rights lawyers and later by the Chilean courts. This paper analyzes when and how the courts began applying treaties in their jurisprudence, and why Chilean post-dictatorship courts eventually shifted to applying human rights treaties. I find that judges and lawyers with experience abroad were more likely to cite treaties given their increased international knowledge base. Similarly, I find that Chilean Courts began to adopt arguments about treaty relevance that had been advanced in international legal decisions against Chile, such as Pinochet's arrest in London. Accordingly, I argue that the increasing global application of human rights treaties in international courts, regional courts, and transnational justice scenarios explains the relevance, power, and timing of the Chilean Supreme Court's shift to applying international human rights treaties in its sentencing decisions. This investigation demonstrates how international pressure and international courts influence the way domestic courts apply international law. The Chilean judges' adoption of international human rights treaties as a way to circumvent legal roadblocks and bring about justice provides an example for other transitional justice situations.

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I. INTRODUCTION

The Universal Declaration of Human Rights (UDHR) is etched in gold lettering along the entrance to Chile's Museum of Memory and Human Rights. The UDHR is an important symbol for the museum because it acknowledges Chile's commitment to remembering human rights violations of the past and respecting human rights in the present. In Chile's recent legal history, the UDHR has been far more than a symbol. Lawyers and judges have used the UDHR and other international treaties to surmount legal barriers, such as statutes of limitations and Chile's still-extant Amnesty law. The application of international treaties, such as the UDHR and the Geneva Conventions, has allowed the Chilean courts to sentence former members of the military and secret police to serve jail terms for their roles in human rights violations.

The following analysis reveals how the increasing prominence of human rights treaties and their application in regional courts and transnational judicial processes was a key catalyst in the shift to judicial sentencing for human rights violations in post-dictatorship Chile. It starts with an analysis of the relevant international human rights treaties and the legal arguments underlying use during and after the dictatorship. It then finds that the existing arguments for the Chilean Supreme Court's shift to

sentencing human rights violators do not sufficiently explain the jurisprudential changes. Instead, the judicial decision-making theories need to be complemented with an analysis of the centrality of human rights treaties in making the jurisdictional shift possible. Thus, international factors, such as Pinochet's detention and regional court decisions, played a critical role in the application of international law in enabling the broader judicial sentencing shift and prosecution of violations of human rights from the Pinochet dictatorship.

II. THE LEGAL ENVIRONMENT DURING THE MILITARY DICTATORSHIP

The Pinochet dictatorship began on September 11, 1973, when the Chilean military staged a coup deposing the government of Salvador Allende. The military detained, tortured, and disappeared citizens in vast numbers, including the famous mass detention in the *Estadio Nacional*, and the torture center at *Villa Grimaldi*. Truth commissions set up after the return to democracy found over 3,000 persons were executed or had disappeared and found over 40,000 political prisoners, many of whom were tortured.¹

As a pretense that rights would be protected, the military junta worked within Chile's longstanding legalistic tradition, using the legal structure to consolidate their power. As one author put it, "the dictatorship found method in its madness. . . General Pinochet utilized the letter of the law to violate its spirit, and created the perfect fascist legal system to process 'enemies of the state.'"² For example, in its first month in control, the junta passed several *Decretos Leyes* to consolidate power in their own hands, including laws giving the junta executive and legislative power. Critically, on his second day in power, Pinochet promulgated *Decreto Ley 5*, which "declared a state of siege decreed for internal commotion that should be understood as 'state or time of war.'"³ Although the legislature was disbanded, the courts

¹ See COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA, INFORME (REPORT OF THE NATIONAL COMMISSION ON POLITICAL IMPRISONMENT AND TORTURE) (2004) (hereinafter VALECH REPORT), available at <http://www.bcn.cl/bibliodigital/dhisto/lfs/Informe.pdf>; COMISIÓN VALECH, INFORME DE LA COMISIÓN ASESORA PARA LA CALIFICACIÓN DE DETENIDOS DESAPARECIDOS, EJECUTADOS POLÍTICOS Y VÍCTIMAS DE PRISIÓN POLÍTICA Y TORTURA (REPORT OF THE ADVISORY COMMISSION ON THE CLASSIFICATION OF DISAPPEARED DETAINEES, VICTIMS OF POLITICAL EXECUTIONS AND VICTIMS OF POLITICAL IMPRISONMENT AND TORTURE (2011) (hereinafter VALECH II), available at <http://www.indh.cl/informacion-comision-valech#sthash.3UyomSdI.dpuf>.

² EDWARD C. SNYDER, *The Dirty Legal War: Human Rights and the Rule of Law in Chile, 1973-1995*, 2 TULSA J. COMP & INT'L L. 253, 254 (1994-95).

³ Decree Law No. 5 (Declara que el estado de sitio decretado por conmocion interna debe entenderse "estado o tiempo de Guerra") (Declared a state of siege decreed for internal

remained in place and the legal system supposedly acted as it always had. As one Vicaría lawyer explained, “[T]hey left the judicial system as a symbol that there would be rights.”⁴

Finally, the Amnesty Law was another junta tactic to enshrine their power in law and prevent judicial investigation of human rights violations. Decree Law 2191 prevented the prosecution of participants in human rights violations occurring between September 1973 and March 1978.⁵ Although it explicitly excluded a few events, the Amnesty Law covered the vast majority of the dictatorship’s human rights violations. Most judges during the dictatorship investigated enough to determine that the crime at hand occurred within the specific period and then closed the case to avoid provoking the regime.

Two legal human rights organizations under the church’s support—the *Comité pro Paz*⁶ and later the *Vicaría de la Solidaridad*⁷—filed tens of thousands of legal documents on behalf of victims. During the seventeen years of dictatorship, the Vicaría and the Comité together filed almost 9,000 *recursos de amparo* – similar to habeas corpus writs – which asked for information on the whereabouts of detained family members.⁸ In some cases, lawyers filed further complaints such as *querellas*,⁹ *denuncias*,¹⁰ or *quejas*.¹¹ A small number of these original legal documents cited international law, including a range of treaties as well as numerous vague references to “public international law” and “international human rights

commotion that should be understood as “state or time of war”) Sep. 12, 1973, DIARIO OFICIAL (D.O.) (Chile).

⁴ Interview with Héctor Contreras, Vicaría Lawyer, in Santiago, Chile (July 14, 2015).

⁵ Decree Law No. 2191 (Ley de Amnistia) (Amnesty Law), Abril 19, 1978, DIARIO OFICIAL (D.O.) (Chile).

⁶ The Comité Pro Paz, formed in October 1973, was the precursor to the Vicaría. It closed in December 1975 under threats from Pinochet. The Comité responded to more than 7,000 cases and filed 2,342 *amparos*. SNYDER, *supra* note 2, at 275-76 (citing PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* 120 (1991)).

⁷ The Vicaría provided legal and social assistance from January 1976 until it closed in December 1992.

⁸ The purpose of *recursos de amparo* “is to safeguard the physical integrity of a detainee by having a judge review the conditions and legality of their continued detention.” CATH COLLINS, *POST-TRANSITIONAL JUSTICE: HUMAN RIGHTS TRIALS IN CHILE AND EL SALVADOR*, 66 n.18 (2010).

⁹ A *querella* is a judicial proceeding filed against those presumptively responsible for a crime and requesting the opening of a criminal proceeding.

¹⁰ A *denuncia* is broader than a *querella* and can be filed against those who were mere participants or had knowledge of a criminal act. The *denuncia* requests an investigation, but not necessarily punishment.

¹¹ A *queja* is a complaint against a judge for a legal failure or grave abuse committed in the passing of a judicial resolution.

treaties.” The overwhelming legal response to the Chilean dictatorship is one of its notable features and the sheer number of documents filed by the Vicaría has proven key to later justice efforts. One Vicaría lawyer explained that they kept filing documents out of necessity – the lawyers could not tell the family members that there was nothing to do after the *amparo* was rejected, and so they filed more and different documents.¹²

The Chilean judicial system remained very formal and legalistic throughout the dictatorship, implying judicial rigor and a receptiveness to application of existing laws. For example, while the *recursos de amparo* rarely resulted in finding a missing person and reporting on their conditions of detention, the courts did at least process the *recursos*.¹³ Most often a *recurso de amparo* would be received by the court, stamped, filed, and then a letter sent off to the Ministry of the Interior, who would respond that they did not know of the person and he was not detained in their care. The judge would then accept the government’s official response and archive the case.¹⁴ A small number of cases received a response that the person requested was in a specific detention center. As a general rule, the courts did not respond to human rights complaints or act to control the military. Instead, as a survey of the Supreme Court criminal cases decided during the dictatorship shows, the courts were preoccupied with numerous cases of drunk driving and fraudulent checks.¹⁵

During the dictatorship years, Chile continued to respect some international treaties, especially those related to extradition. During the dictatorship, Chile applied extradition treaties with Spain, Paraguay, Argentina, and others, when trying to get a prisoner back into Chile.¹⁶ The Supreme Court even approved extradition in situations without a bilateral extradition treaty, by using multilateral treaties and customary international

¹² Contreras, *supra* note 4.

¹³ This paragraph is based on my experience surveying a wide range of *recursos de amparo* and other legal documents in the archives of the Vicaría. *See also*, William Zabel, Diane Orentlicher and David Nachman, *Human Rights and the Administration of Justice in Chile: Report of a Delegation of the Association of the Bar of the City of New York and of the International Bar Association*, 42 REC. ASS’N B. CITY N.Y. 431, 436 (1987) (“To the contrary, consistent with Chile’s highly developed civil law tradition, the forms of legality continue to be adhered to with a punctiliousness uncommon among contemporary military governments.”).

¹⁴ Interview with Liliana Galdámez Zelada, Professor, Univ. of Talca, in Santiago, Chile. (July 9, 2015.)

¹⁵ *See, e.g.* Corte Suprema de Justicia (C.S.J.) (Supreme Court), 2 agosto 1982, “Giro Doloso de Cheque” (fraudulent check), Rol de la causa, F. DEL M. No 285, p.333 (Chile).

¹⁶ *See, e.g.*, Corte Suprema de Justicia (C.S.J.) (Supreme Court), 2 mayo 1983, “Extradición Activa (España)” (Active Extradition to Spain), Rol de la causa: 23207, F. DEL M. No 294, p.203 (Chile).

law.¹⁷ The Supreme Court recognized some other international treaties as well, just not those protecting human rights. For example, in 1984 the Supreme Court applied the Convention for the Protection of the Flora, Fauna, and Natural Scenic Beauty of the Americas to keep the Araucaria Araucana tree safe from destruction and exploitation.¹⁸ The consistent recognition and application of at least some international treaties on the part of the Supreme Court, even during the dictatorship, shows a general openness to international law.

III. THE RELEVANT TREATIES

During the dictatorship, the lawyers proposed a variety of legal arguments on behalf of the detained and disappeared, including citing international treaties. Yet, only a few of those lawyers addressed the specific details of applying the specific treaties in Chile. In response, courts used a variety of different arguments to justify why they felt the treaties were not relevant. The following analysis focuses in turn on each of the most commonly-cited treaties, describing specific arguments for and against their application as valid law in Chile.

A. *The Universal Declaration of Human Rights*

The UDHR was published in 1948 and recognized in 1955 by the Chilean Supreme Court as applicable in Chile.¹⁹ The UDHR is commonly read as providing a definition and description of the human rights to be protected under the UN Charter.²⁰ The Chilean government under President

¹⁷ See, e.g., Corte Suprema de Justicia (C.S.J.) (Supreme Court), 8 mayo 1980, “Extradición Activa (Italia)” (Active Extradition to Italy), Rol de la causa: 21755, F. DEL M. No. 258, p.114, (Chile). See also, Corte Suprema de Justicia (C.S.J.) (Supreme Court), 17 diciembre 1974, “Extradición Activa (Francia)” (Active Extradition to France), Rol de la causa: 18854, F. DEL M. No 193, pp.269-270, (Chile). For a discussion of exile and extradition treaties and their incorporation by referral, see, JOHN DETZNER, TRIBUNALES CHILENOS Y DERECHO INTERNACIONAL DE DERECHOS HUMANOS: LA RECEPCIÓN DEL DERECHO INTERNACIONAL DE DERECHOS HUMANOS EN EL DERECHO INTERNO CHILENO (CHILEAN COURTS AND INTERNATIONAL HUMAN RIGHTS LAW: THE RECEPTION OF INTERNATIONAL HUMAN RIGHTS LAW IN INTERNAL CHILEAN LAW) 20-23. (1988).

¹⁸ Corte Suprema de Justicia (C.S.J.) (Supreme Court), 7 agosto 1984, “Comunidad Galletué c. Fisco,” Rol de la causa: 16743, F. DEL M. No. 309 pp.383, 385-86 (Chile).

¹⁹ Corte Suprema de Justicia (C.S.J.) (Supreme Court), “Caso Lauritzen c. Fisco.” 19 diciembre 1955, R.D.J. t.52, 2a parte, sec. 1a, p. 444-534, 478 (1955) (Chile); see, DETZNER, *supra* note 17.

²⁰ For example, in 1971, the International Court of Justice, in an advisory opinion, found that articles 55 and 56 of the UN Charter “obligate member states to obey and respect human rights.” Continued Presence of South Africa in Namibia (S.W. Africa), Advisory Opinion, 1971 I.C.J. 16 (June 21); see also, DETZNER, *supra* note 17, at 82-84.

Salvador Allende recognized this interpretation and the human rights obligations of the UN Charter, and the UDHR articles, before a UN committee.²¹ Further, by 1988, “a majority of jurists had concluded that the UDHR, or at least some of the fundamental rights enshrined in the Declaration were obligatory for states under customary international law,” and thus would be applicable in Chile.²²

Particularly given its early prominence in the human rights field, the UDHR was among the more frequently cited treaties during the dictatorship. However, UDHR citations in *recursos de amparo* seemed more like a moral argument than a legal argument: a way to reinforce the seriousness and global disapproval of the alleged crime. Fundamentally, the UDHR is a declaration and not a treaty, as even a Vicaría lawyer reiterated and thus while it can be persuasive, it does not include sanctions or specific obligations.²³ Thus, even since the transition to a democracy, the UDHR never stands alone as a legal argument, but instead reinforces the relevance and continuity of other human rights treaties.

B. *The Geneva Conventions*

The Geneva Conventions of 1949, which Chile ratified in 1950, have been the most powerful of the treaties because they were clearly part of Chilean law even during the dictatorship. Geneva Common Article 3 applies in the “case of armed conflict not of an international character” and protects “persons taking no active part in the hostilities” from “violence to life and person,” and “the passing of sentences” without “judicial guarantees.”²⁴ Further, the Geneva Conventions define “grave breaches” that require investigation and penal sanctions and also prohibit state parties from absolving themselves from liability for these grave breaches.²⁵ Chilean

²¹ DETZNER, *supra* note 17, at 83. The Chilean government also recognized the UDHR in a 1949 case regarding Russia’s refusal to grant a visa to a Chilean diplomat’s Russian wife.

²² *Id.* at 37.

²³ Interview with Roberto Garretón, Vicaría lawyer, in Santiago, Chile. (July 7, 2015).

²⁴ Geneva Convention (III) relative to the Treatment of Prisoners of War art. 3(1)(a)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

²⁵ *Id.* at art. 130; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art 146-148, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Although the grave breaches in the Geneva Conventions are only explicitly applicable to international armed conflicts, the language of Common Article 3 provides space for states to prosecute them within non-international armed conflicts as well. SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 476 (2012). Further, there is evidence of a growing customary international law norm for the obligation to prosecute grave breaches, as seen in state practice, particularly international and hybrid war crimes tribunals, and even the Rome Statute complementarity provision (art. 17) such that the ICC has jurisdiction if states do not prosecute domestically for war crimes.

judges have used the Geneva Conventions' phrase "grave breaches" to interpret and define war crimes and crimes against humanity, which do not have a statute of limitations.²⁶ However, the Geneva Conventions apply only in cases of war – either external or internal – so the legal arguments focused on whether or not Chile was in a state of internal war.

In the early years of the military tribunals, lawyers cited the Geneva Conventions with little success. For example, in one of the first Special War Tribunals,²⁷ one Vicaría lawyer used international law, including the Geneva Conventions, as part of a defense to a charge of treason.²⁸ A Vicaría lawyer described this argument as "breaking the thesis of the dictatorship...all of the magic worked through the law and could not work outside the law."²⁹ However, military judges held firm that the Geneva Conventions did not apply. For example, in an early 1974 Military Tribunal case, the court said that 1) there was no external war, 2) in an internal war the state would have to specifically enact the conventions through separate accords, and 3) that the defendant was not a prisoner of war, nor was there any violence.³⁰ In most other cases, the military judges did not even deign to respond to Geneva Convention arguments, or as one lawyer put it "they did not listen to me."³¹

Two decades later, and after the transition to democracy, the first Chilean judges began to apply the Geneva Conventions. The first key decision was the 1994 case of *Barbara Uribe Tamblay* in the Santiago Appeals Court. The Court found that 1) the Geneva Conventions were law in Chile as they had been signed, ratified, and published; 2) Decree Law 5 and Code of Military Justice article 418 declared a state of war that existed at the time of the crime and the procedures and penalties for times of war applied; 3) a previous Supreme Court decision (*Chanfreau*) concluded that Chile was

²⁶ Interview with Lamberto Cisterna, Ministro de la Corte Suprema, in Santiago, Chile. (July 22, 2015).

²⁷ Military tribunals have primary jurisdiction for all cases of crimes involving the military or national police committed in connection with their duties. Military jurisdiction was upheld as late as 1990 in the *Chanfreau* decision, which found a presumption that any crime committed during a state of war implied that the activity was carried out by the military as part of their duty. See, AMNISTÍA INTERNACIONAL, CHILE: LA CORTE SUPREMA DE JUSTICIA CONTINÚA BLOQUEANDO LAS INVESTIGACIONES SOBRE PASADAS VIOLACIONES DE DERECHOS HUMANOS: EL CASO CHANFREAU 2 (1992), available at <https://www.amnesty.org/download/Documents/196000/amr220171992es.pdf>.

²⁸ Defense Brief for Jorge Hernández Figueroa, in Consejo de Guerra, Proceso FACH 1-73, segundo parte (Chile) (on file with the Vicaría).

²⁹ Contreras, *supra* note 4.

³⁰ Consejo de Guerra de Valparaíso, (C.J.) (Valparaíso War Council), 25 abril 1974, "Caso Condenando Armando Barrientos Cardenas," Violation of Arms Control Law, ¶ 8 (Chile) (on file with the Vicaría).

³¹ Contreras, *supra* note 4.

in a state of war; 4) Chile could not escape its treaty obligations through domestic law; 5) Article 5.2 of the 1980 Chilean Constitution incorporated human rights treaties and so they prevail over internal laws.³² However, in response, the Supreme Court overturned the decision because the laws on state of war are a “legal fiction that does not reflect the reality of that era in that there were not armed groups, under a bellicose organization. . .in control of a territory, or the conditions necessary defined for the international statute to take effect.”³³

In 1998, the Chilean Supreme Court first decided that disappearances were ongoing crimes and the Geneva Conventions were applicable. In *Poblete Córdova* in 1998, the court found that applying the Amnesty Law was an error of law because 1) disappearance was an ongoing crime and so amnesty could not be applied because the crime did not end during the time frame, and 2) the Geneva Conventions were applicable as part of Chilean law.³⁴

The development between *Uribe Tamblay* and *Poblete Córdova*, shows the progression of the Chilean Supreme Court’s decisions on the application of the Geneva Conventions and the central role of Decree Law 5. The key logic behind the applicability of the Geneva Conventions to the Chilean dictatorship is a distinction between a de jure civil war and a de facto one. By now, everyone accepts that there was no de facto civil war in Chile – there was no organized armed group that held territory, had a command structure, or carried out “sustained and concerted military operations.”³⁵ The Court in *Uribe Tamblay* focused on the Geneva Convention Additional Protocol II’s factors for the state of an internal war in concluding that Chile did not have a war and so the Geneva Conventions were not applicable. However, by *Poblete Córdova*, the Court was well on its way to a dramatic shift to instead focus on Pinochet’s declaration of a de jure war. The critical Decree Law 5 stated that the “internal commotion the nation was experiencing, should be understood as ‘state or time of war’ for the effects

³² Corte de Apelaciones de Santiago, (C. Apel.) (Court of Appeals), 30 septiembre 1994, “Caso de Barbara Uribe Tambley,” Rol de la causa: 38683-94 s., desaparición, (Chile). (This case is sometimes also spelled Uribe Tamblay)

³³ Corte Suprema de Justicia, (C.S.J.) (Supreme Court), 19 agosto 1998, “Caso de Barbara Uribe Tambley,” Rol de la causa: 973-1997 s., desaparición, F. DE M. vol. 434 p.1474, ¶ 7 (Chile).

³⁴ Corte Suprema de Justicia, (C.S.J.) (Supreme Court), 9 septiembre 1998, “Caso de Pedro Poblete Córdova,” Rol de la causa: 895-1996 s., desaparición, F. DEL M. 478, 1760-69 (This case is sometimes also spelled Poblete Cordoba) (Chile).

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, June 8, 1977, 1124 U.N.T.S. 609; see Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

of the application of the criminal punishments established in the Code of Military Justice for these times, and other criminal laws, and in general for all other effects of said legislation.”³⁶ Importantly, beyond declaring a state of internal war, Decree Law 5 also said there was a state of war for the purpose of broader application of the relevant criminal laws, which would include the Geneva Conventions, since they cover criminal procedures and punishments during states of war.

However, the process toward today’s consensus on applying the Geneva Conventions was not entirely smooth. While most courts relied on the existence of a *de jure* war, occasionally the courts instead relied on the fact that there was no *de facto* war. For example, in 2005, in the *Caso Ricardo Rioseco y Luis Cotal*, the Court used the definition of a non-international armed conflict found in Geneva Conventions Additional Protocol II, which Chile ratified in 1991, to conclude that there was no internal war.³⁷ This decision further rejected the *de jure* war by finding that Decree Law 5 was insufficient to show an internal war because it was only used procedurally to apply the Code of Military Justice.³⁸ Over the decades since *Poblete Córdova*, with a few exceptions, the application of the Geneva Conventions has become a base assumption and so recent decisions cite only the key points: 1) the Conventions were signed, ratified, and published; 2) the Conventions’ Common Article 3 applied in cases of conflict not of an international character; and 3) the government declared internal war.³⁹

C. *The International Covenant on Civil and Political Rights (ICCPR)*

Chile signed and ratified the ICCPR in 1972, which entered into force in 1976, and recognizes and codifies a number of fundamental human rights, some of which are non-derogable even in cases of states of emergencies. During the dictatorship, victims’ family members cited the ICCPR on rights to life, to be free from torture, and to have fair trials. In a 1984 decision, the Chilean Supreme Court held the ICCPR was not law in Chile, because it had

³⁶ Decree Law No. 5 (Declara que el estado de sitio decretado por conmocion interna debe entenderse “estado o tiempo de Guerra”). [Declared a state of siege decreed for internal commotion that should be understood as ‘state or time of war.’] Sep. 12, 1973, DIARIO OFICIAL (D.O.) (Chile).

³⁷ Corte Suprema de Justicia, (C.S.J.) (Supreme Court), 9 febrero 2005, “Caso Ricardo Rioseco Montoya y Luis Cotal Álvarez,” Rol de la causa: 457-2005 s., muerte, ¶ 5-8 (Chile). See, CENTRO DE DERECHOS HUMANOS UDP, PRINCIPALES HITOS JURISPRUDENCIALES EN CAUSAS DDHH EN CHILE 1990-2013 [MAIN JURISPRUDENCE IN HUMAN RIGHTS CASES IN CHILE 1990-2013] 8 (2014).

³⁸ Corte Suprema de Justicia, (C.S.J.) (Supreme Court), 9 febrero 2005, “Caso Ricardo Rioseco Montoya y Luis Cotal Álvarez,” Rol de la causa: 457-2005 s., muerte, ¶ 5-8 (Chile).

³⁹ E.g., Corte Suprema de Justicia, (C.S.J.) (Supreme Court), 13 diciembre 2006, “Caso Molco de Choshuenco,” Rol de la causa: 559-2004 s., homicidio calificado, ¶ 10 (Chile).

not been published in the *Diario Oficial*.⁴⁰ The court relied on Decree Law 247 from Dec 31, 1973, which said that treaties must be published in the *Diario Oficial* to be in effect in Chile. However, one Vicaría lawyer noted, that by the time of this Supreme Court decision, Decree Law 247 was no longer in effect because the 1980 Constitution had superseded it.⁴¹

In addition to rejecting the ICCPR's application on this artificial technicality, the Chilean government was hypocritical toward this treaty, by showing outward respect for it but internal scorn. A Vicaría lawyer described how the Chilean ambassador would go to the UN or the ICCPR Committee and state that the treaty was in force and applicable in Chile, and then return to Chile and aver instead that the treaty was *not* in force because it had not been published.⁴² For example, in a statement to the Ad Hoc Working Group on Chile, the government wrote, "Chile recognizes and respects the ICCPR and is logically disposed to obey its requirements."⁴³ The Chilean government also submitted the notifications and reports required under ICCPR articles and testified about the ICCPR's application before the Human Rights Committee.⁴⁴ In Decree Law 778, written in 1976, Pinochet declared that the ICCPR was law in Chile.⁴⁵ However, Decree Law 778 was not published and thus not common knowledge until the ICCPR was published in April 1989.⁴⁶ The Chilean Ambassador to the UN was apparently the only one who had a copy of Decree Law 778, which he showed to foreign delegates and UN committees.⁴⁷

While the ICCPR was legally interesting during the dictatorship, its

⁴⁰ Corte Suprema de Justicia, (C.S.J.) (Supreme Court), 22 octubre 1984, "Caso de Leopoldo Ortega Rodríguez y otros," Rol de la causa: 24128, apelación de amparo, FALLOS DEL MES (F. del M.) Vol. 311, pp.588-92 (1984) (Chile).

⁴¹ Interview with Hernán Quezada, Vicaría lawyer, Dir. of Human Rights, Ministry of Foreign Affairs, in Santiago, Chile. (July 14, 2015).

⁴² Garretón, *supra* note 23.

⁴³ DETZNER, *supra* note 17, at 69; U.N. Ad Hoc Working Group to Investigate the Human Rights Situation in Chile, *Chilean Government Observations*, 19, UN Doc A/C.3/31/6, 27/10/76 (Oct. 27, 1976).

⁴⁴ DETZNER, *supra* note 17, at 69; U.N. Human Rights Comm., 6th Sess., 130th mtg., *Initial report of Chile* (CCPR/C/1/Add.25 and Add. 40) (Apr. 12, 1979) (On file with the Vicaría).

⁴⁵ Decree Law 77 (Promulga el Pacto Internacional de Derechos Civiles y Políticos adoptado por la Asamblea General de la Organización de las Naciones Unidas por Resolución No 2.200, el 16 de Diciembre de 1996 y suscrito por Chile en esa misma fecha) [Promulgation of the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly in Resolution No. 2200, on December 16, 1996 and signed by Chile on this same date], Abril 29, 1989 (date of publication), Noviembre 20, 1976 (date of promulgation), DIARIO OFICIAL (D.O.) (Chile).

⁴⁶ E-mail from Roberto Garretón, Vicaría lawyer, to author, with notes from a conference speech, (Aug. 9, 2015, 13:55 EST) (on file with author).

⁴⁷ *Id.*

subsequent application has been less significant. The ICCPR was published in 1989 and so has been unarguably in force since the beginnings of democratic governance. For example, ICCPR article 15.2 was applied in a few early cases to support the Chilean state's obligation to investigate and sanction crimes against humanity.⁴⁸ However, the ICCPR is not often used alone as a legal basis, instead it often supports arguments referencing Geneva Convention and other treaties.

D. Other treaties and the Inter-American System

While the Geneva Conventions have been critical in the new wave of sentencing, other treaties have also been important. Treaties on specific crimes were often used for their definitional value in connecting a crime in international law with the corresponding crime in the Chilean penal code.⁴⁹ For example, the Inter-American Convention on Forced Disappearances (which Chile had signed and not ratified, and which entered into force in March 1996) was used to argue that forced disappearances, which are crimes against humanity, correlate to the domestic crime of *secuestro calificado*.⁵⁰ *Secuestro calificado* (qualified kidnapping) was declared to be a permanent crime and thus could not be amnestied, nor have a statute of limitation, because it did not end during the period covered by the amnesty.⁵¹ The Convention Against Torture was also used on occasion to connect the internationally defined crime of torture with the domestic crime of *apremios ilegítimos*.⁵²

Additionally, the American Convention on Human Rights (ACHR) reinforced the international obligation to investigate and punish crimes against humanity. The ACHR was applied with more regularity than the ICCPR because of its regional prevalence, but was less central than the

⁴⁸ Corte Suprema de Justicia, (C.S.J.), (Supreme Court), 9 septiembre 1998, "Caso de Pedro Poblete Córdova," Rol de la causa: 469-1998 s., desaparición, Recurso de Casación en el Fondo Criminal, F. DEL M. Vol. 478, p.1760, ¶ 2. (holding that courts may not apply amnesty until they know who committed the crime) (Chile). Cf., Corte Suprema de Justicia, (C.S.J.) (Supreme Court), 11 noviembre 1998, "Caso de Eugenia Martínez Hernández," Rol de la causa: 477-1997 s., desaparición, Recurso de Casación en el Fondo Criminal, ¶ 1 d) (Rejecting the appeal because the statute of limitations had lapsed) (Chile).

⁴⁹ Galdámez, *supra* note 14.

⁵⁰ Corte de Apelaciones de Santiago, (C. Apel.), Court of Appeals, 1 mayo 2003, "Caso Miguel Ángel Sandoval Rodríguez," Rol de la causa 11821-2003, recurso, ¶ 33-47, *Confirmed by the Supreme Court of Chile*, 17 noviembre 2004, Rol de la causa 517-2004 (Chile).

⁵¹ *Id*; see also, LILIANA GALDÁMEZ ZELADA, *El deber de prevenir, juzgar y sancionar violaciones de Derechos Humanos: el caso chileno (The Duty to Prevent, Judge and Sanction Human Rights Violations: the Chilean Case)*, 62 CUADERNOS DEUSTO DE DERECHOS HUMANOS 24-25 (2011) (Spain).

⁵² Galdámez, *supra* note 14.

Geneva Conventions because it was not ratified in Chile until 1990. However, Inter-American Court (IACHR) decisions gave the ACHR judicial teeth.⁵³ For example, in the case of *Velásquez-Rodríguez*, the IACHR found that amnesty laws violate the ACHR provisions requiring investigation and punishment.⁵⁴

The ACHR faced an uphill battle to applicability in dictatorship-era human rights abuse cases. One key issue was retroactivity – whether the treaty could be applied to crimes that occurred before it was signed.⁵⁵ The Chilean courts eventually adopted the IACHR’s interpretation declaring that the ACHR obligation to investigate and punish still exists as a legal obligation, even if the actual violation occurred prior to ratification.⁵⁶ The other key issue limiting the ACHR’s applicability was the conflict between treaty and domestic law. Chilean courts first found that domestic law took priority over treaties.⁵⁷ Later, courts relied instead on Constitution Article 5.2, which incorporated human rights treaties into the Constitution to give these treaties preeminence.⁵⁸ The Supreme Court even phrased a rule that “the primary norm is that which better protects human rights” in applying the ACHR and ICCPR over the Amnesty Law.⁵⁹

Finally, Chilean Courts applied some treaties and principles as *jus cogens*, even when Chile had not ratified those treaties. For example, Chile used the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity⁶⁰ to get around statute of limitations issues for the dictatorship-era crimes. Chilean statutes of

⁵³ A Court of Appeals judge describes the decisions of the IACHR on the application of the ACHR as key in the human rights shift of the Chilean courts. Interview with Juan Zepeda, Ministro, Corte de Apelaciones de Santiago, in Santiago, Chile. (July 22, 2015).

⁵⁴ *Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (Jul. 29, 1988). See, e.g., Corte Suprema de Justicia (C.S.J.) (Supreme Court), 3 octubre 2006, “Caso Villa Grimaldi,” Rol de la causa: 2707-2007, ¶ 13 (Chile); see discussion *infra* pp. 19-20.

⁵⁵ See, e.g., Corte Suprema de Justicia, (C.S.J.) (Supreme Court), 19 agosto 1990, “Caso de Barbara Uribe Tambley.” Rol de la causa: 973-1997 s., desaparición, F. DE M. vol. 434 p.1474 ¶ 9-11 (Chile).

⁵⁶ *Velásquez-Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (Jul. 29, 1988), 169-178 (Applying Article 1 of the ACHR, “The State has a legal duty . . . to use the means at its disposal to carry out a serious investigation of violations committed.” ¶ 174).

⁵⁷ GALDÁMEZ, *supra* note 51, at 19.

⁵⁸ Article 5.2 of the Constitution was amended in 1989. “It is the duty of the organs of the State to respect and promote those rights, guaranteed by this Constitution, as well as in international treaties ratified by Chile and which are in force.” CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (C.P.) art. 5. See *infra* p. 17-18.

⁵⁹ Corte Suprema de Justicia (C.S.J.) (Supreme Court), 13 marzo 2007, “Caso Chena,” Rol de la causa: 3125-04 s., homicidio calificado, ¶ 4 (Chile).

⁶⁰ G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), entered into force Nov. 11, 1970

limitations range from six months to fifteen years.⁶¹ The Supreme Court first decided that exempting war crimes from statutes of limitations was customary international law⁶² and then *jus cogens*.⁶³ Chilean judges now hold that the obligation to prosecute and the right to reparations for crimes against humanity are also *jus cogens*, just like the obligation to not commit those crimes.⁶⁴

IV. REASONS WHY JUDGES STARTED APPLYING INTERNATIONAL LAW

Chilean judges have shifted from a consensus that international treaties were irrelevant in Chile to a consensus that these same treaties obligate the state to investigate cases, punish crimes, and even pay civil reparations. Existing literature on judicial decision-making in the Chilean Supreme Court includes four common explanations—early pioneers, judicial reform, Pinochet’s detention, *Mesa de Diálogo*—for the changing willingness of the Chilean Supreme Court to find perpetrators guilty for human rights violations that occurred under the dictatorship.⁶⁵ This paper applies these explanations more directly to the shift to applying international human rights treaties as the key to enabling the jurisdictional shift to sentencing. The following analysis finds that the key factor enabling the prosecutorial shift was the growing prominence and application of international law globally, which brought the treaties home to Chile.

A. *The Pioneers*

The first potential factor in explaining the judicial shift to sentencing was the presence of judicial pioneers. New legal ideas need pioneers on the cutting edge willing to put forward a novel argument. In Chile, certain key lawyers and judges were pioneers for the legal recognition of international law, but they faced rejection for years before their ideas were accepted. A Vicaría lawyer filed the first challenge to the Amnesty Law in 1990, but was reprimanded even by other human rights lawyers who thought such a

⁶¹ Zepeda, *supra* note 53.

⁶² Corte Suprema de Justicia, (C.S.J.) (Supreme Court), 13 diciembre 2006, “Caso Molco de Choshuenco,” Rol de la causa: 559-2004 s., homicidio calificado, ¶ 12-18 (Chile).

⁶³ See, e.g., Corte Suprema de Justicia (C.S.J.) (Supreme Court), 25 septiembre 2008, “Episodio Liquiñe,” Rol de la causa: 4662-2007, sentencia de reemplazo, ¶ 8 (Chile).

⁶⁴ Cisterna, *supra* note 26; Zepeda, *supra* note 53.

⁶⁵ KARINNA FERNÁNDEZ NEIRA, *Breve Análisis de la Jurisprudencia Chilena, en Relación a las Graves Violaciones a los Derechos Humanos Cometidos Durante la Dictadura Militar (Brief Analysis of Chilean Jurisprudence Relating to the Grave Violations of Human Rights Committed During the Military Dictatorship)*, 8 ESTUDIOS CONSTITUCIONALES, 467 (2010) (Chile).

judicial push was too much too soon.⁶⁶ Similarly, Humberto Nogueira wrote the 1994 Court of Appeals decisions applying the Geneva Conventions, which had potential for a positive domino effect of increased application of the treaties in other cases.⁶⁷ However, the Supreme Court overturned the 1994 decisions and Nogueira himself was reprimanded.⁶⁸

A few famous judges also had critical roles in challenging prevailing norms in favor of human rights. During the dictatorship, Judge Carlos Cerda tried to apply international law and was reprimanded by the Supreme Court with several months without pay.⁶⁹ A Vicaría lawyer credits Judge Cerda for standing up to the Supreme Court in its most unresponsive phases and providing an example of great moral strength.⁷⁰ In the early post-dictatorship years, a few other judges attempted deeper investigation and were reprimanded and removed from cases.⁷¹ Post-dictatorship, Judge Juan Guzmán also challenged the status quo of impunity and was willing to investigate the regime. Guzmán was the *Ministro en Visita* for the *Caravana*⁷² case against Pinochet in January 1998 and thoroughly investigated the charges. He “initiated a rigorous domestic investigation, unexpected given his own previously conservative record.”⁷³ Given aspects of the Chilean judicial system, “. . .this combination of lawyer protagonism and judicial discretion risks producing an uneven, excessively personalized type of justice. Cases at time appear to be resolved according to the enthusiasm and inclinations of key actors.”⁷⁴ These early efforts helped raise awareness of applying international law and awareness of the treaties themselves, thus having a key background role in introducing the legal basis for the later turnaround.⁷⁵ Still, the early pioneers were not enough to cause the shift alone.

⁶⁶ COLLINS, *supra* note 8, at 102-103.

⁶⁷ LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE*, 196 (2007). Humberto Nogueira Alcalá was an *abogado integrante*, an outside lawyer assigned as judge, for the Court of Appeals in the cases of Barbara Uribe Tambley and Lumi Videla.

⁶⁸ Galdámez, *supra* note 14.

⁶⁹ HILBINK, *supra* note 67, at 212; Garretón, *supra* note 23.

⁷⁰ Garretón, *supra* note 23.

⁷¹ HILBINK, *supra* note 67, at 212-13.

⁷² The *Caravana de la Muerte* represents a killing spree in late September and early October of 1973 where General Arellano Stark traveled up and down Chile, summarily executing prisoners. There were at least 72 victims, but not all of the remains have been found. See, COLLINS, *supra* note 8, at 70.

⁷³ COLLINS, *supra* note 8, at 83.

⁷⁴ *Id.* at 123.

⁷⁵ FERNÁNDEZ, *supra* note 65, at 474. (“The mentions of international law, the primary application of the Geneva Conventions constituted a new reference mostly for the lower tribunals and which propelled the reopening of many cases.”).

B. *Judicial Reforms and Ministros en Visita*

The second potential explanation for the shift in sentencing was a key judicial reform passed in 1997, which meant an influx of fresh faces to replace Pinochet-era judges. The judicial reform changed the appointment procedure caused Pinochet-era judges to retire (mandated retirement at 75), expanded the number of judges from 17 to 21, and divided the Supreme Court into chambers.⁷⁶ Court appointments now needed Senate confirmation and the reform also created five Court posts for lawyers outside the judicial system.⁷⁷ Hilbink argues that appointing lawyers who were not previously lower court judges was key to getting new ideas into the Court and escaping the closed institutionalism.⁷⁸ This reform “transformed a Supreme Court predominantly staffed by Pinochet-era appointees to one where, by 1998, only four of twenty-one judges were from that era.”⁷⁹

A number of judges recognize and mention the critical role of new, more liberal faces on the court. Lamberto Cisterna, a current Supreme Court judge who was in charge of relating the facts of the *Letelier* case, explained that the difference between the *Letelier* sentence⁸⁰ and the *Letelier* extradition⁸¹ was a new set of judges: “the judge said, ‘I was not in the earlier case, I am a different judge and I am in charge of this tribunal.’”⁸² Hilbink similarly cites a number of other judges who discuss the changing faces on the Court as key to the judicial shift, but notes that this explanation is incomplete because the timing does not match and because the “liberalism” of the court was limited to dictatorship human rights violations and did not extend to more recent rights violations.⁸³

A second judicial reform in 2001 also contributed to the judicial shift by increasing the application of *Ministros en Visita* to human rights cases. These *Ministros en Visita*, judges who are assigned specially to investigate certain crimes, are a fixture in the Chilean judicial system, but had not previously been focused on human rights cases – Vicaría lawyers submitted

⁷⁶ COLLINS, *supra* note 8, at 136.

⁷⁷ HILBINK, *supra* note 67, at 187.

⁷⁸ *Id.* at 214.

⁷⁹ COLLINS, *supra* note 8, at 81

⁸⁰ The Chilean Supreme Court sentenced the first military officers, including Manuel Contreras head of the DINA, to prison sentences in November 1993. The *Letelier* case had been explicitly left out of the Amnesty Law, under pressure from the United States.

⁸¹ The Chilean Supreme Court refused to extradite military officers to the United States who had been accused of participation in the assassination of Orlando Letelier in Washington. See, e.g., Charles A. Krause, “Chilean Judge Bars Extradition in Letelier Case,” WASHINGTON POST, (May 15, 1979), <http://www.washingtonpost.com/archive/politics/1979/05/15/chilean-judge-bars-extradition-in-letelier-case/7db20dc4-c59d-480f-9fb9-b4cd6b6ed242/>.

⁸² Cisterna, *supra* note 26.

⁸³ HILBINK, *supra* note 67, at 210-11.

requests for a *Ministro en Visita* during the dictatorship, but were regularly denied.⁸⁴ The *Ministros* had the time and resources to focus on the human rights investigations and many of them would travel around Chile to dig up burial sites and talk to family members, neighbors, and even military officers. The 2001 reform assigned nine judges exclusively for cases of the *detenidos desaparecidos* and another 51 judges who gave human rights cases preferential attention.⁸⁵ Several of these judges (such as Juan Guzmán) were key in raising the profile of human rights cases. Previously much of the investigation that should have been the role of the judges had fallen to the *Vicaría*.⁸⁶

C. Pinochet's Detention in London

The third explanatory factor for the change in sentencing, commonly mentioned by *Vicaría* lawyers was Pinochet's detention in London. Pinochet was arrested on October 17, 1998 on a Spanish arrest warrant for crimes of genocide and terrorism.⁸⁷ One lawyer explained that: "justice changed on the day Pinochet was taken prisoner in London...the Pinochet effect is that the judges learned how to do justice."⁸⁸ After a lot of legal wrangling on issues of extradition and double criminality and the retroactive application of international law, Pinochet returned to Chile after the British declared him unfit to stand trial and the Chilean government under President Frei promoted the ability of the Chilean courts to do justice. One *Vicaría* lawyer thought this promised accountability was key: "It is possible to think that the tribunals changed their jurisprudence to show the British authorities that it was possible to have justice in Chile."⁸⁹ These comments differ from Collins' conclusion that, while "all Chilean accountability actors interviewed believed the Spanish case had proved an indirect stimulus to domestic accountability progress...none identified it as the single or sole cause."⁹⁰ Only one lawyer I talked to denied that Pinochet's arrest had any effect, but then explained that the arrest obligated the state to judge crimes against

⁸⁴ See, e.g., *Solicitud la designación de un Ministro en Visita Extraordinaria* (Request for the Designation of a Special Judge), *Caso de Hector Alejandro Barria Bassay* (on file with the *Vicaría*).

⁸⁵ FERNÁNDEZ, *supra* note 65, at 475

⁸⁶ Contreras, *supra* note 4. ("We did what we had to to investigate, to discover the crimes. After five years of dictatorship we found fifteen bodies in the ovens of Lonquén. And the photo of the ovens of Lonquén is worth more than any argument. I was there.")

⁸⁷ For a thorough examination of the Pinochet case and the proceedings in Spain and the UK, see NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS*, 32-66 (2005).

⁸⁸ Garretón, *supra* note 23.

⁸⁹ Quezada, *supra* note 41.

⁹⁰ COLLINS, *supra* note 8, at 108. (Noting that Garretón was an exception).

humanity.⁹¹ Hilbink also calls Pinochet's arrest an "important catalyst," but her framework focuses more on the process of domestic institutional change and so the arrest served "to strengthen and expedite a process of change that had already begun."⁹²

While the actual impact of Pinochet's detention is hard to show, many lawyers and academics note "coincidences" in the case universe. Hilbink looks at appellate and Supreme Court cases from 1990-2000 to note a marked shift away from decisions favoring military or authoritarian legality after Pinochet's arrest in London.⁹³ In particular, the 1998 *Poblete Córdova* case was the first in which the Supreme Court did not apply the Amnesty Law to a disappearance.⁹⁴ However, while *Poblete Córdova* may have signaled a jurisdictional change, it was still an outlier in 1998. In that year, the Supreme Court used the Amnesty Law to close 18 investigations and then applied *res judicata* on two more and the statute of limitations to close yet another case.⁹⁵ The next big case that sentenced military officials for human rights violations came in 2004 with a case that had been in progress since the January 1975 disappearance of *Miguel Angel Sandoval Rodríguez*.⁹⁶

Pinochet's detention poked a hole in his armor of immunity and opened the way to more legal challenges. After his return to Chile, Pinochet was stripped of his senatorial immunity in June 2000 and then indicted for his role in the Caravana affair. Once Pinochet himself was on trial, international human rights treaties became a key part of the defense argument in guaranteeing due process.⁹⁷ One other measurable impact of his detention was the increased submitting of *querellas* against the dictator and other responsible military agents.⁹⁸ For instance, "around sixty criminal

⁹¹ Interview with Humberto Nogueira Alcalá, Professor, Univ. of Talca, in Santiago, Chile (July 22, 2015).

⁹² HILBINK, *supra* note 67, at 216.

⁹³ Before Pinochet's arrest 29 of 35 decisions favored the military and after Pinochet's arrest, 1 of 6 decisions favored the military. *See*, HILBINK, *supra* note 67, at 90 (Table 5.1).

⁹⁴ Corte Suprema de Justicia (C.S.J.) (Supreme Court), 9 septiembre 1998, "Caso de Pedro Poblete Córdova," Rol de la causa: 469-1998 s., desaparición (Chile).

⁹⁵ FERNÁNDEZ, *supra* note 65, at 472.

⁹⁶ Collins notes that *Sandoval Rodríguez* was the first case to reach sentencing after the *Poblete Córdova* decision. COLLINS, *supra* note 8, at 1992. However, Matus Acuña cites eleven cases in that period in which investigations were reopened for applying the Amnesty Law prematurely. JEAN PIERRE MATUS ACUÑA, *Informe pericial ante Corte Interamericana de Derechos Humanos, sobre aplicación jurisprudencial de decreto ley 2191 de amnistía, de fecha 19 de abril de 1978 (Expert Report before the Inter-American Court of Human Rights on the jurisdictional application of Decree Law 2191 on Amnesty, from April 19, 1978)* 12 REVISTA IUS ET PRAXIS, 275 (2006) (Chile).

⁹⁷ ROHT-ARRIAZA, *supra* note 87.

⁹⁸ *E.g.*, FERNÁNDEZ, *supra* note 65, at 474-75.

complaints had been lodged against [Pinochet] in national courts by the time of his return.”⁹⁹ This increase in cases and complaints began the investigative process leading to more sentences down the line. Collins traces “a link between modest post-1998 accountability success and ‘demand inflation’ in the increased number and variety of legal challenges and strategies.”¹⁰⁰ The increase in filings against Pinochet and other high-ranking military officials is evidence of the weakening of Pinochet’s image – he went from being untouchable to being vulnerable.

D. *Mesa de Diálogo and the Human Rights Programa*

The fourth explanation for the sentencing shift involves the later development of the human rights roundtable discussion and the government’s human rights program. In mid-2000, the Chilean government organized a human rights roundtable (*Mesa de Diálogo*) where human rights activists and military officials attempted to negotiate a solution to the increased calls for accountability. The Mesa was a political failure, in part because it was derailed by Pinochet’s return to Chile, but it also led to some increased judicial activism and public accountability. The Mesa’s final agreement requested passing more human rights cases to *Ministros en Visita*, and while only two new judges were named, the agreement reinforced the value of these *Ministros*.¹⁰¹ These judges, who had been in place since the 1997 judicial reform, were focused on investigating human rights cases and thus progressed much more rapidly. The Mesa passed along their results, even incomplete, to the *Ministros en Visita* and thus contributed to both new and ongoing investigations.¹⁰² The Mesa was also evidence that political solutions were going nowhere, which prompted some judges to be more proactive. The human rights lawyers, both those who participated and those who did not, were, arguably, inspired to try new legal avenues and push for justice. The Mesa also meant a lot of publicity and media attention, which reinforced public accountability efforts.¹⁰³

The Mesa also helped strengthen of the Ministry of the Interior’s Human Rights Program (Programa de Derechos Humanos). The Programa developed in 1997 and was tasked mostly with investigating the

⁹⁹ COLLINS, *supra* note 8, at 85.

¹⁰⁰ *Id.* at 114.

¹⁰¹ FERNÁNDEZ, *supra* note 65, at 475.

¹⁰² *See also*, COLLINS, *supra* note 8, at 89-90.

¹⁰³ Huneus cites judges who “seized the media’s sustained coverage of the cases as another stage for performing acts of penitence and for influencing public opinion in support of Pinochet-era prosecution and a judicial apology.” ALEXANDRA HUNEEUS, *Judging from a Guilty Conscience: The Chilean Judiciary’s Human Rights Turn*, 35 LAW & SOC. INQUIRY 99, 119-20 (2010).

disappeared.¹⁰⁴ The strengthening of the Programa enabled it to bring criminal cases from the Rettig truth commission report and its own investigations.¹⁰⁵ In 2001, the Programa was renamed again after the Mesa and began to take on more cases and have more resources. The strengthening of the Programa, Huneus argues, was associated with the fallout of Pinochet's arrest in London and led to the government becoming more involved as a "helping party" in cases and contributing funding to judicial investigations.¹⁰⁶ The Programa attracted human rights lawyers creating a productive legal environment to respond to the dictatorship-era cases. By 2003, "the Programa had transformed itself from a worthy but essentially secondary institution housing records and tracing remains, to one in the front line of accountability."¹⁰⁷ A 2009 law expanded the Programa's case universe to include executions, and not just disappeared persons.¹⁰⁸ Also, the cases were able to progress further and faster with resources and investigation assistance from the Programa.

V. INTERNATIONAL LAW AND INTERNATIONAL PRESSURE

The increasing application of international treaties paralleled, and was a critical part of, the broader shift to sentencing of human rights violations. Huneus argued that the shift toward sentencing stemmed from the Chilean judges wanting to redeem themselves: that within the post-London period of public scrutiny, judges began to prosecute more human rights violations as a way to make up for their prior passivity.¹⁰⁹ For Huneus, the international pressure that accompanied Pinochet's arrest provided an opportunity for reform-minded judges. This section argues that international treaties themselves provided the necessary tool for judges. The international human rights treaties played a central role in enabling the sentencing shift by providing the legal key for overcoming roadblocks to justice, such as the Amnesty Law and statutes of limitations.

This section also argues that the growing acceptance of international law in Chilean courts depended on the growing global application of these same human rights treaties. While a 1989 constitutional amendment incorporated human rights treaties into the Constitution, some Chilean judges noted in interviews that human rights treaties were still relatively unknown at this time. First, the British House of Lords applied international

¹⁰⁴ COLLINS, *supra* note 8, at 81.

¹⁰⁵ *See id.* at 90.

¹⁰⁶ HUNEEUS *supra* note 103, at 106.

¹⁰⁷ COLLINS, *supra* note 8, at 113.

¹⁰⁸ Interview with Fransisco Ugás Tapia, Exec. Sec., Human Rights Program, Ministry of the Interior, in Santiago, Chile (July 23, 2015).

¹⁰⁹ HUNEEUS, *supra* note 103, at 124-25.

law in questions of Pinochet's extradition and then the Inter-American Court of Human Rights applied international law in finding Chile in violation. This international pressure provided examples of the application of international human rights treaties to the Chilean case and provided a model judges could follow.

A. *Treaty Awareness*

Lawyers and judges who worked during the dictatorship noted that international law was not well known at the time. The weaker profile of treaties in the early transition years is one reason that it took much longer for judges to begin using international law, despite having challenged the blanket application of the Amnesty Law within the first few years after democracy.¹¹⁰ For example, one judge explained, “. . . it has been a process after the opening of democracy, getting to know the international treaties and human rights materials in the universities and in the armed forces. It has been a gradual effort that is bearing fruit.”¹¹¹ For younger lawyers working now, the universities do teach international law but still on a more theoretical basis without actual case analysis.¹¹² An increasing awareness of international treaties and their applicability in Chile has come about through judicial reform and increasing globalization.

The lawyers and judges who took risks with the novel application of international law often had a more international background, which primed them to recognize and apply treaty norms. One Vicaría lawyer's argument in the early military tribunal attempt (Fach 1-73) to apply the Geneva Conventions acquainted other lawyers with the idea that the treaties were applicable.¹¹³ The lawyer behind Fach 1-73 had been educated in the United States and thus had greater awareness of international law norms.¹¹⁴ Not just the lawyers, but many of the judges who were early adopters of international law “have either studied or lived in other countries or have participated in extrajudicial activities that connected them to colleagues elsewhere and allowed a process of mutual enrichment to take place.”¹¹⁵ As one lawyer

¹¹⁰ E.g., Corte Suprema de Justicia (C.S.J.) (Supreme Court), 4 septiembre 1991, “Caso de Agustín Martínez Meza,” Rol de la causa: 3518-1991 (revoking the case dismissal and instead applying a temporary stay to better identify the perpetrators) (Chile); Corte Suprema de Justicia (C.S.J.) (Supreme Court), 4 septiembre 1995, “Caso Eugenia Martínez Hernández,” Rol de la Causa: 5661-1995 s., desaparición, (returning the case to the summary stage to be able to investigate) (Chile). See also, MATUS ACUÑA, *supra* note 96, at 275.

¹¹¹ Cisterna, *supra* note 26.

¹¹² Ugás, *supra* note 108.

¹¹³ Contreras, *supra* note 4.

¹¹⁴ *Id.*

¹¹⁵ ROHT-ARRIAZA, *supra* note 87, at 215.

explained, globalization had an important effect in sharing information regarding treaties, jurisdiction from other states and international tribunals.¹¹⁶ During the dictatorship, judges and lawyers often had to have studied or worked abroad to have access to information and education about international law. But in recent decades, the exchange of information has been much easier and has brought a correspondingly greater awareness of use and application of international law.

Further, over the decades since the coup, international law has grown in prominence and application. There have been more human rights treaties and more examples of their application in domestic, transnational, and international cases. The International Criminal Tribunal for Yugoslavia was established in 1993,¹¹⁷ the International Criminal Tribunal for Rwanda opened in 1995,¹¹⁸ and the International Criminal Court's Rome Statute was adopted July 1998.¹¹⁹ One Appeals Court judge mentioned that the increasing prominence of international tribunals helped define the field of international criminal law and that Chilean courts followed and learned from their decisions.¹²⁰ The development of these courts exemplifies the growing prominence of international criminal law and treaty jurisprudence, especially for crimes against humanity. The transnational cases, most of which arose in Europe and many dealing with events that occurred in the Southern Cone, also marked an increase in application and understanding of international treaty law.¹²¹ For example, in an extradition case from Mexico to Spain of an Argentine torturer, a judge "who knew extradition law but not international law, began a crash course."¹²² Chilean judges and lawyers, too, had to master international law to participate in and respond to the increasing application of human rights treaties.

B. Constitution Article 5.2

Beyond the general growth and development of international law globally, international law was officially incorporated domestically in Chile

¹¹⁶ Ugás, *supra* note 108.

¹¹⁷ UNITED NATIONS, International Criminal Tribunal for the former Yugoslavia, <http://www.icty.org/> (last visited Aug. 22, 2015)

¹¹⁸ UNITED NATIONS, International Criminal Tribunal for Rwanda, <http://www.unictr.org/en> (last visited Aug. 22, 2015)

¹¹⁹ INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/EN_Menu/ICC/Pages/default.aspx (last visited Aug. 22, 2015); *see* SIVAKUMARAN, *supra* note 25 at 488 (noting that after the ICTY, ICTR, and ICC, states began enacting domestic legislation to criminalize breaches of international humanitarian law).

¹²⁰ Zepeda, *supra* note 53.

¹²¹ ROHT-ARRIAZA, *supra* note 87.

¹²² *Id.* at 147.

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as well. In 1989, Chile amended Article 5.2 of the Constitution to explicitly include international treaties:

The exercise of sovereignty recognizes as a limitation the respect for the essential rights, which emanate from human nature. It is the duty of the organs of the State to respect and promote those rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force.¹²³

This second sentence, which was not in the 1980 Constitution, was an important legal change tying domestic recognition of human rights to international law. The 1980 Constitutional Committee had rejected this very idea because they argued human rights treaties did not accurately describe and list the fundamental natural human rights the Committee wanted to protect.¹²⁴ Remarkably though, Pinochet's ruling military junta proposed the 1989 Amendment adding the language about treaties.¹²⁵

Article 5.2 gave international treaties constitutional status, but the interpretation and application took years. As one Supreme Court Judge explained, "At the beginning Article 5 was something vague and no one knew exactly what would happen. Then came university articles about the extent of Article 5. . .it was a discussion until the jurisprudence began following this path."¹²⁶ Once treaties had constitutional status, the Court began to address conflicts between internal and international law. For example, another Supreme Court Judge explained that the Constitutional change was key, but took time to become part of judicial practice: "someone discovered that in 1989 they had passed Article 5.2 and could apply the conventions and uncover the idea of crimes against humanity."¹²⁷ In this understanding, the Court first accepted that recent treaties, such as the ICCPR and ACHR were law, but that their application was still limited by the fact that they had been ratified after the dictatorship crimes. As this same judge explained, the Court eventually concluded that the atrocities and

¹²³ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE (C.P.) art. 5, *available at* https://www.constituteproject.org/constitution/Chile_2012.pdf (emphasis added).

¹²⁴ *Historia de la Constitución Política, Art. 5. 1.11*, Sesión No 54 del 16 de Julio de 1974. P. 57; *see also, Historia de la Constitución Política Art. 5. 1.9* Sesión No 48 del 25 de junio de 1974. P.28 (Chile).

¹²⁵ *Historia de la Constitución Política, Art. 5. Proyecto Ley. Ley No 18.825. 1.1* Proyecto de Ley. 01 de junio 1989. Boletín No 1086-16. P.74-78 (Chile). The Article 5 amendment was part of a negotiated pack of 54 reforms approved to enable the transition to democracy. Nogueira, *supra* note 91.

¹²⁶ Cisterna, *supra* note 26.

¹²⁷ Interview with Hugo Dolmetsch, Ministro de la Corte Suprema, in Santiago, Chile (July 21, 2015).

obligations codified in the treaties had long existed as crimes and thus there was no *ex post facto* issue.¹²⁸

The next big question the Court had to address was to define exactly which rights were incorporated. While the new article language explicitly mentioned international treaties, it left issues of customary international law and *jus cogens* up for debate. Many constitutional law scholars felt the language on natural rights meant an interpretation broader than just treaties, which would also incorporate these other sources of international law.¹²⁹ Another issue confronting courts was whether to apply domestic or international law when they conflicted, for example on statutes of limitations. One response used the Vienna Convention on the Law of Treaties, which codifies the obligation to obey treaties in good faith and says that internal law cannot displace treaty obligations.¹³⁰ Other responses find primacy: “international law in general, and treaties in particular, have preeminence over internal juridical order” and prevail in cases of conflict.¹³¹ As one lawyer explained, Article 5.2 meant that treaties guaranteeing fundamental rights were given supra-legal status, putting them at a level above regular laws.¹³² As this discussion shows, while the incorporation of international treaties into the Chilean Constitution became key for the application of international law, judges still had to define the interactions between treaties and domestic law, thus requiring a greater knowledge base of international law, as discussed above, and also benefitting from the example of other courts.

C. Pinochet’s Arrest and International Law

The key legal issues underlying the Pinochet affair in London depended on the application of international law, and thus raised the profile of international human rights treaties throughout the Southern Cone and with Chilean judges. One lawyer explained the judicial “opening is a result of *international* justice and *international* pressure.”¹³³ The application of international law by the British and Spanish courts played a critical role in increasing domestic awareness of the applicability of international laws. As Roht-Arriaza argues in her book *THE PINOCHET EFFECT*:

The Spanish case and the wide international publicity it

¹²⁸ *Id.*

¹²⁹ Gáldamez, *supra* note 14. Nogueira, *supra* note 91.

¹³⁰ Nogueira, *supra* note 91.

¹³¹ Hernán Quezada, Informe en Derecho, ¶ 59 (Dec. 2003) (unpublished manuscript) (on file with author).

¹³² *Id.* at ¶ 52.

¹³³ COLLINS, *supra* note 8, at 134 n.189 (quoting Fabiola Letelier, italics in original).

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generated also changed the Chilean polity's and judiciary's view of international law. The Chilean legal tradition is Napoleonic, relatively closed to new influences and ideas. Judges had paid little attention to treaties and treaty bodies. With the detention of Pinochet in London, international law assumed a flesh-and-blood reality, capable of frustrating the will of the most powerful person in the country.¹³⁴

The Spanish and British courts had to address some of the same treaty application issues that would come to face the Chilean courts, such as retroactivity and double jeopardy, and thus their decisions helped pave the way through both global expectations of justice and the practical application of international law to Pinochet and his human rights violations. The later decisions by Chilean judges adopted many of the same legal arguments accepted by the British House of Lords, showing that the decisions in the UK contributed to the adoption of international human rights treaties by the Chilean Supreme Court. This shift was part of a general increase in prominence of international law, but more specifically, these courts addressed the same issues around Pinochet that the Chilean Courts later had to address.

The international nature of the arrest and the associated increase in international attention contributed to Chilean judges beginning to sentence human rights violators. The fact that European courts could accomplish what the Chilean courts could not put pressure on judges to represent their country in front of the eyes of the world. This "Garzón effect" supposedly convinced Chilean judges that decisive progress on accountability could be rewarded, while its continued glaring absence might fatally compromise Chile's international standing. Most domestic commentators certainly consider that the UK arrest and its aftermath increased the determination of the Chilean judicial system to show that it could deal with Pinochet and other outstanding accountability issues "in-house."¹³⁵ A Chilean Supreme Court judge agreed that the international pressure was definitely a factor.¹³⁶ The Pinochet arrest created a firestorm of public and media attention, which empowered individual judges and "suspended business as usual" and thus enabled judges to air anti-Pinochet views without as much fear.¹³⁷ Huneeus argues that the prosecutorial shift had two prongs in that "judges came to understand the judiciary as stained by its past, and to view the prosecutions as a means toward redemption" and that the post-Pinochet public scrutiny

¹³⁴ ROHT-ARRIAZA, *supra* note 87, at 86.

¹³⁵ COLLINS, *supra* note 8, at 143.

¹³⁶ Cisterna, *supra* note 26.

¹³⁷ HUNEEUS *supra* note 103, at 125.

provided an opportunity to push human rights prosecutions forward.¹³⁸ Chilean judges cared about international legitimacy and the international media attention contributed to a feeling among judges that they needed to represent Chile's ability to do justice before the world's eyes and the world's courts.

D. Inter-American Court Decisions

Inter-American Court (IACHR) decisions, specifically those that found Chile in violation of treaty norms, increased the prominence and application of international law. One judge explained that to understand the development of Chilean human rights jurisprudence, "...you have to study the IACHR cases as the clearest thing that guides us."¹³⁹ The increasing prominence of international institutions, and increasing familiarity with the treaties "made judges more amenable to using international law in their own courts."¹⁴⁰ The Latin American nature of the IACHR decisions brought international human rights law into the region more directly than some of the other international tribunals and decisions. The Inter-American Commission and the Organization of American States investigated and reported on human rights violations during the dictatorship, but the Pinochet regime was not particularly receptive. In particular, the 2006 case of *Almonacid-Arellano et al. v. Chile* marked a change in the jurisprudence of the Chilean Supreme Court.¹⁴¹ Notably, before reaching the Inter-American system, the Chilean Supreme Court accepted a finding of amnesty in this case and rejected an appeal based on the fact that the statute of limitations had run, closing the case in November 1988.¹⁴² In *Almonacid-Arellano*, the IACHR held that murder was a crime against humanity and a violation of international law during the dictatorship and thus could not be subject to amnesty nor a statute of limitations because of the duty to investigate and punish.¹⁴³ The *Almonacid-Aerellano* case was decided in September 2006 and, by December 2006, the Chilean Supreme Court was citing that decision in defense particularly of the idea that crimes against humanity have no statute of limitations:

The Inter-American Court has had the opportunity to pronounce

¹³⁸ *Id.* at 111-12.

¹³⁹ Zepeda, *supra* note 53.

¹⁴⁰ ROHT-ARRIAZA, *supra* note 87, at 216.

¹⁴¹ Nogueira, *supra* note 91.

¹⁴² *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶82 (Sep. 26, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf

¹⁴³ *Id.* at ¶99, ¶114, ¶151

on the issue of the inapplicability of statutes of limitations to war crimes and crimes against humanity, in numerous sentences, for example in the cases Velásquez Rodríguez; Godínez Cruz y Blake, and most importantly in the recent *Almonacid Arellano* and others versus Chile, where explicitly the court recognizes that homicide committed by state agents against the person of Mr. Luis Alfredo Almonacid Arellano, as a crime against humanity, adding the prohibition against committing this class of crimes is a jus cogens norm and the penalization of these crimes is obligatory under international law.¹⁴⁴

The fact that the Chilean Court cited the Inter-American Court decisions so thoroughly, and so soon after the decision came down, shows that the judges were paying attention to the IACHR and incorporating those legal interpretations into domestic decisions.¹⁴⁵ Even further, as one scholar said, the Chilean Supreme Court faced that “juridical obligation to comply with some part of the *Almonacid-Arellano* decision from the perspective that these decisions in practice constitute something already interpreted and thus not only applicable to the case at hand but also to cases that are identical in terms of crimes against humanity.”¹⁴⁶ The IACHR decisions finding Chile in violation were part of the international pressure and attention seen in the Pinochet affair, in which world opinion came down against Chile and its courts. Again, both IACHR decisions and the Pinochet affair in London were examples of the application of international human rights treaties to the cases at hand in Chile and thus provided an example to Chilean judges on how to apply these treaties.

VI. CONCLUSION

Chile’s recent justice for human rights violations committed during the dictatorship provides many lessons for other countries dealing with internal disruptions. From the *Vicaría* and the legal efforts during the dictatorship comes the power of documentation and of not giving up. Many critics at the time accused the lawyers of playing the dictatorship’s game and just

¹⁴⁴ Corte Suprema de Justicia (C.S.J.) (Supreme Court), 13 diciembre 2006, “Caso Paulino Flores Rivas y Otros,” Rol de la causa: 559/2005 s., delito de homicidio premeditado (Chile) (internal citations removed).

¹⁴⁵ *But cf.* Alexandra Huneeus, *Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 112, 120-23 (Javier Couso, Alexandra Huneeus, & Rachel Sieder eds.) (2010) (arguing that the Supreme Court’s incorporation of *Almonacid* was part of a broader trend).

¹⁴⁶ Nogueira, *supra* note 91.

repeating *recursos de amparo* endlessly.¹⁴⁷ But, history has shown the power of the original documentation, as these documents form the basis of lawsuits that are still going on today. From the junta's decision to declare a state of internal war comes a lesson for other governments who declare states of emergency: Chile has shown that a de jure state of war is sufficient for application of the Geneva Conventions, even if there was no de facto civil war. From Pinochet's arrest in London and the repercussions on transitional justice comes the power of international pressure and the importance of international law. Or, as one lawyer said, "[T]oday I would not recommend to any person to be a dictator because there's going to be a later day and it's going to end badly."¹⁴⁸ From the application of IACHR decisions comes an example of the benefit and value of international courts. From the application of international human rights law, including treaties and jus cogens, comes a new way to solve legal roadblocks and bring about justice. Overall, the real lesson is that in this day and age, human rights violators will be brought to justice for violation of norms as codified in international human rights treaties, independent of their legal system.

¹⁴⁷ Contreras, *supra* note 4.

¹⁴⁸ Garretón, *supra* note 23.