

# NUNCA MÁS MEETS #NIUNAMENOS— ACCOUNTABILITY FOR PINOCHET-ERA SEXUAL VIOLENCE IN CHILE

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## ABSTRACT

Chile has been held up as a transitional justice success story. Emerging from a repressive dictatorship to democracy, it has made meaningful progress in grappling with brutal human rights violations through truth commissions and, more recently, criminal trials. Yet, the Chilean human rights prosecutions have a glaring hole. Courts have convicted scores of state agents for enforced disappearance, execution, and torture (or their equivalents in Chilean law at the time), but have failed to meaningfully address sexual violence crimes, even though almost all women detained by the regime were victims of some form of sexual violence, and many were raped. Recent, however, the issue seems to be gaining more judicial attention.

This Article explores the question why it has taken so long for Chilean courts to reach the issue of dictatorship-era sexual violence. The reasons include the “pacted” Chilean transition, deficiencies in Chilean criminal law and procedures on sexual violence, lack of resources for sexual violence prosecutions, normalization of violence against women, and the reluctance of survivors to come forward when the likelihood of success was exceedingly low. The Article also examines the confluence of cultural and legal forces—perhaps most importantly, feminist mobilization and greater judicial openness to

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international norms—that have given rise to recent attempts to litigate sexual violence. Ultimately, it seeks to draw lessons from the Chilean transitional justice experience for future domestic prosecutions for sexual violence in the context of mass atrocities.

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## INTRODUCTION

In the world of transitional justice, Chile is considered something of a success story.<sup>1</sup> The country transitioned from a brutally repressive dictatorship to a democracy, and Chile has attempted to grapple with its legacy of grave human rights abuses through truth commissions and, more recently, trials. Chilean courts have seen a massive wave of cases involving human rights violations committed during the country's dictatorship, which spanned 1973 to 1990. Some 1,500 criminal cases based on dictatorship-era human rights abuses are making their way through the courts, with roughly 350 convictions so far.<sup>2</sup>

Still, the Chilean justice system's massive human rights reckoning has overlooked some important matters. While the courts have adjudicated many cases of disappearance, homicide, and, more recently, torture, the human rights prosecutions have largely ignored the issues of sexual and gender-based violence. Although judgments have occasionally mentioned sexual violence in passing, there has not

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1. See, e.g., *Human Rights 'Success Stories' Shared at the UN to Serve as Example, and Inspire Others*, UN NEWS (Sept. 27, 2018), <https://news.un.org/en/story/2018/09/1021172> [<https://perma.cc/NBP5-5GRS>] (discussing former Chilean president Michelle Bachelet's speech to the UN on recent human rights advances, including in Chile); Marny A. Requa, *A Human Rights Triumph?: Dictatorship-Era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79, 79–80, 106 (2012) (noting that Chile has received a lot of attention for its accountability efforts relating to dictatorship-era human rights violations, but cautioning that political support is necessary to achieve "consistent and comprehensive accountability").

The perception of Chile's success may be shifting. As this article goes to print, the Chilean government has been criticized for human rights violations in the wake of massive protests over inequalities.

2. See *Procesos en Chile*, EXPEDIENTES DE LA REPRESIÓN (2019), <http://expedientesdelarepresion.cl/procesos-en-chile/> [<https://perma.cc/6QY6-R6PG>] (Chile) (stating that there are around 1,500 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 human rights crimes. Another 18 detainees died during their time in detention. JUAN JOSÉ OSSA SANTA CRUZ, MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, RESPONDE REQUERIMIENTO DEL H. DIPUTADO SR. OSVALDO URRUTIA SOTO, ORD. NO. 5081, anexo 1–2 (Aug. 22, 2018) (Chile) (on file with author).

been a single criminal conviction for rape or other crimes of sexual violence.<sup>3</sup>

There are some signs that courts may finally turn their attention to sexual violence. Over the past decade, survivors of sexual violence have filed complaints focusing on the sexual violence perpetrated by state agents. 2018 marked the first time the Supreme Court of Chile (and possibly any court in Chile) recognized rape as a crime against humanity, albeit in a civil case for damages against the Chilean state.<sup>4</sup> Moreover, in April of 2019, nine state agents were convicted of “aggravated kidnapping with a sexual connotation,” in a decision that emphasized the sexual violence aspects of the case.<sup>5</sup>

This Article explores the reasons for the delay in justice for dictatorship-era sexual violence in Chile and the implications for transitional justice efforts. It relies on Chilean legal filings (criminal complaints,<sup>6</sup> decisions, and judgments) in human rights prosecutions. Given the scant reference to sexual violence in legal documents, however, the Article also relies extensively on original research, particularly information gathered in recent interviews of Chilean human rights lawyers, judges, activists, and academics. These interviewees include human rights judges tasked with hearing first instance human rights cases related to the dictatorship in different regions of the country (“Ministros de Visita”), as well as justices of the Supreme Court of Chile with extensive experience in human rights cases.<sup>7</sup>

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3. The closest courts have come is with Minister Mario Carroza’s April 2019 conviction of several state agents for “aggravated kidnapping of a sexual connotation.” See *infra* notes 104–109 and accompanying text.

4. See *infra* Part II.B.

5. See *infra* Part II.C.

6. In Chile, as in many civil law systems, private citizens can initiate a criminal prosecution via a complaint (“querrela”).

7. The specialist human rights judges are based in the capitol, as well as in different cities in different regions of Chile. The Supreme Court is based in Santiago, Chile. See generally *Corte Suprema de Chile*, PODER JUDICIAL REPÚBLICA DE CHILE, <http://www.pjud.cl/corte-suprema> [https://perma.cc/54L6-C3Q2] (providing the address of the court and listing the justices). One Supreme Court justice interviewed spoke generally about the Chilean prosecutions for human rights violations that occurred during the dictatorship, but not about the issue of sexual violence. Interview with SC3, Justice, Supreme Court of Chile, in Santiago, Chile (Mar. 20, 2018), Name removed to protect confidentiality; interview; notes on file with the author.

The Chilean experience with judicial treatment of dictatorship-era sexual violence warrants exploration. First, it offers a useful lens through which to assess the Chilean transitional justice experience, a subject that in and of itself is worthy of attention. Chile has engaged in extensive efforts to address the gross human rights abuses of the dictatorship, including truth commissions and hundreds of criminal cases. The success or failure of the Chilean transitional justice efforts must take into account blind spots and efforts to overcome them. At least up until very recently, justice for victims and survivors<sup>8</sup> of sexual violence has been one of those blind spots. Second, in recent years, accountability for sexual and gender-based violence has been one of the central aims of international criminal justice and, in particular, of the prosecutor of the International Criminal Court (ICC).<sup>9</sup> Due to resource constraints and the ICC's "complementarity" model, whereby the ICC acts as a fallback only if domestic jurisdictions fail to address international crimes, domestic judicial systems' responses to sexual and gender-based violence are crucial to the ICC's success in meeting this goal of accountability. Thus, the Chilean experience with prosecutions for sexual violence offers insight into the challenges of domestic accountability processes for sexual violence and how the international community can support domestic accountability processes.

The Article proceeds as follows: Parts I and II explain the landscape of dictatorship-era sexual violence and the attempts to prosecute people for sexual violence. Specifically, Part I situates sexual violence in historical context and delineates the Chilean transitional justice trajectory. Part II discusses recent attempts to take allegations of sexual violence to the Chilean courts. Part III explores reasons for

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8. This article sometimes uses the term "victims" and sometimes "survivors." I realize that there is controversy surrounding this language choice in the context of sexual violence. Sometimes I use the term "victim" because the victim of the crime did not, in fact, survive. In other instances, I use the term "victim" when speaking of the person's being a victim *of a crime*. In most other instances, I use the term "survivor."

9. See INT'L CRIMINAL COURT: OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 5, 42 (June 2014), <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [<https://perma.cc/59C7-XG7Q>] (describing the elevation of the goal of achieving justice for sexual and gender-based crimes to a "key strategic goal"); see also Caroline Davidson, *Rape in Context: Lessons for the United States from the International Criminal Court*, 39 CARDOZO L. REV. 1191, 1218 (2018) (describing the ICC Prosecutor's decision to prioritize the prosecution of sexual and gender-based crimes).

the delay in judicial attention to sexual violence. It suggests that a variety of factors likely gave rise to the delay, including the nature of the Chilean transition to democracy, the focus on locating the disappeared, cultural and legal barriers, and a lack of resources to assist survivors in bringing claims. Part IV explores possible reasons for the recent attention to dictatorship-era sexual violence in Chile, which include shifting views on violence against women, increased receptivity of Chilean courts to international law, and political mobilization of feminist groups and survivor groups. Part V examines implications of the Chilean transitional justice experience with respect to sexual violence. It argues that cultural and social forces, including feminist mobilization in Latin America, have played a critical role in putting sexual violence on the front burner. Part V also offers suggestions on how to support domestic accountability efforts for sexual violence, including improved investigations targeting sexual violence, resources for prosecution of sexual violence, and increased access of domestic legal actors to international norms.

## I. BACKGROUND

Although space constraints preclude detailed treatment, this Part attempts to offer some context for recent Chilean litigation for dictatorship-era sexual violence. It provides a brief background on the Pinochet regime and its systematic and rampant use of sexual violence as a repressive mechanism, subsequent Chilean attempts to address human rights violations committed during the dictatorship, and the current (nascent) state of prosecutions for sexual violence.

In 1970, Chile elected the Socialist doctor Salvador Allende president. Allende, building on the work of his predecessors, engaged in massive labor and economic reforms, including the nationalization of a number of industries. These measures proved highly divisive and earned Allende the antipathy of the Chilean right and much of the center. Thanks in part to concerted efforts by the United States to undermine Allende's government,<sup>10</sup> Chile went through a serious

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10. The United States was very concerned about the election of a Marxist leader in South America and feared that it could lead to the spread of communism in the region. PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* 23, 46–47 (1991).



economic crisis.<sup>11</sup> At the same time as Chile was undergoing economic and labor reform, it saw the advent of the women's liberation movement.<sup>12</sup> This development likewise worried Chilean conservatives who wished to retain the traditional, patriarchal family structure in the very Catholic country.<sup>13</sup>

On September 11, 1973, a U.S.-backed military junta forcibly ousted Allende.<sup>14</sup> Soon, Augusto Pinochet became the dominant figure of the junta.<sup>15</sup> He remained in power until 1989, when Chile held a referendum and voted for a return to democracy. In the immediate wake of the 1973 coup, the new government rounded up hundreds of members of the Allende government, socialists, communists, union leaders, student leaders, and others believed to have leftist leanings that threatened the new regime.<sup>16</sup> Many were executed. Others were sent into exile.<sup>17</sup> Still others were taken to detention and extermination centers. In 1974, the junta formally created the Dirección Nacional de Inteligencia (known as the DINA), which was tasked with ridding the country of those the regime deemed enemies.<sup>18</sup> The majority of the violence occurred in the first few years of the dictatorship, but the regime continued to use arbitrary detention, enforced disappearance,

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11. See generally *id.* at 25–27, 166–67 (describing government mismanagement, food shortages, inflation, and an economy “spinning out of control”).

12. FUNDACIÓN INSTITUTO DE LA MUJER, CORPORACIÓN LA MORADA, INFORME DE INVESTIGACIÓN: LAS MUJERES VICTIMAS DE VIOLENCIA SEXUAL COMO TORTURA DURANTE LA REPRESIÓN POLÍTICA EN CHILE 1973–1990: UN SECRETO A VOCES 20–22 (2004) (Chile) [hereinafter SECRETO A VOCES].

13. See *id.*

14. See generally CONSTABLE & VALENZUELA, *supra* note 10, at 15–20, 29–39, 51 (describing the coup and the United States's support for it).

15. *Id.* at 64–69.

16. *Id.* at 29–39.

17. *Id.* at 149–52.

18. *Id.* at 90–114; see also REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 75–88 (Phillip Berryman trans., 1993) (1991), [https://www.usip.org/sites/default/files/resources/collections/truth\\_commissions/Chile90-Report/Chile90-Report.pdf](https://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf) [<https://perma.cc/72CS-HXSF>] [hereinafter Rettig Report] (describing the creation and repression of the DINA, its counterinsurgency and “virulent anticommunism,” and its eventual replacement by the CNI); COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA, INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA (VALECH I) 213–17 (2004) (Chile), <https://bibliotecadigital.indh.cl/handle/123456789/455> [<https://perma.cc/6L8P-XLVS>] [hereinafter Valech Report] (describing the repression during the period of January 1974 to August 1977, in which the DINA was a critical player).

political executions, torture, and sexual violence as tools of repression throughout its existence.<sup>19</sup>

Feminists have argued that the junta sought not only to thwart the spread of leftist ideologies and Marxism, but also to restore traditional gender roles. According to *Secreto a voces*, a report prepared by the Fundación Instituto de la Mujer, Corporación La Morada, the dictatorship valued women only as mothers and spouses, and those who transgressed this “natural gender order” would be “executed, tortured and sexually assaulted.”<sup>20</sup> The report contends that the regime’s aim was destruction of the woman’s identity and, in turn, “the model of the political woman, doubly subversive.”<sup>21</sup>

Some 40,000 people were arbitrarily detained and tortured during the Pinochet regime, and many raped or sexually abused.<sup>22</sup> The report of the National Commission on Political Imprisonment and Torture, known as the “Valech Commission,”<sup>23</sup> noted that, of the 3,399 women the Commission interviewed, almost all had been subjected to sexual violence.<sup>24</sup> Some 316 women informed the Commission that they

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19. See Rettig Report, *supra* note 18, at 155–65, 632–39; see also SECRETO A VOCES, *supra* note 12, at 26 (“La política represiva se ha dividido en la bibliografía chilena . . . 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.”).

20. SECRETO A VOCES, *supra* note 12, at 25; see also *id.* at 39 (“En el discurso de la dictadura las mujeres son alabadas exclusivamente en tanto madres y esposas. Las otras, las detenidas, serán ejecutadas, torturadas y violentadas sexualmente, por el solo hecho haber trasgredido el orden natural de los géneros . . .”). All English translations are my own, except where otherwise noted.

21. *Id.* at 39 (“La violencia emanada desde el aparato estatal-militar se orientaba a la destrucción de la identidad que representaba una amenaza para su existencia y dentro de éste, del modelo de mujer/política, doblemente subversiva.”).

22. *Chile Recognises 9,800 More Victims of Pinochet’s Rule*, BBC (Aug. 18, 2011), <https://www.bbc.com/news/world-latin-america-14584095> [<https://perma.cc/D75L-MGKE>] (noting that the “new figures bring the total of recognised victims to 40,018”).

23. Decree No. 1040 art. 1, Crea Comisión Nacional sobre Prisión Política y Tortura, para el Esclarecimiento de la Verdad acerca de las Violaciones de Derechos Humanos en Chile, Septiembre 26, 2003, DIARIO OFICIAL [D.O.] (Chile) (“Créase . . . una Comisión Nacional sobre Presión Política y Tortura, . . . que tendrá por objeto exclusivo determinar . . . 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 . . .”).

24. Valech Report, *supra* note 18, at 252. A later report, *Secreto a voces*, concluded the same: “la tortura sexual contra las mujeres fue una práctica sistemática y generalizada por parte de los organismos represivos . . . . Todas las

had been raped in custody.<sup>25</sup> 229 of the women said that at the time of their detention they were pregnant, and eleven said they had been raped while pregnant.<sup>26</sup> As the Commission noted, these figures may well be artificially low because the Commission did not explicitly inquire into sexual violence and it was very difficult for many of the women to talk about it.<sup>27</sup> The methods were brutal: rape, through use of rats, dogs, and foreign objects; use of electrical currents on genitals and breasts; rape in front of family members; forced nudity; and forced abortion.<sup>28</sup> *Secreto a voces* concluded, based on extensive interviews of survivors, that “sexual violence was used in a systematic manner in all of the centers where there were women and it responded to the logic of torture applied in Chile.”<sup>29</sup> Women of all ages and backgrounds were targets of the sexual abuse.<sup>30</sup>

The regime used sexual violence against men as well, but the extent of the practice is difficult to gauge. All of the first instance human rights judges interviewed stated that they had seen evidence of

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mujeres que pasaron por centros de detención fueron víctimas de violencia sexual.” *SECRETO A VOCES*, *supra* note 12, at 41.

25. Valech Report, *supra* note 18, at 252.

26. *Id.* (reporting that twenty women miscarried due to torture and fifteen gave birth while in detention).

27. *Id.* (“Las entrevistas realizadas por esta Comisión no indagaron expresamente acerca de la violencia sexual ejercida contra las ex presas. Las situaciones que registran fueron mencionadas espontáneamente por las declarantes. Es necesario señalar que la violación sexual es para muchas mujeres un hecho del cual les cuesta hablar y muchas veces prefieren no hacerlo.”).

28. *SECRETO A VOCES*, *supra* note 12, at 28 (“El uso de animales formó parte de la tortura sexual utilizada contra las mujeres por la DINA. Se buscaba la degradación máxima de la víctima, que sintiera vergüenza de sí, de su propio cuerpo. Era, a juicio de las propias mujeres el peor de los castigos, la peor tortura.”); *see also* EVA PALOMINOS ET AL., *NOSOTRAS TAMBIÉN ESTUVIMOS EN 3Y4 ÁLAMOS: Y OTROS RELATOS*, 9–11, 18–19, 23, 58–59, 84, 88, 98–99 (Shaíra Sepúlveda & Lautaro Araneda Fornachiari eds., 2d ed. 2015) (Chile) (describing rapes and other sexual torture experienced at the clandestine torture centers, Villa Grimaldi and Venda Sexy, prior to being transferred to 4, a clandestine waystation for those awaiting transfer to recognized detention centers or execution, and 3 Álamos, an officially recognized detention center for political prisoners).

29. *SECRETO A VOCES*, *supra* note 12, at 27 (“[L]a violencia sexual se ejerció de manera sistemática en todos los centros donde había mujeres y que ésta respondió a la racionalidad de la tortura aplicada en Chile.”).

30. *Id.* at 43 (“Fueron objeto de violencia sexual mujeres de todas las edades, todos los estratos socio económicos, pertenecientes a étnias, embarazadas o no. Las violaciones fueron individuales y grupales. Los perpetradores actuaron solos o en grupo.”).

sexual violence directed against men.<sup>31</sup> However, Lorena Fries, the Sub-Secretary for Human Rights under President Michelle Bachelet and now Director of the feminist NGO Corporación Humanas, explained that it was different for men and women. She acknowledged that sexual violence was used against men sometimes as a method of torture, but for women it typically was used from the moment they entered a detention center to the moment they left.<sup>32</sup> Feminist survivors likewise contend that men were not subjected to sexual violence to the same extent as women.<sup>33</sup>

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31. Interview with Min. 1, First Instance Human Rights Judge/Judge of the Court of Appeals, in Chile (Nov. 2017); Interview with Min. 2, First Instance Human Rights Judge/Judge of the Court of Appeals, in Chile (May 2018); Interview with Min. 3, First Instance Human Rights Judge/Judge of the Court of Appeals, in Chile (June 2018); Interview with Min. 4, First Instance Human Rights Judge/Judge of the Court of Appeals, in Chile (July 2018); Interview with Min. 5, First Instance Human Rights Judge/Judge of the Court of Appeals, in Chile (July 2018). Names removed to protect confidentiality. Interview recordings and notes on file with the author. *See also* Rettig Report, *supra* note 18, at 638 (discussing the Venda Sexy and noting that “[t]orture methods were different from those elsewhere since the emphasis was on sexual humiliation. Rape and other sexual abuses by the guards and agents were common practice. The male prisoners were also subject to such abuses.”). Some have speculated that there is even greater underreporting of sexual violence against men during the dictatorship. *SECRETO A VOCES*, *supra* note 12, at 51.

32. *See supra* note 24 and accompanying text (discussing the Valech Commission’s finding that all women detained had been subject to sexual violence); Interview with Lorena Fries Monleón, President, Corporación Humanas, in Santiago, Chile (Mar. 29, 2018). Mirta Crocco, a social worker and social activist, explained that in the wake of the coup, when her former social work students came to her house and told her what happened to them:

All the female students had been raped! If the military suspected them of having been involved in any sort of revolutionary activity, they took them prisoner and raped and tortured them. It was so brutal and barbaric. I saw open sores on their breasts where many of the young women had been burned with cigarettes.

Mirta Crocco, *in* VOICES OF RESISTANCE: TESTIMONIES OF CUBAN AND CHILEAN WOMEN 145, 154 (Judy Maloof ed. & trans., 1999).

33. *See, e.g.*, MUJERES EX-PRISIONERAS POLÍTICAS DEL TERRITORIO DE CONCEPCIÓN Y SUS ALREDEDORES DENUNCIAN (on file with author) (“En general a todas las mujeres las desvestían primero, las desnudaban obviamente a la fuerza, no así a los hombres . . . La violencia sexual con diversas formas brutales las sufrieron mucho más las mujeres que los hombres, durante las detenciones, prisiones, centros de tortura.”); Beatriz Bataszew, Centro Cultural por la Memoria La Monche-Concepción, Aportes para la violencia política sexual 1 (on file with

After Chileans voted Pinochet out of office in a 1989 referendum, the newly-elected democratic government opted to address the regime's abuses through a truth commission. Given the fragile state of Chilean democracy—Pinochet remained the head of the armed forces and senator for life—and the close ties of the judiciary to the dictatorship, criminal trials were deemed to be out of the question.<sup>34</sup> President Patricio Aylwin convened the National Commission for Truth and Reconciliation, often referred to as the “Rettig Commission,”<sup>35</sup> charged with documenting serious human rights violations involving deaths and disappearances under the dictatorship.<sup>36</sup> The National Corporation for Reparations and Reconciliation (Corporación Nacional de Reparación y Reconciliación) continued this work. The Commissions together named 3,195 victims of execution and disappearance. Still, torture fell outside the purview of the Rettig Commission.<sup>37</sup> Fifteen years later, President Ricardo

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author) (“La violencia política desatada por el terrorismo de estado no fue vivida de la misma manera por hombres y por mujeres.”).

34. See Alejandra Carmona López, *Adiós, en la medida de lo posible*, EL MOSTRADOR (Apr. 18, 2016), <https://www.elmostrador.cl/noticias/pais/2016/04/19/adios-en-la-medida-de-lo-posible-2/> [<https://perma.cc/DQ4X-B4J4>] (Chile) (discussing President Aylwin's defense of this modest notion of justice, given the political climate of the time and the fear of the military again seizing power); Eduardo Parra, *Patricio Aylwin: en la medida de lo posible*, MEDIUM (Apr. 20, 2016), <https://medium.com/@EduParra/patricio-aylwin-en-la-medida-de-lo-posible-959682fc5baf> [<https://perma.cc/U9VB-5T2V>] (“Sin duda una de sus frases más recordadas y repudiadas fue la que emitió en una entrevista al El Mercurio en el año 1990 cuando dijo que ‘La conciencia moral de Chile exige que se esclarezca la verdad y que se haga justicia en la medida de lo posible.’”).

35. The President of the Commission was Raúl Rettig Guissen. See Decree No. 355 art. 3, Crea Comisión de Verdad y Reconciliación, Abril 25, 1990, D.O. (Chile); see also Cath Collins & Boris Hau, *Incremental Truth, Late Justice*, in TRANSITIONAL JUSTICE IN LATIN AMERICA 126, 128 (2016) (noting that the National Commission for Truth and Reconciliation is dubbed the “Rettig Commission” after the President of the Commission).

36. Decree No. 355 art. 1, Crea Comisión de Verdad y Reconciliación, Abril 25, 1990 (“Créase una Comisión Nacional de Verdad y Reconciliación que tendrá como objeto contribuir al esclarecimiento global de la verdad sobre las más graves violaciones a los derechos humanos cometidas en los últimos años . . . en el país.”). In English, the Commission was created “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.” *Supreme Decree No. 355*, in REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, *supra* note 18, at 24, 24–27.

37. Decree No. 355 art. 1, Crea Comisión de Verdad y Reconciliación, Abril 25, 1990.

Lagos created the Valech Commission on torture, which in turn recognized some 30,000 victims of political detention and torture.<sup>38</sup>

After the Rettig Commission concluded its work, the Commission sent its files to the courts, which left open the possibility of prosecution.<sup>39</sup> Not so for the Valech Commission on torture.<sup>40</sup> After Valech, the legislature passed a law making the Commission's records secret for fifty years.<sup>41</sup> The "Valech Secret," as it is known in Chile, remains a subject of intense debate.<sup>42</sup> Victims could request their own files for court cases, but until 2017, would be provided only their own statements, not any evidence or other statements related to their

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38. Valech Report, *supra* note 18, at 6.

39. Collins & Hau, *supra* note 35, at 129.

40. Interview with SC1, Justice, Supreme Court of Chile, in Santiago, Chile (June 26 & July 4, 2018). Name removed to protect confidentiality. Interview recording and notes on file with the author. *See also* Skype Interview with Rodrigo Lledó Vasquez, Lawyer & former Head of Legal Area, Human Rights Program of the Ministry of the Interior and Public Security (Apr. 3, 2018) ("[L]a gran diferencia entre Rettig y Valech . . . en Rettig se entregó todo a los tribunales. . . . En Valech . . . [quedó] secreto por 50 años.").

41. *See* Law No. 19.992 art. 15, Establece Pensión de Reparación y Otorga Otros Beneficios a Favor de las Personas que Indica, Diciembre 17, 2004, D.O. (Chile) (making the "documents, testimony, and facts" (other than the report itself) given to the Commission by victims secret for 50 years and noting that participants in the Commission were likewise precluded from divulging any such information and that disclosure of the same was a crime).

42. Isabel Caro, *El debate tras el secreto Valech*, LA TERCERA (Sept. 15, 2017), <https://www.latercera.com/noticia/debate-tras-secreto-valech/> [<https://perma.cc/4H2W-7FUM>] (Chile). According to one justice of the Chilean Supreme Court, there was a period of time where the Valech Commission could have sent files to courts, since the decision to keep the underlying evidence secret for 50 years was made after the report was issued. Interview with SC1, *supra* note 40; *see also* Branislav Marelic, *Historia legislativa del secreto de la Comisión Valech: El establecimiento del secreto de 50 años en los archivos de la comisión sobre prisión política y tortura*, LONDRES 38 (Aug. 2015), [http://www.londres38.cl/1934/articles-97310\\_recurso\\_1.pdf](http://www.londres38.cl/1934/articles-97310_recurso_1.pdf) [<https://perma.cc/6GGY-Y5QG>] (Chile) (noting that the law making Valech files secret was passed after the issuance of the report).

cases.<sup>43</sup> Efforts to lift the “Valech Secret” have met with little success to date.<sup>44</sup>

Prosecutions for human rights went nowhere for many years, but in 1998 things started to turn around. 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>45</sup> In January 1998, the Chilean communist party filed a criminal complaint against Pinochet in Chile and lawyers filed a series of complaints against Pinochet related to the Caravan of Death throughout that year.<sup>46</sup> The judge assigned to the case, Judge Juan Guzmán, engaged in a serious and sweeping investigation in the face of extreme political pressure and despite his own conservative background. The case eventually ended with the Court of Appeals deciding that Pinochet was unfit to stand trial, but not before Pinochet was stripped of official immunity, indicted, and detained.<sup>47</sup>

Chilean courts began to see criminal complaints against other alleged human rights violators from the dictatorship. In 1998, the Chilean Supreme Court also issued a landmark ruling in the *Poblete-Córdoba* case declaring enforced disappearance to be prosecutable under the domestic crime of kidnapping, which it deemed to be an ongoing crime and thus not subject to the statute of limitations or

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43. Interview with Cristián Cruz, Human Rights Lawyer, in Santiago, Chile (Oct. 18, 2017) (noting that the Instituto Nacional de Derechos Humanos (where the Valech files are kept) “sólo entrega cuando es declarante o tiene interés directo. Al abogado, no”); see also Skype Interview with Rodrigo Lledó Vasquez, *supra* note 40 (“[Es una t]rampa—cuando una víctima va al tribunal y pide información o hace querrela, el Instituto de DDHH te entrega tu propio relato—lo que tu diste a la comisión, no el relato de ningún otro.”).

44. Law reform proposals to lift the “Valech Secret” at the end of the second Bachelet administration did not succeed. Nevertheless, victims are now able to obtain more records about their own cases than they once could. Previously, they were given only their own statements. JUAN PABLO DELGADO ET AL., OBSERVATORIO DE DERECHOS HUMANOS UDP, PRINCIPALES HITOS JURISPRUDENCIALES EN CAUSAS DDHH EN CHILE 1990–2018, at 22 (2018) (on file with author) [hereinafter UDP Report].

45. CATH COLLINS, POST-TRANSITIONAL JUSTICE: HUMAN RIGHTS IN CHILE AND EL SALVADOR 81 (2010) [hereinafter COLLINS, POST-TRANSITIONAL JUSTICE].

46. *Id.* at 82, 104–05; see also EDUARDO CONTRERAS MELLA, EL DESAFORADO: CRONICA DEL JUICIO A PINOCHET EN CHILE 26–30 (2003) [hereinafter CONTRERAS MELLA, EL DESAFORADO] (describing the Chilean legislation against Pinochet in the Caravan of Death case).

47. COLLINS, POST-TRANSITIONAL JUSTICE, *supra* note 45, at 92; CONTRERAS MELLA, EL DESAFORADO, *supra* note 46.

amnesty.<sup>48</sup> Still, while some judges moved forward on investigations in the early 2000s, many others continued to dismiss cases based on the regime's self-amnesty and statutes of limitations.<sup>49</sup>

In 2006, the Chilean judiciary received another external push to move forward on human rights cases. In *Almonacid-Arellano et al. v. Chile*, the Inter-American Court of Human Rights (Inter-American Court) found that Chile violated the Inter-American Convention on Human Rights (Inter-American Convention) based on its failure to prosecute those responsible for killing Mr. Almonacid.<sup>50</sup> The Court held that Chile had an obligation to prosecute and that statutes of limitations and self-granted amnesties were not valid barriers to prosecution of war crimes or crimes against humanity under international criminal and human rights law.

Slowly but surely, Chilean courts have been making their way through cases for enforced disappearance (charged as aggravated kidnapping or homicide) 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 illegitimate pressure (*apremio ilegítimo*) or use of force (*aplicación de tormentas*).<sup>51</sup> In 2001, the Supreme Court gave nine ministers a docket made up exclusively of human rights cases, with another fifty-one judges giving priority to human rights cases.<sup>52</sup> In 2017, the Supreme Court consolidated cases concerning dictatorship-era violence to a handful of human rights judges—one in Santiago and the others divided among different regions of the country.<sup>53</sup> All of these judges are Court of Appeals judges sitting by designation as first instance judges.

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48. See COLLINS, POST-TRANSITIONAL JUSTICE, *supra* note 45, at 83.

49. See *id.*

50. *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 121–22, 133, 145–46 (Sept. 26, 2006).

51. Literally, “application of torments.”

52. UDP Report, *supra* note 44, at 7 (“La Corte Suprema designa 9 ministros de dedicación exclusiva, y 51 jueces de dedicación preferente, para investigar causas derechos humanos.”).

53. See CENTRO DE DERECHOS HUMANOS UNIVERSIDAD DIEGO PORTALES, INFORME ANNUAL SOBRE DERECHOS HUMANOS EN CHILE 2018, at 55 (2018) <http://www.derechoshumanos.udp.cl/derechoshumanos/images/InformeAnual/2018/Collins-Negacionismo.pdf> [<https://perma.cc/QPU7-F85K>] (noting the consolidation of human rights cases to five judges but that 13 judges in Chile issued judgments in dictatorship-era human rights cases in 2018).



Courts adjudicate dictatorship-related human rights cases under the old Chilean procedural system,<sup>54</sup> in proceedings that are largely closed to the public and which result in a written final judgment of conviction or acquittal. A single judge investigates and then decides the case on the merits.<sup>55</sup> Cases often come to judges through criminal complaints (*querellas*) filed by family members of the deceased or survivors. Judges may also *sua sponte* open investigations when they see evidence of crimes in other cases. Finally, the Human Rights Program of the Ministry of Justice, formerly of the Ministry of Interior, may assist in and, as of a few years ago, initiate cases through criminal complaints.<sup>56</sup> After a complaint or on their own initiative, the judge investigates and, if there is enough evidence, issues an indictment (*acusación*). Most of the process is behind closed doors, with the judge collecting evidence and witness statements (*sumario*). At the end, the judge issues a written judgment (*sentencia*) describing the evidence, stating findings, and issuing a sentence.

Despite the years of judicial silence on dictatorship-era sexual violence, the issue seems to be moving to the forefront of human rights litigation in Chile. Litigants are bringing claims of sexual violence to

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54. Chile enacted a new procedural code which was gradually rolled out from 2000 to 2005 and which 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, 1363–65 (2012) (describing Chile’s massive criminal procedure reform).

55. Perceived inefficiencies and unfairness of the old system led to the enactment of a new procedural code in 2000. However, the new code does not apply to the dictatorship-era cases. One commentator explained that, under the old system:

[T]he 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 . . . . [I]t was the same judge that issued a ruling convicting or absolving the accused of the crime.

*Id.* at 1365–66 (arguing that the old system “did not provide objective conditions of impartiality”).

56. Decree No. 1005, Reglamenta función asumida por el Ministerio en materias que indica, de competencia de la ex corporación de reparación y reconciliación que creo la Ley No 19.123, Abril 25, 1997, D.O. (Chile).

the courts and prioritizing the aim of bringing attention to sexual violence. Judges appear to be more open to discussing sexual violence and recognizing it as a serious international crime. In 2018, the Chilean Supreme Court recognized in a civil case that rape could be a crime against humanity.<sup>57</sup> In April of 2019, Minister Mario Carroza came as close as any judge yet to convicting directly for sexual violence with a conviction of nine state agents for “aggravated kidnapping of sexual connotation.”<sup>58</sup>

## II. TAKING SEXUAL VIOLENCE TO THE COURTS

Although sexual violence was a systematic tool of repression for the dictatorship and has long been a matter of public record, only recently have Chilean courts begun to address allegations of sexual violence at the hands of the dictatorship. Chilean human rights lawyers lament that where survivors or witnesses raised claims of sexual violence, courts or other actors in the judicial system often ignored, erased, or minimized them.<sup>59</sup>

Recently, inspired by successes in prosecuting rape in international criminal tribunals and, perhaps more critically, in other Latin American countries, several survivors brought cases alleging sexual violence. Alongside these efforts of survivors of sexual violence to initiate suits, the Human Rights Program of the Ministry of Justice brought a case for a disappeared victim who was raped prior to her disappearance.<sup>60</sup> Despite judicial resistance at the first instance level, the Program tried to keep the allegations regarding sexual violence alive.

These recent attempts to bring dictatorship-era sexual violence to the courts raise the important questions: why the delay, why now, and what do these cases look like? After explaining the methodology behind the research, this Part attempts to answer these questions.

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57. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 octubre 2018, Rol de la causa: 40.168-2017 (Chile).

58. See *infra* notes 104–111 and accompanying text.

59. See *infra* Part II.B.

60. See *infra* Part II.C.

## A. Methodology

In order to try to understand the justice trajectory for sexual violence in Chile, I gathered as many judicial filings and decisions as possible. These included a relatively small number of appellate decisions available on Westlaw Chile using the terms “crime against humanity” (*lesa humanidad*) and “sexual” with the objective of capturing documents mentioning sexual violence in the dictatorship;<sup>61</sup> legal documents (judgments, indictments, and complaints) sent to me by interviewees; and appellate judgments I was able to find on the internet, including through the judiciary’s own search engine, by triangulating from news stories or human rights reports.<sup>62</sup> However, there are relatively few judgments discussing sexual violence, so the bulk of the documentary research stems from complaints, preliminary court decisions, truth commission reports, and human rights reports.

To fill in the gaps in the documentary material, I conducted interviews of attorneys involved in human rights and sexual violence cases, including private attorneys who represent or have represented family members and survivors, government attorneys from several different offices,<sup>63</sup> and attorneys from the women’s rights NGO *Corporación Humanas*. I also interviewed specially-designated human rights judges located throughout the country, as well as three justices of the Chilean Supreme Court.<sup>64</sup> I complemented these interviews of

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61. The word for rape, “violación,” was not a viable search term because it is also the word for “violation” and would have captured cases talking about any violation of rights, rules, law or other standards. By using the term “sexual,” which is the same in Spanish as in English, I could capture any case mentioning “sexual abuse” (*abuso sexual*), “sexual torture” (*tortura sexual*), “sexual violence” (*violencia sexual*), acts of a “sexual nature,” etc.

62. See PODER JUDICIAL, <http://www.pjud.cl/home> [<https://perma.cc/3BHP-FB9H>] (Chile). All first instance judgments, like criminal complaints and indictments, were sent to me by attorneys I interviewed.

63. These included attorneys from the Human Rights Program of the Ministry of Justice and Human Rights, including former heads of the Program, the Subsecretariat for Human Rights, the Section on Human Rights and Sexual and Gender Violence of the Public Prosecutor’s Office, 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. Several attorneys, though not currently at the Human Rights Program under the Ministry of Justice, had previously worked at the Human Rights Program when it was under the Ministry of Interior.

64. I sought to interview as many human rights judges as possible, although there are judges other than the specially-designated human rights judges who still have human rights cases even after the consolidation of *Ministros de Visita* in 2017.

judicial actors with interviews of feminist activists, heads of survivor groups, and academics, including a psychologist who works with survivors of dictatorship-era sexual violence in ongoing criminal investigations.

Selection of interviewees was a somewhat organic process. Interviewees were selected with an eye towards identifying people who have dedicated significant time to litigating, investigating, or adjudicating human rights cases, supporting survivors of dictatorship-era sexual violence, or studying human rights cases, particularly those with experience with the issue of sexual violence. I began by interviewing people suggested by Professor Myrna Villegas, law professor and then-Director of the Human Rights Center of the University of Chile,<sup>65</sup> and Professor Cath Collins, Director of the Transitional Justice Observatory at Diego Portales University and Professor of Transitional Justice at Ulster University's Transitional Justice Institute.<sup>66</sup> I then interviewed others whose names were suggested by interviewees, as well as people whose names I spotted in case filings, news stories, other human rights reporting or, in one instance, whom I met in between arguments at the Supreme Court.<sup>67</sup> All interviewees favor the notion of criminal accountability for human rights violations,<sup>68</sup> which is not true of Chilean society generally. Their views thus should not be taken as indicative of any kind of a Chilean consensus on any point. Nevertheless, the interviewees offer useful insider perspectives on matters of delay in the prosecution of sexual violence, recent attempts to take sexual violence to the courts, and the framing of the cases. Interviewees ranged in age from mid-twenties to mid-seventies.

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65. See *Myrna Roxana Villegas Díaz*, UNIVERSIDAD DE CHILE: PORTAFOLIO ACADÉMICO, <http://www.uchile.cl/portafolio-academico/perfilAcademico.jsf?user name=mvillega> [<https://perma.cc/ZFU8-JG9P>]; *Myrna Villegas Díaz*, DESAFÍOS GLOBALES PARA LA DEMOCRACIA, [http://desafiosglobales.org/imagenes/Villegas\\_Myrna.pdf](http://desafiosglobales.org/imagenes/Villegas_Myrna.pdf) [<https://perma.cc/3EP6-VZZR>].

66. *Investigadores Asociados: Cath Collins*, CENTRO DE DERECHOS HUMANOS, UNIVERSIDAD DIEGO PORTALES, <http://www.derechoshumanos.udp.cl/derechoshumanos/index.php/quienes-somos?layout=edit&id=150> [<https://perma.cc/P2BB-4CAW>] (Chile).

67. All interviews were conducted in Spanish, with the exception of an interview with the historian Hillary Hiner, a native English speaker, which was conducted in English.

68. 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.

## B. Past Treatment of Sexual Violence in Chilean Human Rights Cases

Chilean courts have been criticized for ignoring women's allegations of sexual violence or subsuming the allegations under other crimes. A 2012–2013 survey of human rights prosecutions involving women undertaken by the Human Rights Center of the Universidad Diego Portales and Corporación Humanas<sup>69</sup> reviewed sixty cases involving women, fifty of whom had been victims of sexual violence. The survey concluded that impunity for sexual violence was the norm; that sexual violence had received “no judicial response”; and that its perpetrators “enjoy total impunity for the gender violence that was part of the repressive policy of the country.”<sup>70</sup> According to a lawyer for the Human Rights Program of the Justice Department, “to the present day, it's the same . . . it's frustrating.”<sup>71</sup> The lawyer explained that, “although some cases mention sexual violence in the proven facts . . . none has converted it into a conviction for sexual violence.”<sup>72</sup>

A review of more recent judgments shows a willingness on the part of courts to identify sexual violence, but this willingness has yet to result in convictions for rape or other sexual violence crimes. Sexual violence is sometimes mentioned in judgments, either in a description of the proven facts of the case (“hechos acreditados”) or in a description of the repressive context that elevated the crimes into crimes against humanity. In a few instances, sexual violence seems to form part of the torture leading to the conviction for “unlawful pressure” or “use of

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69. Florencia González et al., Centro de Derechos Humanos UDP, Corporación Humanas, & Corporación Parque por la Villa Grimaldi, *Respuesta judicial a la violencia sexual contra las mujeres en dictadura* (unpublished PowerPoint presentation) (on file with author). Corporación Humanas is an NGO based in Santiago that describes itself on Facebook as “un Centro de Estudios y Acción Política Feminista, que promueve y defiende los derechos humanos de las mujeres y la justicia de género, en Chile y Latinoamérica.” Corporación Humanas, *About*, FACEBOOK, [https://www.facebook.com/pg/corphanas/about/?ref=page\\_internal](https://www.facebook.com/pg/corphanas/about/?ref=page_internal) [<https://perma.cc/C56K-SWYD>].

70. González et al., *supra* note 69 (“La investigación realizada ha dejado de manifiesto que a la violencia sexual cometida contra las mujeres no se le ha dado ninguna respuesta judicial, gozando sus autores de total impunidad por la violencia de género que hizo parte de la política represiva aplicada en el país.”).

71. Interview with Lawyer, Human Rights Program, Ministry of Justice & Human Rights, in Santiago, Chile (Oct. 4, 2017) (“Hasta el día de hoy se mantiene lo mismo. . . [es] frustrante.”).

72. *Id.* (“[A]lgunos casos donde mencionan violencia sexual en los hechos acreditados . . . ninguno se ha convertido en una condena por violencia sexual.”).

force,” or more recently, kidnapping resulting in grave harm. However, no criminal defendant has been convicted based on rape as a crime against humanity.

Sexual violence appears in judgments in a variety of ways. The Supreme Court has recognized sexual violence as part of the systematic repression under the dictatorship. For example, in a 2013 case rejecting the application of the statute of limitations in civil cases of indemnity for crimes against humanity (not just criminal cases), the Supreme Court noted the regime’s systematic use of sexual violence, among other forms of repression.<sup>73</sup>

Courts have also described sexual violence as part of the conduct deemed to amount to torture (or its watered-down equivalent in the Chilean code at the time of the offenses). In a 2013 case, for example, human rights judge Minister Mario Carroza convicted Miguel Krassnoff Martchenko of the crime of “illegitimate pressures” (apremios ilegítimos) based on the torture inflicted on a female detainee<sup>74</sup> at the torture center Villa Grimaldi. The judgment

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73. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 4 septiembre 2013, Rol de la causa: 3841-2012 (Chile).

[I]nequívocamente los hechos no han podido acaecer sino como efecto de una política de Estado, y por lo tanto reiterada y sistemática de conductas lesivas a los derechos fundamentales propias de regímenes no democráticos como el instaurado en Chile el 11 de Septiembre de 1973, Esto es, cuando integrantes de sus órganos de seguridad asumen con el apoyo de todo el aparato estatal políticas represivas conculcando derechos fundamentales de sus opositores –hombres y mujeres particularmente jóvenes–, mediante torturas físicas y psicológicas, abusos sexuales, desapariciones y ejecuciones forzadas como práctica institucional entre otros graves atentados ocultos a los ojos de mucha gente y de la jurisdicción hasta muy avanzada la democracia. Objetivo de verdad que junto a los de justicia, paz y reparación hacen inaplicables las normas sobre responsabilidad civil del código del ramo.

*Id.*

74. In general, I have avoided using victims’ and survivors’ names in this article, except where I have their consent, because it is hard to ascertain where survivors have made a conscious choice to have their names and details of their experiences made public and where that choice has been forced upon them by the release of a court judgment, news story, or other article. I speak in relatively general terms about the sexual violence itself, which may have the paradoxical effect of scrubbing the sexual violence from this Article in much the same manner some complain it has been scrubbed from judgments. It is not my aim to sanitize talk of sexual violence, perpetuate any taboos around sexual violence, or deny the

summarizes the victim's declaration detailing her capture, torture, and sexual abuse.<sup>75</sup> The Court of Appeals affirmed the conviction later that year in a decision that did not describe the underlying facts.<sup>76</sup> The Supreme Court affirmed the conviction and described the sexual violence as part of the proven facts ("hechos acreditados") of the case.<sup>77</sup> Although the Court did not convict for a crime explicitly denominated as a sex crime, the Court did emphasize the importance of describing the facts on which the conviction was based.<sup>78</sup>

Likewise, in a 2016 case annulling the convictions of people (members of the military and civilians) convicted in sham proceedings in military courts under the dictatorship, the Supreme Court noted that the prosecutors in the impugned cases permitted or even encouraged torture as a way of getting confessions, and that the torture involved sexual violence, including against pregnant women, and forced nudity.<sup>79</sup> Thus, the Court mentioned sexual violence both as an example of the type of torture that led to false confessions and in its description of the context of lawlessness that gave rise to the unlawful convictions.

The Supreme Court also affirmed a conviction for "application of torments/use of force" in 2017 based on various forms of torture inflicted on a married couple, including the use of sexual violence against the woman in the presence of her husband. In summarizing the facts, the Court noted the victim's description of her torture, which included electrocution, repeated blows, including about her breasts and

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agency of survivors who have chosen to come forward with their stories. However, due to the risk of unwittingly revealing or making more public details a survivor or victim's family wishes not to be public, I have erred on the side of caution and either avoided names or used a pseudonym.

75. Corte de Apelaciones de Santiago [C. Apel.] [Santiago Court of Appeals], 10 mayo 2013, Rol de la causa: 8079-2005 (Chile) (on file with author).

76. Corte de Apelaciones de Santiago [C. Apel.] [Santiago Court of Appeals], 24 diciembre 2013, Rol de la causa: 8079-2005 (Chile) (on file with author).

77. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 14 julio 2014, Rol de la causa: 3058-2014 (Chile).

78. *Id.* ("Que a efectos de dejar de manifiesto el contexto de los ilícitos indagados en autos y la calificación jurídica que éstos recibieron, importa indicar que son hechos de la causa . . .").

79. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 3 octubre 2016, Rol de la causa: 27543-2016 (Chile) (overturning sham convictions from 1973 stemming from confessions obtained under torture).

genitals, and forced nudity.<sup>80</sup> The Court also noted the husband's testimony about his own torture and additional forms of sexual violence inflicted against his wife.<sup>81</sup> The Court noted that, although a medical examination showed no physical evidence of the crimes, there was evidence of psychological and emotional symptoms resulting from the detention, torture and degrading treatment.<sup>82</sup> The Court labeled the crimes as a whole "crimes against humanity," and therefore declined to apply the Chilean doctrine of *media prescripción* (half-statute of limitations), which would have reduced the sentence based on the amount of time that has elapsed since the commission of the crimes.<sup>83</sup>

The Supreme Court has also described the use of sexual violence at the detention or torture centers where victims had been held as part of the proven facts of cases. In a case affirming the conviction of a defendant for the aggravated kidnapping of two disappeared victims (and acquitting him of the aggravating kidnapping of another victim), the Court described among the proven facts of the case the habitual use of sexual violence at a clandestine detention center at Calle Iran,<sup>84</sup> where the victims had been detained prior to their disappearance.<sup>85</sup> Likewise, in a 2017 judgment, the Supreme Court affirmed a conviction for "application of torments" or

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80. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 23 enero 2017, Rol de la causa: 43425-2016 (Chile) (describing the woman's testimony).

81. *Id.* (describing the man's testimony).

82. *Id.* ("[S]i bien sus exámenes médico legales no registran evidencias físicas, por las razones ya descritas, sí muestran secuelas psicológicas y emocionales, producto del encierro, torturas y tratos degradantes, según consta de los informes de fojas 125, 126, 148 y 156.").

83. *See id.*

84. This torture center is also known as the "Venda Sexy" [the Sexy Blindfold] or "La Discotheque," based on the systematic use of sexual violence there and the constant playing of loud music. ARCHIVO CHILE, CENTRO DE ESTUDIOS MIGUEL ENRIQUE, CENTRO DE TORTURA DE "LA VENDA SEXY" O "DISCOTEQUE" OPERADO POR LA DINA, CALLE IRÁN 3037, CON LOS PLÁTANOS. EN LA COMUNA DE MACUL, SANTIAGO 1-2 (2008), [https://archivochile.com/Dictadura\\_militar/centros\\_tort/DMcenttort0019.pdf](https://archivochile.com/Dictadura_militar/centros_tort/DMcenttort0019.pdf) [<https://perma.cc/ULU6-4M58>] [hereinafter CENTRO DE TORTURA DE "LA VENDA SEXY"].

85. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 12 diciembre 2017, Rol de la causa: 11601-2017 (Chile) ("En este lugar [la Venda Sexy] permanecieron muchos detenidos, los que eran mantenidos con la vista vendada, separados en piezas distintas los hombres de las mujeres. Los agentes operativos realizaban los interrogatorios bajo tortura . . . una práctica habitual como método de tortura en este recinto eran las vejaciones sexuales.").



“use of force” of several agents related to notorious torture center Villa Grimaldi. Calling the acts “torture,” the Court noted the use of sexual violence—among the many horrific forms of violence practiced at Villa Grimaldi—as part of the proven facts of the case.<sup>86</sup> The Court rejected the appeal of one set of complainants who had argued that the crimes ought to be characterized as kidnapping resulting in grave harm (“secuestro con grave daño”), with a sentence of up to twenty years, instead of “aplicación de tormentas,” for which the maximum sentence is only five years.<sup>87</sup>

In a decision from October 2018, however, the Supreme Court accepted this “kidnapping resulting in grave harm” (“secuestro con grave daño”) argument and affirmed the convictions of several defendants convicted on this basis.<sup>88</sup> The complainants were two female survivors, leftist activists who had been kidnapped, detained

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86. The Court rejected the defendants’ argument that they should have benefited from the doctrine of “media prescripción” (reducing the sentence in half due to the passage of time). Corte Suprema de Justicia [C.S.J.] [Supreme Court], 27 abril 2017, Rol de la causa: 82.246-16 (Chile).

Dichos tormentos consistieron a vía ejemplar, además, de los malos tratos precedentemente descritos en someter a los prisioneros a golpes de puños y pies en distintas partes del cuerpo; descargas eléctricas (‘parrilla’); colgarlos de pies y manos durante horas (‘pau de arara’); golpes a manos abiertas en ambos oídos (‘teléfono’); sumergirlos en agua o taparles la cabeza con bolsas de plástico, casi hasta la asfixia (‘submarino seco’ y ‘mojado’); y vejaciones sexuales, en el caso de las mujeres.

*Id.*

87. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 25, 141, 150 (Chile). The complainant-appellant’s argument was that the code provision for the crime of “application of torments” applied to abuse of people serving a lawful sentence, and the tortured detainees here were not lawfully detained. *See* C.S.J., 27 abril 2017, Rol de la causa: 82.246-16.

88. As a report from the human rights center of the Universidad Diego Portales notes, this use of the charge of kidnapping with grave damages in the case of survivors is “relatively novel and highlights the multiple grave crimes committed against survivors of torture and political imprisonment. These people were not ‘simply’ subjected to torture . . . but rather enforced disappearance, forced abortion, and a litany of other aberrant crimes.” OBSERVATORIO DE JUSTICIA TRANSICIONAL UNIVERSIDAD DIEGO PORTALES, SANTIAGO DE CHILE BOLETÍN INFORMATIVO N° 49: NOTICIAS EN VERDAD, JUSTICIA, REPARACIONES, GARANTÍAS DE NO-REPETICIÓN Y MEMORIA, EN CHILE Y LA REGION 4 (2018) (“[U]na línea relativamente novedosa de argumentación jurídica . . . pone en relieve los múltiples delitos gravísimos cometidos en perjuicio de las y los sobrevivientes de tortura y prisión política. Aquellas personas no fueron ‘simplemente’ sometidas a torturas . . . sino a desaparición forzada, abortos forzosos, y un sinfín de otros crímenes aberrantes.”).

and tortured at Villa Grimaldi. The Supreme Court's judgment did not describe the torture in detail, but the judgment of the Court of Appeals described among the proven facts of the case ("hechos acreditados") the use of prolonged periods of forced nudity and electrocution among the forms of torture inflicted on the victims.<sup>89</sup>

In a landmark 2018 decision, albeit in a civil case,<sup>90</sup> the Supreme Court of Chile recognized rape as a crime against humanity in a case involving dictatorship-era sexual violence.<sup>91</sup> Explaining that international law prohibits using statutes of limitation as an obstacle to adjudicating cases involving crimes against humanity,<sup>92</sup> the Supreme Court overturned the lower courts' decisions dismissing the plaintiff's claim for civil indemnity from the state. Her rape, the judgment noted, was not an isolated occurrence but rather was consistent with the widespread use of sexual violence by state officials against women under the dictatorship and the regime's systematic use of sexual violence to minimize opposition to the regime.<sup>93</sup>

### C. Recent Efforts to Focus Judicial Attention on Sexual Violence as a Tool of Repression under Pinochet

In the past decade, lawyers and survivors have engaged in strategic litigation to bring attention to the systematic use of sexual violence by the Pinochet regime. After years of inattention to sexual violence, a few cases putting sexual violence front and center are making their way through the courts. To the author's knowledge, these

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89. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 octubre 2018, Rol de la causa: 40.168-2017 (Chile) (describing in detail the torture, forced nudity, and application of electricity).

90. The civil case was for indemnity from the government of Chile.

91. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 23 enero 2018, Judgment, Rol de la causa: 17.900-2014 (Chile).

92. This is one of the principal ways that Chilean courts have avoided application of amnesty and statutes of limitation. *See supra* notes 67–73 and accompanying text.

93.

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.

C.S.J., 23 enero 2018, Rol de la causa: 17.900-2014.

prosecutions include one brought by the Human Rights Program of the Justice Department (formerly Ministry of Interior), two brought by survivors through Corporación Humanas,<sup>94</sup> and a handful brought by survivors through Hiram Villagra, a human rights attorney who worked for years with the human rights organization Corporación de Promoción y Defensa de los Derechos del Pueblo (CODEPU).<sup>95</sup> All cases are in Santiago, but survivors in Chile's second-largest city, Concepción, are also preparing complaints alleging sexual violence.<sup>96</sup>

Since 2010, Corporación Humanas has been litigating a case centering on kidnapping and sexual violence on behalf of two survivors of a clandestine torture center at the Plaza Constitución (under the Presidential Palace, la Moneda).<sup>97</sup> In their complaints, eventually joined together in a single case, the complainants alleged torture, sexual violence as torture, rape, and sexual abuse (“abusos deshonestos”).<sup>98</sup> In the “procesamiento” (the order formalizing the court's decision to open an investigation against an accused), Minister Carroza described the sexual violence but elected to proceed only on

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94. See *infra* notes 97–121 and accompanying text.

95. See Interview with Hiram Villagra, Human Rights Lawyer, in Santiago, Chile (Nov. 6, 2017).

96. Interview with Ester Hernández Cid, Activist & Head of Corporación La Monche, in Concepción, Chile (July 11, 2018).

97. *Corporación Humanas solicitó a Corte de Apelaciones de Santiago negar libertad bajo fianza a José Luis Contreras procesado por secuestro agravado*, HUMANAS, <http://www.humanas.cl/?p=15193> [perma.cc/BCV3-PM6L] (Chile); see *Corporación Humanas Presenta Nueva Querrela Por Violencia Sexual Como Tortura en Dictadura*, CRÓNICA DIGITAL (June 16, 2015), <http://www.cronicadigital.cl/2015/06/16/corporacion-humanas-presenta-nueva-querrela-por-violencia-sexual-como-tortura-en-dictadura/> [perma.cc/2HA9-3PEL] (Chile); see also Hillary Hiner, *¿El “nunca más” tiene género? Un análisis comparativo de las comisiones de la verdad en Chile y Argentina*, 20 REVISTA ESTUDIOS DE SOCIOLOGIA 253, 255 (2015) [hereinafter Hiner, *Nunca más*] (noting the filing of the 2010 complaint for sexual torture and a later 2014 complaint). Although the press labeled the 2010 complaint as the first complaint for sexual violence, human rights lawyer Magdalena Garcés contends that women had been including sexual violence in their complaints for years and that this aspect of the complaints was ignored. Interview with Magdalena Garcés, Human Rights Lawyer, in Santiago, Chile (Nov. 8 & 30, 2017).

98. See *Procesamiento* at 6–7, Corte de Apelaciones de Santiago [C. Apel.] [Santiago Court of Appeals], 26 abril 2019, Rol de la causa: 629-2010 (Chile) (on file with author).

the crime of “aggravated kidnapping of a sexual connotation,” not torture or sexual abuse.<sup>99</sup>

The international nonprofit Women’s Link Worldwide filed an amicus brief in the case encouraging the court to view the case through the lens of gender and detailing international criminal law (ICL) on sexual violence.<sup>100</sup> They encouraged the Court to consider the different ways in which victims are targeted based on gender in conjunction with other aspects of their identity, including socio-economic status, race, age, pregnancy, and the like.<sup>101</sup> The brief explained that ICL recognized rape as a crime against humanity, both as a stand-alone crime and as a form of torture. It also addressed issues of proof, including the recognition that a victim’s testimony alone is sufficient proof, the importance of coercive circumstances in assessing the proof, considerations of assessing witness credibility, and forms of responsibility under ICL.<sup>102</sup>

The judgment in this case, issued on April 26, 2019, came as close as any court yet to convicting state agents for sexual violence crimes. Minister Mario Carroza convicted several agents for the crime of “aggravated kidnapping with a sexual connotation for having committed it with the motive or reason of rape.”<sup>103</sup> Carroza convicted Manuel Agustín Muñoz Gamboa as a principal and sentenced him to five years and one day in prison.<sup>104</sup> He convicted eight others as accomplices. He sentenced seven of the accomplices to three years and

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99. *Id.*; see Interview with Beatriz Bataszew, Psychologist & Head of Mujeres Sobrevivientes Siempre Resistentes, in Santiago, Chile (Mar. 20, 2018); Interview with María José Castillo, Lawyer, Corporación Humanas, in Santiago, Chile (Dec. 11 & 22, 2017).

100. Brief for Women’s Link Worldwide as Amicus Curiae at 3, Juzgado del Crimen de Santiago [J. Cri.] [Criminal Court], noviembre 2015, Rol de la causa: 99-2015 (Chile) (on file with author).

101. *See id.* at 4–6.

102. *See id.* at 8–28.

103. *See* Corte de Apelaciones de Santiago [C. Apel.] [Santiago Court of Appeals], 26 abril 2019, Rol de la causa: 629-2010, sentencia, 163–64 (Chile).

104. *Id.* at 163; see also *Víctimas de violencia sexual en dictadura apelan fallo de Ministro Carroza*, DIARIO UCHILE (May 14, 2019, 4:43 PM), <https://radio.uchile.cl/2019/05/14/victimas-de-violencia-sexual-en-dictadura-apelan-fallo-de-ministro-carroza/> [perma.cc/4MWJ-A5SY] (Chile) [hereinafter *Víctimas de violencia sexual en dictadura*] (reporting on the sentence and the appeal thereof).

one day in prison, and gave the eighth a 541-day suspended sentence.<sup>105</sup>

The crime label chosen by the Court, “aggravated kidnapping with a sexual connotation for having committed it with the motive or reason of rape”—though not a stand-alone sexual violence offense because the sexual violence component is hitched to “aggravated kidnapping”—explicitly acknowledged the sexual violence aspect of the crime. The judgment also details the forced nudity, sexual abuse, and rapes, as well as the physical and psychological harms done to the complainants.<sup>106</sup> Moreover, it noted the gendered and sexual nature of violence directed at women in the dictatorship.<sup>107</sup> The judgment noted that the complainants called this gendered and sexual violence “political sexual violence,” though the Court did not adopt this label itself.<sup>108</sup> Finally, the Court stated that the “described facts” constitute crimes against humanity.<sup>109</sup> This judgment does not explicitly recognize rape as a crime against humanity, but the Court seems to have tried to fold the sexual violence into the crimes against humanity framework by referring to the “described facts” holistically. Corporación Humanas has lauded the decision’s attention to sexual violence and its focus on reparations, but has appealed the sentence, which it argues is too low.<sup>110</sup>

In another case, Corporación Humanas represents Beatriz Bataszew, the head of the feminist survivor organization Mujeres

105. C. Apel., 26 abril 2019, Rol de la causa: 629-2010, at 164.

106. *Id.* at 145–46.

107. *Id.* at 146–47.

108. *Id.* at 146–47 (“[S]us vivencias hacen parte de un momento histórico de violaciones masivas a los derechos humanos . . . que afectó a las mujeres a través de una forma específica de violencia, marcada por un componente sexual y de género, que denominan las demandantes como violencia política sexual.”).

109. *Id.* at 147 (“Los hechos descritos y que afectaron a [the complainants], revisten el carácter de Crímenes de Lesa Humanidad y Crímenes de Guerra.”).

110. *Victimas de violencia sexual en dictadura*, *supra* note 104.

Valoramos este fallo en lo que representa como reconocimiento del delito cometido, pero consideramos un deber el exigir justicia plena, con penas acordes con la gravedad de estos delitos. Se trata también de seguir en un camino que puede abrir espacios para que otras mujeres, que también sufrieron tortura y violencia sexual en dictadura y que aún no han iniciado acciones legales, confíen en que es posible alcanzar verdad y justicia. Por eso es importante apelar, buscamos justicia no en la medida de lo posible, sino verdad y justicia plena.

*Id.*

Sobrevivientes Siempre Resistentes (“Mujeres Sobrevivientes”). According to the complaint, filed in 2016,<sup>111</sup> on December 12, 1974, Bataszew was kidnapped and taken to the torture center at Calle Iran where she was interrogated, beaten, and subjected to brutal sexual violence.<sup>112</sup> Her criminal complaint alleges that torturers often chided the female detainees for not having been in the home where they belonged and for having gotten involved in politics:

I remember that they reprimanded women a lot for the fact of being involved in political organizations to get us to see that ‘that was not for us.’ The most frequent offenses were to tell us that we were ‘daddy’s girls’ and that we shouldn’t be involved in those things. There was a strong element of social resentment towards us and especially a gendered attack considering that activism was not a thing for women.<sup>113</sup>

The criminal complaint alleges “the crimes of aggravated kidnapping, sexual violence as torture or application of severe torments, rape, and sexual abuse [literally, ‘dishonest abuse’],”<sup>114</sup> as

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111. Email from Camila Maturana, Lawyer, Corporación Humanas, to author (Mar. 21, 2019) (on file with author) (stating that the complaint was formally presented on November 30, 2016). As of publication of this article, the court has not yet issued a judgment in this case.

112. Bataszew Complaint, *supra* note 27.

113.

Recuerdo que a las mujeres nos recriminaban mucho el hecho de estar involucradas en organizaciones políticas haciéndonos ver que eso “no nos correspondía”. Las ofensas más frecuentes era decirnos que siendo nosotras “hijitas de papá” y teniéndolo todo no deberíamos estar metidas en esas cosas. Había una fuerte carga de resentimiento social hacia nosotras y especialmente una agresión de género por considerar que la militancia no era asunto de mujeres.

*Id.*

114. For information about the crime of “abusos deshonestos,” see generally Ismael Salvador Sierra Contreras, *Análisis Crítico del Tipo Penal de Abusos Sexuales y de la Figura del Child Grooming a partir de una Interpretación Jurisprudencial del Artículo 366 Quáter del Código Penal 9 (2011)* (unpublished Licenciado thesis, Universidad de Chile), [http://repositorio.uchile.cl/bitstream/handle/2250/111874/de-Sierra\\_ismael.pdf](http://repositorio.uchile.cl/bitstream/handle/2250/111874/de-Sierra_ismael.pdf) [https://perma.cc/83AU-P7LS] (noting that “Etcheberry sostiene que el abuso deshonesto consiste en realizar sobre otra persona actos que no lleguen al acceso carnal ni vayan encaminados a él, que sean objetivamente aptos para ofender la honestidad o pudor de la otra persona, y que no sean libremente consentidos por ésta”). There is some controversy over elements of the crime. See Tito E. Solari Peralta & Luis Rodríguez Collao, *A propósito de un*

well as the offense of “criminal enterprise to kidnap and torture, all constituting crimes against humanity.”<sup>115</sup>

The complaint reads like a primer on ICL on sexual violence. Although, as is typical in Chilean human rights cases, it uses Chilean charges, including “aggravated kidnapping” and “aplicación de tormentos,” the complaint also reframes the latter in ICL terms as “sexual torture.”<sup>116</sup> The complaint cites the *Akayesu* judgment from International Criminal Tribunal for Rwanda (ICTR) for the proposition that rape can be the basis for genocide and for the definition of genocide reached and crimes against humanity, the *Celebici* judgment from International Criminal Tribunal for the former Yugoslavia (ICTY) for the proposition that rape can be a form of torture and that rape need not involve penetration by a penis, and the ICTY *Erdemovic* judgment for the proposition that crimes against humanity are grave and speak to the denial of the humanity of the victim.<sup>117</sup> It also cites the Rome Statute provision detailing different forms of sexual violence as crimes against humanity, as well as its provision on torture.<sup>118</sup> The complaint refers repeatedly to decisions of the Inter-American Court of Human Rights for the proposition that rape and sexual violence as crimes against humanity are not subject to amnesty or statutes of limitations.<sup>119</sup>

Human rights attorney Hiram Villagra likewise has prepared criminal complaints on behalf of several other sexual violence

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*fallo sobre abusos deshonestos*, 4 REVISTA DE DERECHO (VALPARAÍSO) 301, 301 (1980) (Chile).

115. Bataszew Complaint, *supra* note 27, at 4–5 (“[D]elitos de secuestro agravado, violencia sexual como tortura o aplicación de tormentos agravados, violación sexual y abusos deshonestos cometidos contra mi persona y por el delito de asociación ilícita para secuestrar y torturar, todos constitutivos de crímenes de lesa humanidad . . .”).

116. *Id.* at 4–5.

117. *Id.* at 10–11, 23 (citing Prosecutor v. Akayesu, Judgement, ICTR-96-4-T, ¶ 731 (ICTR Trial Chamber I 1998); Prosecutor v. Delalic et al., Judgement, IT-96-21-T, ¶¶ 479, 495–96 (ICTY Trial Chamber 1998); Prosecutor v. Erdemovic, Sentencing Judgement, IT-96-22-T, ¶ 28 (ICTY Trial Chamber 1996)).

118. *Id.* at 12 (citing Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 7(1)(g), 37 I.L.M. 999, 1004, 2187 U.N.T.S. 90, 93 (entered into force July 1, 2002) [hereinafter Rome Statute]).

119. *Id.* at 12–14 (citing Miguel Castro Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶¶ 223–24, 310–11 (Nov. 25, 2006); Espinoza González v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 289, ¶¶ 191–93, 195 (Nov. 20, 2014)).

survivors.<sup>120</sup> A case brought by survivors represented by Villagra made international news in late 2014 for its explicit focus on sexual violence.<sup>121</sup> Although the complainants also allege aggravated kidnapping and torture, they directly allege “sexual violence” as a crime unto itself.<sup>122</sup> The complaint argues that the sexual violence to which the complainants had been subjected was “persistent and systematic” and not only is prohibited in domestic law, as rape or sexual abuse, but also as a crime against humanity.<sup>123</sup> The complaint also invokes the Rome Statute, precedent from the *ad hoc* tribunals, and the Geneva Conventions to argue that ICL prohibits a far more expansive range of sexual violence than is encompassed in Chile’s narrow definition of rape.<sup>124</sup>

Villagra, together with the human rights organization CODEPU, has also filed criminal complaints directly alleging the crime of rape as a crime against humanity. One example is a 2015 complaint

120. The author has several drafts of complaints alleging various forms of sexual violence on file sent by Mr. Villagra.

121. *Women File Complaint in Chile over Rape, Sexual Torture during Pinochet Era*, FOX NEWS (Dec. 4, 2014), <https://www.foxnews.com/world/women-file-complaint-in-chile-over-rape-sexual-torture-during-pinochet-era> [<https://perma.cc/XR4N-TQVG>].

122. Querrela Criminal [Criminal Complaint], at 2, “A.A. et al.,” (on file with author) hereinafter A.A. et al. Complaint] (“[Q]ue venimos en interponer querrela criminal por secuestro calificado, violencia sexual, torturas y otros tratos crueles, inhumanos y degradantes y asociación ilícita en contra de todos aquellos que resulten responsables.”).

123. *Id.* at 26.

Los hechos descritos, por las querellantes, representan conductas delictivas, persistentes, sistemáticas y orgánicas con la finalidad de degradar a las mujeres pertenecientes a un grupo social y político. Lo que conlleva una abierta transgresión no solamente a las leyes nacionales sino también a lo que se tipifica como delito internacional, ya como de crimen contra la humanidad o bien como genocidio.

*Id.*

124. *Id.* at 27.

La violencia sexual debe ser entendida como cualquier acción positiva contra la mujer y que conlleve una connotación sexual contrario a la voluntad de esta. Es así que podemos decir que el delito en comento incluye las tocasiones de las partes genitales, el interior de los muslos, los pechos, el trasero, así como también la introducción vaginal, anal o oral de objetos o dedos de las manos, ratas o el obligar a las detenidas a relaciones aberrantes con animales.

*Id.*



on behalf of a survivor who was tortured and subjected to sexual violence in the National Stadium at age sixteen and later at the torture center Villa Grimaldi. The complaint alleges the “crimes of kidnapping of a minor, rape, sexual abuse (of a minor), torture and other cruel, inhumane and degrading treatment, as well as criminal organization.”<sup>125</sup> These complaints, like those prepared by Corporación Humanas, invoke the Rome Statute, the caselaw of the Yugoslavia and Rwanda tribunals, and the Geneva Conventions to emphasize the gravity of the crimes and the expansiveness of international criminal prohibitions on sexual violence.<sup>126</sup>

Finally, although its mandate extends only to the dead or disappeared, the government’s Human Rights Program<sup>127</sup> likewise has fought to bring attention to the issue of sexual violence. The Human Rights Program spent years attempting to keep alive torture charges against a defendant in the case of “A.B.” In 2014, the investigating judge dismissed the charge of illegitimate pressure (“apremio ilegítimo”), the closest analog to torture in Chilean code at the time of the crimes, but permitted the aggravated kidnapping case to continue.<sup>128</sup> The Human Rights Program appealed the dismissal of this charge, emphasizing the importance of investigating and punishing allegations of rape and sexual violence.<sup>129</sup>

The Human Rights Program invoked international law, including ICL, to support its arguments that the case for illegitimate pressure be reopened. The brief discusses developments from the ICTR, as well as the Rome Statute’s recognition of rape and other forms of sexual violence as crimes against humanity.<sup>130</sup> Although the defendant was also charged with aggravated kidnapping, the Human

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125. Querrela Criminal [Criminal Complaint], “A.D.” (on file with author).

126. See, e.g., A.A. et al. Complaint, *supra* note 122 (listing the forms of sexual violence prohibited under international law).

127. The Human Rights Program has recently been moved to the Ministry of Justice and Human Rights. See *Programa de Derechos Humanos*, MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, <http://pdh.minjusticia.gob.cl> [<https://perma.cc/H7WU-V3WP>] (Chile).

128. See Corte de Apelaciones de Santiago [C. Apel.] [Santiago Court of Appeals], 28 agosto 2014, Rol de la causa: 808-2014 (Chile) (noting that the investigating judge had closed the case for apremio ilegítimo and ordering that the case for apremio ilegítimo be reopened).

129. Motion for Auto de Procesamiento y Reapertura del Sumario y Diligencias que Indica, Corte de Apelaciones de Santiago [C. Apel.] [Santiago Court of Appeals], 17 abril 2014, Rol de la causa: 24.649-2005 (Chile).

130. *Id.*

Rights Program emphasized the need to bring attention to the rape, forced nudity, and torture as crimes against humanity.

This case is an outlier because the family counted on the assistance of the government's Human Rights Program in litigating the case. The Human Rights Program only has the authority to bring cases for execution or forced disappearance. Thus, it was able to bring this case only because it was rape and torture *after which the victim was disappeared*. Moreover, the case is atypical because there was proof of the rape, despite the absence of any testimony from the victim, due to the presence of a third-party witness during the rape.<sup>131</sup> The case against the defendant was ultimately dismissed due to his death.<sup>132</sup>

Thus, in recent years, complainants and lawyers in Chile have been demanding that courts pay attention to the allegations of sexual violence. Although there have been setbacks, as with the death of the relevant defendant in the A.B. case, litigants seem to be making some progress regarding judicial accountability for sexual violence. The human rights judge for Santiago has convicted one defendant of a crime of a sexual connotation, and the Supreme Court of Chile has explicitly acknowledged that rape can serve as a stand-alone basis for a crime against humanity, not merely as a subset of torture.

#### D. The Framing Question—Rape, “Political Sexual Violence” or Torture

Mirroring disagreements over the framing of sexual violence on the international level,<sup>133</sup> Chilean lawyers and activists disagree on

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131. Interview with Lawyer, Human Rights Program, *supra* note 71.

132. C. Apel., 14 marzo 2018, Rol de la causa: 808-2014, ¶ 4 (Chile) (affirming the convictions of other defendants for aggravated kidnapping and noting the death of the defendant).

133. See generally Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 53–64 (2008) (describing disagreements over how to frame sexual violence, albeit in the context of a high degree of consensus among feminists on the need to push sexual violence up the ICL hierarchy); Karen Engle, *The Grip of Sexual Violence: Reading United Nations Security Council Resolutions on Human Security*, in RETHINKING PEACEKEEPING, GENDER EQUALITY AND COLLECTIVE SECURITY 23–46 (2014) (describing the trend in Security Council resolutions to view sexual violence independently from gender violence and criticizing the related framing of sexual violence as a humiliating, life-ruining harm). In other work, Engle critiques ICL formulations of rape as an international crime, cautioning

how best to frame the issue of sexual violence. They disagree on whether to situate sexual violence in the rubric of torture or to push for judicial recognition of rape as a stand-alone crime against humanity (both of which are recognized in ICL) or even as a new crime of “political sexual violence.” However, though they may disagree on labels, activists and lawyers share the aim of changing the “culture of impunity,”<sup>134</sup> which they believe is responsible for ongoing sexual violence against women at the hands of police and other security forces.

### 1. Political Sexual Violence (“Violencia política sexual”)

Several complainants and activists<sup>135</sup> have fought for recognition of a new offense of political sexual violence (PSV),<sup>136</sup> and this recognition is one of the central goals of the feminist survivor organization *Mujeres Sobrevivientes Siempre Resistentes* (“*Mujeres Sobrevivientes*”).<sup>137</sup> The *Mujeres Sobrevivientes* pamphlet on PSV

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against unintended, and sometimes anti-feminist, consequences. See Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778 (2005); Karen Engle, *Judging Sex in War*, 106 MICH. L. REV. 941, 942–43 (2008) (“[T]hese decisions served to reproduce many assumptions about women’s (lack of) agency. Through its rules regarding evidence of consent and its equation of rape with torture, the ICTY essentially created a jurisprudence in which much of the sex between opposing sides in the war was made criminal.”).

134. See Interview with Beatriz Bataszew, *supra* note 99; Interview with María José Castillo, *supra* note 99.

135. Among the proponents of recognition for PSV are survivor-activist Patricia Herrera, Beatriz Bataszew of *Mujeres Sobrevivientes*, and Ester Hernández, head of the feminist group in Concepción known as *La Monche*. See Daniela Castro Hernández, *Verdad y justicia: La violencia político sexual durante la dictadura militar y la lucha por el reconocimiento en el Chile democrático*, HISTORIAS QUE VIENEN: REVISTA DE ESTUDIANTES DE HISTORIA UDP, May 2016, at 4–16 (citing Interview by Daniela Castro Hernández with Patricia Herrera Escobar in Santiago, Chile (Nov. 12, 2014)) (containing observations and notes from an interview with complainant Patricia Herrera); Interview with Beatriz Bataszew, *supra* note 99; Interview with Ester Hernández Cid, *supra* note 96.

136. In Spanish, “violencia política sexual.”

137. Cath Collins, *Verdad, Justicia y Reparaciones*, in UDP INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2016, at 46 (2016) (“[L]ucha por visibilizar la violencia sexual como una práctica específica utilizada por la dictadura contra las mujeres. Sus metas incluyen la tipificación de la violencia política sexual como un delito autónomo, y la recuperación de la casa de tortura denominada “*Venda Sexy*” . . .”). Although it appeared at the time of the report that *Mujeres Sobrevivientes* had succeeded in making the *Venda Sexy* a memorial site, the effort

describes PSV as including forced nudity, forced housework, insults involving sexual content, touching or manhandling body parts, and simulated rape.<sup>138</sup>

Beatriz Bataszew, both a complainant in a case alleging sexual violence and the head of *Mujeres Sobrevivientes*, explains that the group invented the term PSV to capture a particular aspect of the crime: sexualized power.<sup>139</sup> She contends that PSV is “a counter-insurgent, anti-subversive instrument against women who fight,”<sup>140</sup> and that there is a “significant gender component: [using] sexual power to punish. To make women return to the place where they belong.”<sup>141</sup>

Proponents of the recognition of PSV also seek to emphasize the similarities between the violence suffered under the dictatorship and the persistent use of sexual violence, threats, and humiliation against women engaging in protests and other political activities in Chile today. *Mujeres Sobrevivientes*'s pamphlet informs readers: “The violence that we women and students suffer today during detentions in protests, are nothing more than the faithful reflection of the impunity for the PSV and torture of which we were victims during the dictatorship.”<sup>142</sup> Here, Chilean survivors/activists seek to highlight the persistent structural problem of gender-based and sexual violence without lumping it in with other abuses under the heading of torture. This argument echoes a feminist critique on the international level of

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has proved unsuccessful to date. *See* Interview with Beatriz Bataszew, *supra* note 99.

138. Interview with Beatriz Bataszew, *supra* note 99; *see* MUJERES SOBREVIVIENTES SIEMPRE RESISTENTES, *VIOLENCIA POLÍTICA SEXUAL* (on file with author).

139. Interview with Beatriz Bataszew, *supra* note 99 (“[E]ste tiene como conotación . . . poder sexualizado.”).

140. *Id.*

141. *Id.* (remarking on an “alto contenido de género . . . poder sexual para castigar para volver a las mujeres al espacio que le corresponde”); *see also* Interview with Ester Hernández Cid, *supra* note 96 (“[T]he fundamental connotation [was]—‘what are you doing here when you should be at home with your children.’” [“La conotación fundamental [fue]—‘qué andan hacienda aquí cuando deben estar en casa con sus niños.’”]).

142. MUJERES SOBREVIVIENTES SIEMPRE RESISTENTES, *supra* note 138 (“La violencia que hoy sufrimos mujeres y estudiantes durante las detenciones en las manifestaciones, no son más que el fiel reflejo de la impunidad de la violencia política sexual y tortura sexual, de la que fuimos víctimas durante la dictadura.”).

the excessive focus on sexual violence in conflict with a failure to understand a broader pattern of gendered violence in peacetime.<sup>143</sup>

However, PSV presents difficulties related to the legality principle, at least with respect to crimes of the dictatorship. Unlike the crime of rape, which existed in the Chilean code at the time of the acts, or even torture, which was prohibited under international law at the time of the offense and has a domestic (albeit inadequate) analog,<sup>144</sup> PSV was not recognized as a crime under domestic law at the time of the offenses and there is no crime under that label in ICL.

Thus, complainants and activists advocating recognition of this crime face the limitation that it must either be used prospectively or as a descriptive gloss for the crimes committed against victims of sexual violence in the dictatorship, but cannot provide the basis for convictions for dictatorship-era abuses, at least standing alone. Still, this rhetorical role of contextualizing and emphasizing the gravity of the conduct nevertheless is a valuable one. It is one of the principal roles ICL has played in the Chilean human rights prosecutions, as courts in recent years routinely reframe dictatorship-era crimes as

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143. For example, Carla Ferstman has argued:

[T]he focus on rape as a weapon of war can de-link that conduct from the more tolerated forms of violence that persist in peacetime. Conflict-related violence can be fostered by discriminatory and stereotypical attitudes towards women and girls in society (which operate in both peacetime and during conflict), and often towards race and class. Gender-based violence during peacetime can be a method to enforce social expectations about how individuals should behave. For instance, domestic violence may be used as a tool to exert control over women's behaviour in the home, and rape and other forms of sexual violence may be used to "punish" individuals for their sexual orientation and/or transgender identity.

Carla Ferstman, *Reparations for Sexual and Other Gender-Based Violence*, in *GENDER PERSPECTIVES ON TORTURE: LAW AND PRACTICE* 19, 22 (2016).

144. CÓD. PEN. art. 361 (Chile). Although the Convention Against Torture postdated many of the crimes during the dictatorship, the Geneva Conventions already prohibited torture as of 1949. Chile was a signatory of the Geneva Conventions, and Chilean courts have found that the conventions applied to the crimes of the dictatorship based on the junta's declaration of a state of war. See Corte Suprema de Justicia [C.S.J.], [Supreme Court], 9 septiembre 1998, "Pedro Enrique Poblete Córdova," Rol de la causa: 895-96, ¶ 9 (Chile).

crimes against humanity even while they convict for domestic crimes.<sup>145</sup>

Although they use a different label and include examples of acts within the crime of PSV that may not rise to the level of crimes against humanity,<sup>146</sup> proponents of PSV also seek recognition that rape and sexual violence can be crimes against humanity unto themselves, and not merely when they fall within the category of torture.<sup>147</sup>

## 2. Rape as a Crime Against Humanity

A few of the complainants have charged rape directly as a crime against humanity, albeit in tandem with other crimes, such as illegitimate pressure (apremio ilegítimo).<sup>148</sup> This strategy is not without regional precedent. In 2010, in a landmark decision, an Argentine court convicted Gregorio Molina of rape as a crime against humanity.<sup>149</sup>

Charging sexual violence directly as rape has the advantage of bringing attention to the gendered nature of the attacks on women and emphasizes the notion that sexual violence is as grave as other types

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145. See Caroline Davidson, *International Criminal Law by Analogy: The Use of International Criminal Law in the Chilean Human Rights Prosecutions*, U.C. DAVIS J. INT'L L. & POL'Y (forthcoming) [hereinafter Davidson, *ICL by Analogy*] (exploring the ways in which Chilean courts have invoked international criminal law in Chilean human rights prosecutions, including to emphasize the gravity of the crimes and to avoid application of statutes of limitations and amnesty).

146. It is possible that many would, however, if they meet the umbrella requirements for crimes against humanity, including nexus to a widespread or systematic attack, and are deemed to be of sufficient gravity. The Rome Statute lists as crimes against humanity: "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." Rome Statute, *supra* note 117, art. 7(1)(g) (emphasis added).

147. See Interview with Beatriz Bataszew, *supra* note 99; see also Interview with Alicia Lira, Head, Agrupación de Familiares de Ejecutados Políticos (AFEP) [Association of Relatives of Executed Political Prisoners], in Santiago, Chile (Oct. 23, 2017) ("[L]a lucha de las compañeras es caracterizarlo de lesa humanidad . . . lo que quieren es reconocer que es lesa humanidad.").

148. These include the cases brought by Hiram Villagra and CODEPU. See *supra* notes 120–127 and accompanying text.

149. See generally Paloma Montañez et al., *The Prosecution of Sexual and Gender Crimes in the National Courts of Argentina*, 39 HUMAN RIGHTS Q. 680, 683, 693–700 (2017) (discussing the two lines of cases dealing with the sexual and gender crimes of the junta in Argentina—one for rape as a crime against humanity directly and the other for rape as the crime against humanity of torture—and discussing the debate surrounding the issue of how to frame charges).

of crimes against humanity, not solely as a form of torture. However, proponents of the crime of PSV argue that it fails to capture the political nature of the violence directed at victims. Due to the narrowness of the definition of rape at this time, it also excludes a number of forms of sexual violence.

Even though rape is a crime against humanity under ICL, several lawyers have voiced concern over whether judges in Chile would recognize it as such—which would be necessary to avoid application of amnesty and statute of limitations for rape.<sup>150</sup> Again, even though the charges are based on crimes recognized in the Chilean criminal code at the time of the offenses, they survive motions to dismiss on amnesty and statute of limitations grounds based on the contextual argument that what the courts are really dealing with are war crimes or crimes against humanity.<sup>151</sup>

### 3. Sexual Violence as Torture

Other human rights and feminist lawyers have fought to have sexual violence recognized as torture. By framing the sexual violence as torture, they draw attention to the *violent*, rather than the sexual, nature of the crime.<sup>152</sup> By choosing the torture frame, these lawyers wanted to bring attention to the special gendered nature of the torture directed at women and also to show that this form of torture was just as grave as any other, including forms of torture used on men.<sup>153</sup> They sought to emphasize that this was not just ordinary rape.

Advocates of the torture frame have argued that they are more likely to succeed in courts by labeling the conduct as torture than by labeling it as rape, because torture is viewed as a more serious

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150. Interview with Lorena Fries Monleón, *supra* note 32; Interview with Human Rights Lawyer, in Temuco, Chile (June 12, 2018). Name removed to protect confidentiality. Interview recording and notes on file with the author.

151. This is not the only way that litigants have gotten around these obstacles, but it is the prevailing rationale now. *See supra* notes 69–76 and accompanying text.

152. Interview with María José Castillo, *supra* note 99; Interview with Lawyer, Women’s Ministry, Ministry of Interior, in Santiago, Chile (Oct. 17, 2017).

153. Interview with Lorena Fries Monleón, *supra* note 32 (“[E]s importante . . . por el reconocimiento de la violencia sexual como tortura . . . [contra las mujeres] tiene el mismo valor que [violencia contra] los hombres.”).

offense.<sup>154</sup> This view is not unique to Chile.<sup>155</sup> Lawyers acknowledge, however, that this approach has the disadvantage of “invisibiliz[ing]” the sexual violence.<sup>156</sup>

However, the torture frame has a more technical strategic aim of keeping the case alive in the face of the Chilean amnesty and statutes of limitations for non-international crimes. Whereas Chilean courts have recognized torture as a crime against humanity and therefore cases involving torture are not barred by the amnesty or statute of limitations,<sup>157</sup> to date, no Chilean court has acknowledged that rape is a crime against humanity not subject to statutes of limitations in a criminal case.<sup>158</sup> Lorena Fries of Corporación Humanas stated that directly charging rape as a crime against humanity could work in other nations (and pointed out that indeed the Rome Statute contemplates just that), but seemed skeptical that Chilean courts would take the claim seriously.<sup>159</sup> Fries was not the only interviewee to

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154. Interview with Lorena Fries Monleón, *supra* note 32 (expressing concern about framing the crimes as rape or PSV “en un país que no valoriza violencia sexual,” which translates to “in a country that does not give weight to sexual violence”).

155. Ferstman, *supra* note 143, at 21 (stating that torture “is an important lens [through which to view gender-based violence] because of the status and weight given to torture under international law” but noting that it “is not a perfect fit” because, as it has been understood traditionally, it excludes some forms of gender-based violence).

156. See Interview with Magdalena Garcés, *supra* note 97 (“[P]ara mi era importante que la violencia sexual fuera reconocido como tortura . . . pero invisibilizó la violencia sexual.”).

157. Chile previously had been condemned by the Inter-American Court for failure to investigate and make reparations for torture claims. See *García Lucero et al. v. Chile*, Preliminary Objection, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 267, ¶ 21 (Aug 28, 2013).

158. Interview with Lorena Fries Monleón, *supra* note 32. *But see* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 23 enero 2018, Judgment, Rol de la causa: 17.900-2014 (Chile) (holding in a civil case that rape is a crime against humanity and statute of limitation does not apply). Minister Carroza’s judgment in the Plaza Constitución case comes close, as he convicts the defendants for aggravated kidnapping with a sexual connotation, classifies it as a crime against humanity, and notes that therefore neither the amnesty nor statutes of limitation apply, but the conviction is not directly for rape or a stand-alone sexual violence offense. See *Procesamiento* at 6–7, Corte de Apelaciones de Santiago [C. Apel.] [Santiago Court of Appeals], 26 abril 2019, Rol de la causa: 629-2010 (Chile) (on file with author).

159. Interview with Lorena Fries Monleón, *supra* note 32 (“[L]as cortes van a declarar que es prescriptible.”).



express skepticism on this issue.<sup>160</sup> However, the strategic calculus on alleging rape directly as a crime against humanity may change now that the Supreme Court has recognized it as one, albeit in a civil case.

### III. WHY THE SLOW PATH TO JUSTICE?

This Part suggests reasons for the long path to justice for victims of dictatorship-era sexual violence in Chile. Relying extensively on interviews and human rights reporting due to the absence of discussion of the matter in caselaw, this Part argues that the delay likely stems from a confluence of several factors: the Chilean “pacted transition,” which prioritized reconciliation over justice, most notably through the use of truth commissions; the truth commissions’ gendered framing of issues; the role of the Catholic Church in documenting human rights abuses; domestic legal barriers; lack of resources; a perception, for a long time accurate, of the futility of bringing prosecutions; and, finally, cultural views on women and rape.

#### A. Pacted Transition, Priorities, and Frames

##### 1. The Truth Commissions Frame—Prioritizing the Disappeared and the Dead

Justice for victims of sexual violence has come slowly, in part, because justice has come slowly for all victims of human rights abuses in Chile. As noted above, the first democratically-elected government after the dictatorship established a truth commission as the primary

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160. Other lawyers interviewed did not believe that judges conceive of rape and other forms of sexual violence as crimes against humanity. *See, e.g.*, Interview with María José Castillo, *supra* note 99 (stating that, although it is not explicitly stated in caselaw, rape is not considered a crime against humanity (“lesa humanidad”) and therefore charges for dictatorship-era sexual violence may be barred by statutes of limitations); Interview with Temuco Human Rights Lawyer, *supra* note 150 (stating that acts of sexual violence are charged as torture (apremio ilegítimo) because if they were classified as rape or sexual violence, the cases would be dismissed on statute of limitations grounds); Interview with Lawyer, Sub-Secretariat for Human Rights, in Santiago, Chile (Apr. 10, 2018) (stating that “domestic courts have not taken the step of international criminal law of sexual violence as crimes against humanity,” or in the original Spanish, “los tribunales nacionales no han dado el paso más allá que siguen los tribunales [internacionales] . . . de reconocer a la violencia sexual como un crimen de lesa humanidad”).

vehicle for addressing human rights complaints.<sup>161</sup> Unlike Argentina, Chile underwent a gentle transition model via referendum and negotiation with the outgoing government.<sup>162</sup> In Chile, many institutions, including the judiciary, retained strong ties to the dictatorship.<sup>163</sup> Pinochet remained senator for life and, in the early days after the transition, head of the armed forces. “Justice, where possible” was the new government’s vision, and for a long time not much justice was possible.<sup>164</sup>

Nevertheless, the truth commissions provided the frame for the country’s understanding of the human rights violations that shaped the prioritization of subsequent judicial efforts. According to Hillary Hiner, “the truth commissions play an important role in setting the ‘legitimate’ discourse about the past and these in turn shape our understandings of the present and the future.”<sup>165</sup> She proposes that the truth commission reports of Chile and Argentina not only collected testimony, but also represented a state-sponsored “creation myth.”<sup>166</sup>

In this creation myth, the man is the center of attention. Hillary Hiner argues that, for the Rettig Commission, “the victim of political violence is a man . . . this foundational, discursive focus has

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161. Interview with Carolina Franch Maggiolo, Professor, Dep’t of Anthropology, Univ. of Chile, in Santiago, Chile (Sept. 17, 2017); Interview with Eduardo Contreras Mella, Human Rights Lawyer, Politician, and Former Chilean Ambassador to Uruguay, in Santiago, Chile (Oct. 26, 2017); Skype Interview with Rodrigo Lledó Vasquez, *supra* note 40 (“[S]e embarca dentro del mundo administrativo.”).

162. See also José Zalaquett, *Introduction to the English Edition of REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION*, *supra* note 17, at 6, 12–15 (contrasting Chile’s pacted transition with the transitions coming after military defeat, as in Argentina and after World War II, and positing that “if the government had made an attempt (however futile, given Chile’s existing legality) to expand the possibilities for prosecutions, most likely it would have provoked tensions and reactions resulting in that neither truth nor justice could be achieved”); see also CONSTABLE & VALENZUELA, *supra* note 10, at 316–18 (describing the Chilean transition and Pinochet’s efforts to protect his legacy).

163. Skype Interview with Rodrigo Lledó Vasquez, *supra* note 40.

164. See *supra* note 34 (discussing President Aylwin’s much-criticized promise of “justicia en la medida de lo posible”).

165. Hiner, *Nunca más*, *supra* note 97, at 254 (“Proponemos aquí que las comisiones de la verdad juegan un rol importante en la fijación de discursos ‘legítimos’ sobre el pasado y que éstos moldean nuestras posibilidades del presente y el futuro.”).

166. *Id.* (“mito útil de creación”) (quoting Greg Grandin & Thomas Miller Klubock, *Editor’s Introduction*, *RADICAL HIST. REV.*, Winter 2007, at 1, 3 (2007)).

never been overcome.”<sup>167</sup> As noted above, for the Rettig Commission—Chile’s first truth commission—the focus was on the dead and the disappeared. The Rettig Commission only had the authority to investigate the circumstances surrounding death and disappearance, not torture. Thus, any sexual violence, unless tied closely to executions or disappearances, fell outside of the ambit of the report.

Despite its limited scope, the Rettig Report did discuss torture and detention centers, but gave scant attention to sexual violence. Where mentioned, it was mentioned briefly and minimized. The report, in a section discussing the detention center known as “La Venda Sexy/La Discotheque,” described it as a place where tortures were “relatively light,” at the same time that it noted that women there were raped and abused sexually.<sup>168</sup> To be sure, the description was situated in the context of a report focusing on killing and disappearance, where there was no shortage of other brutal torture methods preceding execution. Nevertheless, this is the very torture center where women were raped repeatedly by their captors and through use of a specially-trained dog.<sup>169</sup> Thus, this section of the Rettig Report conveys the impression that this sexual violence was less significant than other forms of torture.

Although the later Valech Commission’s report on torture included a chapter on sexual violence, it did so only after women’s rights activists put international pressure on the Commission.<sup>170</sup> Corporación Humanas complained to the Committee Against Torture about the Valech Commission’s failure to consider sexual and gender violence.<sup>171</sup> The Committee Against Torture then recommended that the Commission broaden its inquiry and include sexual violence within its questionnaire.<sup>172</sup> Even so, the section on “Sexual Violence Against

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167. Interview with Hillary Hiner, Professor of History, Diego Portales Univ., in Santiago, Chile (Mar. 14, 2018); *see also* Hiner, *Nunca más*, *supra* note 97, at 268 (“De hecho, género, sexualidad, etnicidad, raza, clase, todas estas variables quedan fuera del análisis de las comisiones y las víctimas ‘estándar’ que produjeron.”).

168. Rettig Report, *supra* note 18, at 638 (noting that “as a rule people were treated less brutally”).

169. *See* CENTRO DE TORTURA DE “LA VENDA SEXY,” *supra* note 84, at 2.

170. *See* Interview with Lorena Fries Monleón, *supra* note 32.

171. *Id.*

172. *Id.*

Women” was a stand-alone six-page section of an 806-page report.<sup>173</sup> Thus, at least until recently, women were not viewed as the “subjects” of these official documentation processes.<sup>174</sup>

## 2. Preservation of this Hierarchy in Prosecutions

The prioritization of the human rights prosecutions has mirrored that of the truth commissions, focusing first on the disappeared, later the executed, and only recently on torture victims. During the dictatorship, legal efforts were directed at trying, urgently, to find disappeared people through writs of habeas corpus (*recursos de amparo*) before they were killed.<sup>175</sup> Attempting to prosecute claims of torture or sexual violence or any crimes at all in such a hostile environment seemed not only futile, but also secondary to efforts to help those who could still be spared death.<sup>176</sup>

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173. Valech Report, *supra* note 18, at 251–57; *see also* SIN TREGUA: POLÍTICAS DE REPARACIÓN PARA MUJERES VÍCTIMAS DE VIOLENCIA SEXUAL DURANTE DICTADURA Y CONFLICTOS ARMADOS (2008), [http://www.humanas.org.co/archivos/sin\\_tregua.pdf](http://www.humanas.org.co/archivos/sin_tregua.pdf) [<https://perma.cc/585N-4E57>] [hereinafter SIN TREGUA].

174. SECRETO A VOCES, *supra* note 12, at 12 (“A pesar de este proceso de reconocimiento de la violencia de género en contextos de conflictos armados o de excepción, los documentos oficiales que reconocen la represión en Chile, no contemplan a las mujeres como sujetos específicas de la misma.”).

175. *See* COLLINS, POST-TRANSITIONAL JUSTICE, *supra* note 45, at 66; *see also* Collins & Hau, *supra* note 35, at 134 (noting that “[b]etween 1973 and 1990, the Chilean courts’ deference to and complicity with the regime, including rejection of almost 10,000 habeas corpus writs over the period, made it unthinkable that they would hold the security forces to account even before amnesty offered a pretext for inaction”); *see also* PATRICK WILLIAM KELLY, SOVEREIGN EMERGENCIES: LATIN AMERICA AND THE MAKING OF GLOBAL HUMAN RIGHTS POLITICS 72 (2018) (describing the efforts of the Pro-Peace Committee, a Chilean organization formed to protect and aid Chileans after the coup, which filed over 2,300 habeas corpus petitions in the first two years of the dictatorship, “only three of which were successful”).

176. Roberto Garretón, *La Defensa de los Derechos Humanos y la Agresión Sexual a Mujeres Presas Durante la Dictadura*, in MEMORIAS DE OCUPACIÓN: VIOLENCIA SEXUAL CONTRA MUJERES DETENIDAS DURANTE LA DICTADURA 51, 52 (2005) (Chile) (“[L]as denuncias que se recibían estaban marcadas por la esperanza de lograr algo, en una realidad de horrores . . . el génesis del movimiento civil por los derechos humanos es la situación de los desaparecidos, en la que está vigente la esperanza de que aparezca vivo mañana.”); *see also* SECRETO A VOCES, *supra* note 12, at 33–34 (“En este sentido, las que emergieron en el primer período de la represión se centraron en impedir desapariciones y ejecuciones . . . [P]rimero, la urgencia es tratar de ubicar esa persona de tal manera de saber su paradero y salvar una vida’ . . . La tortura no constituyó una preocupación prioritaria . . .”).

Once litigation began to include efforts at accountability, not just locating missing people, this prioritization of adjudicating claims related to the dead and disappeared stuck. Early criminal cases, or to be precise, the earliest cases where courts began hearing claims, dealt with disappearances, even though at some point most knew that disappearance also meant death. The next wave of cases focused on executions, and even getting the courts to accept those cases was a fight. One veteran human rights lawyer, Eduardo Contreras, explained the focus was on disappearance and then execution based on an assessment of likelihood of success and public support.<sup>177</sup> Lawyers started with matters that had public support: “the strength of society for the disappeared was stronger, then the executed . . . .”<sup>178</sup>

Only in 2013 did courts quietly begin adjudicating torture cases.<sup>179</sup> And as torture cases have been moving forward in recent years, sexual violence allegations have too. According to another veteran human rights lawyer, Hiram Villagra, “we are discovering sexual violence by exploring torture.”<sup>180</sup>

### 3. Role of Catholic Church in Early Efforts at Finding Disappeared

The centrality of the Catholic Church to the human rights effort during and after the dictatorship may also have contributed to the absence of prosecutions for sexual violence. The Church, through the Comité Pro Paz and, later, the Vicaría de la Solidaridad, played a critical role in early attempts to use the justice system to help people whom the regime had disappeared.<sup>181</sup> After the transition to democracy, the Rettig Commission also got its files from the Vicaría, so accounts had already passed through the filter of a church group.

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177. Interview with Eduardo Contreras Mella, *supra* note 161 (noting that the “hoy día los tribunales especiales para DDHH están empezando los primeros casos de tortura.”).

178. Interview with Eduardo Contreras Mella, *supra* note 161 (“[L]a fuerza de la sociedad para desaparecidos era mas fuerte, después ejecutados . . . .”).

179. *Id.* (“muy disimuladamente”).

180. Interview with Hiram Villagra, *supra* note 95 (“[V]amos descubriendo violencia sexual por explorar la tortura.”).

181. COLLINS, POST-TRANSITIONAL JUSTICE, *supra* note 45, at 65; *see also* KELLY, *supra* note 175, at 70–74 (describing the formation by the Catholic Church of the Pro-Peace Committee, which provided legal and other assistance to victims of the dictatorship and laid a foundation for cooperation with international organizations).

Hillary Hiner contends that the filter of the Catholic Church “relates to how gender becomes systematically . . . scrubbed from these records or, if it is thought about at all, it is thought about in a very traditional sense.”<sup>182</sup>

## B. Legal Barriers

The Chilean legal system likewise has made prosecutions for sexual violence difficult. The Chilean criminal code’s narrow definition of rape, high requirements of proof for rape (exacerbated by the passage of time), delay in recognizing rape as a crime against humanity, inadequate alternative crime categories, and the lack of a complex litigation framework have presented significant obstacles. Sentencing concerns and a judicial preference in human rights cases for convicting based on one crime compounded these problems.

### 1. Narrow Definition of Rape and Theories of Accountability

One reason that the Chilean human rights cases have not produced sexual violence convictions is the deficiency in the charging options for sexual violence. At the time of the offenses, the crime of rape was defined narrowly. It included only “carnal access by way of vagina, anus or mouth,” and could only be perpetrated by a man.<sup>183</sup> This definition is understood to exclude penetration by the use of objects and animals, a common form of sexual violence. There was no “aggravated sexual abuse” crime in the Chilean code at the time, and the crime of “sexual abuse” applied only to the abuse of minors.<sup>184</sup>

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182. Interview with Hillary Hiner, *supra* note 167.

183. Interview with María José Castillo, *supra* note 99. This restrictive definition is not obvious on the face of the rape provision, however:

La violacion de una mujer será castigada con la pena de presidio menor en su grado máximo a presidio mayor en su grado medio. Se comete violacion yaciendo con la mujer en alguno de los casos siguientes: 1. Cuando se usa de fuerza o intimidacion. 2. Cuando la mujer se halla privada de razon o de sentido por cualquier causa. 3. Cuando sea menor de doce años cumplidos aun cuando no concurra ninguna de las circunstancias espresadas en los dos números anteriores.

CÓD. PEN. art. 361 (1874) (Chile).

184. Interview with María José Castillo, *supra* note 99 (noting that there was no “aggravated sexual abuse” offense at the time of the crimes); *cf.* CÓD. PEN.

According to Magdalena Garcés, a human rights attorney litigating several dictatorship-era cases, the narrow definition is compounded by narrowness in theories of responsibility. She explains that it is difficult to get at anyone other than the direct perpetrator or his superiors, as judges have acknowledged vertical accountability, not horizontal.<sup>185</sup> Judges have been reluctant to adopt the ICL doctrines of co-perpetratorship, joint criminal enterprise, and the like to convict people present at or participating in detention centers.<sup>186</sup>

## 2. Proof and the Passage of Time

Problems of proof and the passage of time have also made prosecuting sexual violence difficult.<sup>187</sup> Interviewees explained that Chilean courts historically have required physical evidence to confirm the victim's allegations. As one human rights judge explained: "Our experience always was oriented towards physical evidence."<sup>188</sup> The Minister noted that this orientation is shifting as judges have begun to adhere to the Istanbul Protocol<sup>189</sup> for dealing with torture victims. Under the Istanbul Protocol, the Minister explained, you can use psychological damage, bolstered by the testimony of other witnesses ("una reiteración de testigos"), to establish [the crime].<sup>190</sup> Nevertheless, historically, problems of proof with respect to sexual violence have made it more likely that judges would focus on the kidnapping and use

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art. 366 (1874) (Chile) (defining sexual abuse to encompass only abuse of girls over the age of twelve but under the age of twenty).

185. Interview with Magdalena Garcés, *supra* note 97.

186. *Id.*; see also Davidson, *ICL by Analogy*, *supra* note 145 (discussing the Jorge Grez case, where the Chilean Court of Appeals overturned the convictions of 46 DINA agents and refused to consider participation in a system of mistreatment as a valid basis for convicting).

187. Interview with Lawyer, Women's Ministry, *supra* note 152 ("[P]racticamente [hay] dificultades en acreditar la violencia."); see also Skype Interview with Rodrigo Lledó Vaquez, *supra* note 40 ("[A]creditación de la agresión sexual es muy difícil, al no ser por testimonio.").

188. Interview with Min. 1, *supra* note 31 ("[N]uestra experiencia siempre iba a la evidencia física.").

189. See UNHCHR, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Office of the United Nations High Comm'r for Human Rights, at 28–29, U.N. Doc. HR/P/PT/8/Rev. 1 (Aug. 9, 1999).

190. Interview with Min. 1, *supra* note 31 ("[M]e da la prueba . . . con la pericial [psicológica y los otros testigos].").

evidence of sexual violence to bump the kidnapping up to “aggravated kidnapping.”<sup>191</sup>

Judges’ desire for corroboration of the victim’s claims can be difficult to satisfy after so many years,<sup>192</sup> particularly if the victim was disappeared or executed. The required medical/psychological exam may also reveal little after thirty-plus years have passed.<sup>193</sup> Complainants, until recently, were required to submit to a gynecological exam.<sup>194</sup> After forty years, it is difficult if not impossible to identify injuries or ascertain with any certainty the source of injuries encountered.<sup>195</sup> The “Valech Secret” compounds these difficulties by making it difficult for litigants to access evidence compiled by the Valech Commission to support the charges.<sup>196</sup>

According to Svenska Arensburg, a professor at the University of Chile and a psychologist who has assisted survivors in cases of dictatorship-era sexual violence, even the psychological exam is poorly designed for the purpose of corroborating sexual violence and is traumatic for victim-witnesses. She explains that the exam was intended to be used to interview victims of child molestation, not to test victims of sexual violence occurring over 40 years ago.<sup>197</sup>

Some lawyers pointed out that difficulties in prosecuting sexual violence in Chile are not limited to dictatorship cases. As a lawyer from the Ministry of Women explained, one has to keep context

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191. *Id.* (“[S]e evidenciaba mas la agravación del secuestro... Era necesario... [la violencia sexual] quedaba inconcluso.”).

192. Interview with Svenska Arensburg, Psychologist & Professor, Dep’t of Soc. Scis., Univ. of Chile, Santiago, Chile (Nov. 23, 2017); Interview with Lawyer, Human Rights Program, *supra* note 71; *see also* Interview with Lawyer, Public Defender’s Office (formerly, Lawyer, Human Rights Program of the Min. of Interior), in Santiago, Chile (July 9, 2018) (noting the “problema probatoria complejo” due to the passage of time).

193. *See* Interview with Svenska Arensburg, *supra* note 192; Interview with María José Castillo, *supra* note 99; Interview with Magdalena Garcés, *supra* note 97 (“[E]l paso de tiempo es nuestro peor amigo.”).

194. Until 2006, women were required to submit to a gynecological exam. Now, among other changes, judges focus more on psychological exams. *See* Interview with María José Castillo, *supra* note 99.

195. Interview with Beatriz Bataszew, *supra* note 99 (describing the futility of a medical exam to try to prove that a certain scar stems from a particular abuse when it is imposible after so much time and calling the exam a “nuevo ultraje” [new outrage/insult]); Interview with Svenska Arensburg, *supra* note 192 (“[L]as hacen pasar por pericias ginecológicas por actos de hace 40 años.”).

196. *See supra* notes 42–44 and accompanying text.

197. Interview with Svenska Arensburg, *supra* note 192.



in mind: even today, only five to nine percent of rape cases lead to conviction.<sup>198</sup> Likewise, a lawyer from the Human Rights, Gender Violence, and Sex Crimes Division of the Chilean Prosecutor's Office (Ministerio Público),<sup>199</sup> noted that accountability remains a challenge even today. Today, particularly in less extreme forms of sexual violence, sexual violence is "invisibilized." He explains: "it's bigger and more cultural." There are challenges of proof, he says, but also cultural ones—"the law doesn't coincide with reality, and all of this is a form of violence against women."<sup>200</sup>

### 3. Failure to Comprehend Sexual Violence as an International Crime

A failure to recognize sexual violence as a crime against humanity, at least until 2018, also may have contributed to delays in prosecutions for sexual violence. Even though the Chilean human rights prosecutions rely on domestic charges (kidnapping, murder, unlawful pressure), international law has proven essential. Judges have circumvented the country's amnesty law and the statutes of limitation, which would otherwise apply to domestic crimes, by reframing the crimes as international crimes and invoking international norms obliging states to prosecute crimes against humanity and war crimes.<sup>201</sup> Several human rights lawyers voiced skepticism that judges would conceive of rape or other forms of sexual violence as crimes against humanity.<sup>202</sup> By contrast, first instance human rights judges interviewed indicated that they believed rape could be the basis for a crime against humanity.<sup>203</sup> It bears noting, however, that these judges are those who remained after a 2017 shuffling of the judiciary that consolidated human rights cases before

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198. Interview with Lawyer, Women's Ministry, *supra* note 152.

199. Interview with Lawyer, Human Rights, Gender Violence, and Sex Crimes Division, Chilean Prosecutor's Office (Ministerio Público), in Santiago, Chile (June 14, 2018).

200. *Id.*

201. See Corte Suprema de Justicia [C.S.J.], [Supreme Court], 9 septiembre 1998, "Pedro Enrique Poblete Córdova," Rol de la causa: 895-96, ¶ 2 (explaining that the amnesty does not apply to war crimes under the Geneva Conventions); see also Davidson, *ICL by Analogy*, *supra* note 145 (discussing the crimes against humanity argument).

202. See *supra* note 160 and accompanying text.

203. Interview with Min. 1, *supra* note 31; Interview with Min. 3, *supra* note 31; Interview with Min. 2, *supra* note 31. The other two did not offer an opinion one way or another (and also were not directly asked).

certain judges perceived to have demonstrated a record of progress on these cases.

Though several of the judges acknowledged that sexual violence could be the basis for a crime against humanity, this may be a recent shift. As noted above, in a landmark 2018 case, the criminal chamber of the Supreme Court recognized rape as a crime against humanity in a civil case related to the rape of a woman by state agents under the dictatorship.<sup>204</sup>

#### 4. Tendency to Convict for One Crime

The tendency of judges in human rights cases to convict on only one basis likewise may contribute to the lack of convictions for sexual violence. Rodrigo Lledó, former legal chief of the Human Right Program, explained that judges have a “tendency to only indict and convict for the most serious crime . . . it’s a problem of weighing the proof.”<sup>205</sup> Sometimes, the obstacle is technical. According to one human rights lawyer, often you cannot charge both because you need either greater than ninety days’ detention or serious harm as the aggravator for aggravated kidnapping—“the criminal code ties our hands.”<sup>206</sup> Human rights lawyer Magdalena Garcés disputes the contention that judges cannot convict on more than one basis, and notes that in present day cases they do so all the time. She argues that with the dictatorship cases, courts cannot get their heads around convicting on more than one basis.<sup>207</sup> Whatever the reason, the sexual violence allegations get swallowed by other charges.<sup>208</sup>

Minister 1 confirmed this judicial tendency to focus on the most serious charge. The Minister explained that judges did not focus on

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204. See *supra* note 93 and accompanying text.

205. Skype Interview with Rodrigo Lledó Vasquez, *supra* note 40 (“[L]os tribunales de justicia tienen la tendencia de sólo acusar y condenar por el delito mas grave . . . es un problema de ponderación de los medios de prueba.”).

206. Interview with Lawyer, Human Rights Program, *supra* note 71 (“[P]orque necesitan o mas de 90 dias o grave danos para el calificante . . . [el] código penal nos ata las manos.”).

207. Interview with Magdalena Garcés, *supra* note 97 (noting the tendency of judges to choose one crime—either an aggravated kidnapping case or a homicide case, maybe aggravated by the sexual violence—because judges have difficulty conceiving of the notion of convicting on more than one basis).

208. *Id.*; Interview with Min. 1, *supra* note 31.

sexual violence “in order not to complicate life.”<sup>209</sup> For example, the Minister noted, in a situation where there was a sexual attack within a homicide or within a kidnapping, it would be charged as homicide or kidnapping, not as homicide and rape or kidnapping and rape. When asked why not both, the Minister responded, “it should.”<sup>210</sup> Like the Human Rights Program lawyer, the Minister contended that one of the difficulties is that sometimes sexual violence is used as the facts that make an offense “aggravated.” So, for example, with “aggravated kidnapping” (“secuestro calificado”), “I aggravate the kidnapping, as is appropriate, but I also do not specify it [the aggravating element].”<sup>211</sup>

Sentencing considerations also have the effect of preventing judges from convicting for sexual violence. Since judges tend to convict on the basis of one crime only, getting the highest sentence often means convicting for something other than sexual violence or torture. The closest equivalents to torture in the code, unlawful use of force (“aplicación de tormentas”) or unnecessary rigor/illegitimate use of authority (“apremio ilegítimo”), carry low penalties. The potential sentence ranges from sixty-one days up to five years.<sup>212</sup> Due to various rules regarding mitigation and alternative punishment under Chilean law, this sentence often means no jail time.<sup>213</sup> By contrast, aggravated

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209. Interview with Min. 1, *supra* note 31 (“[No se enfocaba en atentados sexuales] para no complicar la vida.”).

210. *Id.* (“debería”).

211. *Id.* (“[A]gravo el secuestro como corresponde pero tampoco lo específico.”).

212. CÓD. PEN. arts. 25, 150 (Chile); *see also* Interview with Lawyer, Human Rights Program, *supra* note 71 (noting that the sentence for apremio ilegítimo ranges from 541 days to three years).

213. Interview with Francisco Ugas, Human Rights Lawyer and Former Head of the Human Rights Program of the Ministry of the Interior, in Santiago, Chile (Sept. 8, 2017); *see also* Karinna Fernández, *Breve análisis de la jurisprudencia chilena, en relación a las graves violaciones a los derechos humanos*, ESTUDIOS CONSTITUCIONALES, Primer Semestre de 2010, at 467, 481–87 (2010) (Chile) (describing the Supreme Court’s logic in applying media prescripción and noting that for many defendants convicted of sentences from ten to fifteen years in prison, media prescripción meant that they could pass their sentences in freedom without spending even a day in jail).

Así, el considerar el transcurso del tiempo como una aminorante muy calificada, sin ponderar la magnitud y gravedad de los delitos perpetrados, les permitió acceder, a quienes habían sido condenados en primera y segunda instancia a penas que fluctuaban entre quince y diez años, a una pena que se les permitió cumplir en libertad sin estar un solo día presos.

*Id.* at 483.

kidnapping (*secuestro calificado*) carries a sentence of up to twenty years of “*presidio efectivo*,” whereby the person actually goes to jail.<sup>214</sup> This sentencing discrepancy forces complainants to choose between bringing attention to sexual violence and actually sending the perpetrator to jail.<sup>215</sup> Until recently, many have opted for the latter.

However, judges may be opening to the concept of convicting for more than one crime. Diego Portales University’s human rights summary for 2017 noted greater variety in the types of crimes for which defendants were convicted and a greater willingness of courts to convict on more than one basis.<sup>216</sup>

### C. Resources—Lawyers, Experts, and Support

A lack of resources, and specifically a lack of lawyers, constitutes a major practical hurdle for would-be complainants of sexual violence. Although the Human Rights Program of the Ministry of Justice and Human Rights<sup>217</sup> has the authority to bring criminal cases for enforced disappearance or execution, they lack the authority to do so in cases outside of these categories. Their mandate, therefore, excludes torture and sexual violence unless the victims were then killed or disappeared. The state has yet to provide any legal assistance to Chile’s over 40,000 victims of state violence under the dictatorship,<sup>218</sup> which would require a far greater commitment of

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214. CÓD. PEN. arts. 25, 141 (Chile); *see also* Interview with Francisco Ugas, *supra* note 213 (explaining that the Chilean doctrine of *media prescripción*, sometimes invoked by courts and sometimes not, cuts any sentence in half and means that many defendants never go to jail even after convictions for very serious crimes).

215. Interview with Lawyer, Human Rights Program, *supra* note 71 (“[A]ctualmente las víctimas piensan como proceder. Tienen que decidir entre visibilizar la violencia sexual y una condena efectiva.”).

216. The Diego Portales Annual Human Rights Report for 2017 noted, in “el presente periodo una tendencia a la ampliación de las figuras penales por los cuales se procesan y se condenan autores de crímenes, sean contra víctimas ausentes o sobrevivientes.” CENTRO DE DERECHOS HUMANOS UNIVERSIDAD DIEGO PORTALES, INFORME ANNUAL SOBRE DERECHOS HUMANOS EN CHILE 2017, at 65 (2017), <http://www.derechoshumanos.udp.cl/derechoshumanos/images/InformeAnual/2017/1-verdad,%20justicia,%20reparación%20y%20memoria.pdf> [https://perma.cc/E48A-LEUV] (“[C]on distintas combinaciones de [las figuras penales] invocadas dentro de una misma causa y respect de las mismas víctimas o agentes.”).

217. The program previously fell under the Ministry of Interior.

218. Interview with Lawyer, Human Rights Program, *supra* note 71 (“[Es] un reclamo de los sobrevivientes. [El] estado no ha hecho cargo de sobrevivientes.”);

resources than to the 1,500 or so cases of disappearance and political execution.

Instead, victims of torture and sexual violence must rely on the assistance of an interested NGO or private attorneys. The NGO Corporación Humanas principally engages in policy and community education work, but has also brought a handful of strategic impact cases, including a few for crimes of sexual violence. There are also a number of attorneys who generously volunteer their time to help in court cases.<sup>219</sup> Again, the one case brought by the then-Ministry of Interior's [now Ministry of Justice's] Human Rights Program, the A.B. case, is an exceedingly rare case. It only fell within the office's mandate because A.B. was ultimately disappeared.<sup>220</sup>

The resources problem is compounded in regions outside of the capitol. As one human rights lawyer put it, while resources are a problem generally, Santiago is ahead of other places.<sup>221</sup> Other parts of the country lack NGOs that might provide legal assistance or other support, as such organizations tend to be concentrated in Santiago.<sup>222</sup> This problem extends beyond the lack of lawyers. In other parts of the country, she explains, sometimes the doctor from the Servicio Medico Legal, who does the physical or psychological evaluation required in all cases, has to recuse themselves because either they or a family member are a victim. Often, though, they are the only expert in the region.<sup>223</sup>

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*see also* Skype Interview with Rodrigo Lledó Vasquez, *supra* note 40 (describing the limited mandate of the Human Rights Program).

219. Interview with Alicia Lira, *supra* note 147. Lira is the head of an organization for family members of executed political prisoners ("ejecutados politicos").

220. Corte de Apelaciones de Santiago [C. Apel.] [Santiago Court of Appeals], 28 agosto 2014, Rol de la causa: 808-2014 (Chile).

221. Interview with Lawyer, Sub-Secretariat for Human Rights, *supra* note 160 (stating that "se extrema todo en otras partes del país").

222. *Id.* (noting "la falta de ONGs en otras partes del país"); *see also* Interview with Hillary Hiner, *supra* note 167 (noting that there are few if any resources in Chile other than Corporación Humanas, and that many parts of the country have no access to such resources). Corporación Humanas is in Santiago.

223. Interview with Lawyer, Sub-Secretariat for Human Rights, *supra* note 160 ("[A] veces en el Servicio medico legal, el personal [médico] . . . se han declarados incompatibles para llevar adelante y [tienen que recusar] porque son víctimas, o porque son familiares de víctimas . . . Y son el único perito de la región.").

#### D. Cultural Norms on Gender and Status Quo of Impunity for Sexual Violence Generally

Cultural and gender norms also appear to have contributed to the delay in prosecuting sexual violence. Roberto Garretón, a veteran Chilean human rights lawyer who litigated habeas corpus petitions during the dictatorship—when asked, “why the delay in prosecuting sexual violence?”—put it bluntly: “Because it affects women and not men.”<sup>224</sup>

Many human rights practitioners and commentators have emphasized the gendered role for women in justice efforts—as witnesses for the main show of finding the disappeared and, later, punishing perpetrators of other crimes deemed more serious. Victims viewed themselves as “witnesses” and deprioritized their own suffering because they compared themselves to the disappeared or the dead.<sup>225</sup> These victims, at least, were alive. According to the report *Secreto a voces*: “the women assume, based on their gender role, the search for and defense of their loved ones, spouses, fathers, children, many times detained and other times executed or disappeared.”<sup>226</sup> Lorena Fries, speaking of the process of collecting testimonies for the report *Sin Tregua* of women who had been tortured, noted: “the link between sexual violence and torture had not been made . . . they ‘invisibilized’<sup>227</sup> what had happened to them.”<sup>228</sup> Many victims did not conceive of at

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224. Interview with Roberto Garretón, Retired Human Rights Lawyer, Comité Pro Paz, Head, Legal Unit, Vicaría de la Solidaridad, Former Special Rapporteur, United Nations Commission for Human Rights in the Democratic Republic of the Congo (DRC), in Santiago, Chile (July 4, 2018) (“Porque [la violencia sexual] afecta a las mujeres y no a los hombres.”). Men were also victims, but most lawyers spoken with contended that sexual violence was more systematic and continuous against women. *See supra* notes 31–32 and accompanying text.

225. Interview with Lawyer, Human Rights Program, *supra* note 71; *see also* Interview with Hiram Villagra, *supra* note 95 (“[L]os presos políticos se organizaban de grupos de testigos sobrevivientes. No se auto-percibían de víctimas.”).

226. SECRETO A VOCES, *supra* note 12, at 34 (“[L]as mujeres asumen, desde su rol de género la búsqueda y defensa de sus seres queridos, esposos, padres, hijos/as, muchas veces detenidos y otras ejecutados o desaparecidos.”).

227. “Invisibilize” of course is not a word in English, but I believe that this neologism better translates “invizibilizar” than does “obscure,” because obscuring may carry the negative connotation of intentionally hiding, which I believe is not meant here.

228. Interview with Lorena Fries Monleón, *supra* note 32 (“[N]o se había ligado violencia sexual con tortura. . . ellas invisibilizaban lo que les pasaba.”).

least some forms of sexual abuse as torture, or at least not in response to questions asked as part of the Valech/Rettig truth commissions.

Sexual violence inflicted on women in detention centers and during house raids also tended to be downplayed because it did not square well with prevailing male-centric notions of torture. As *Secreto a voces* explained:

In general, the concept of “torture” is associated with extreme pain and beatings . . . Blows and mistreatment, and in the case of women, sexual abuse, are not easily identifiable in this context as “torture” in accordance with expertise on the subject. From this perspective, sexual violence and rape remained outside of torture, being considered at most mistreatment.<sup>229</sup>

Ester Hernández, the head of a women’s survivor organization in Concepción, Chile,<sup>230</sup> also noted this tendency to downplay the abuses suffered by women: “here, one never spoke of crimes. One spoke of ‘excesses.’”<sup>231</sup> Beatriz Bataszew of Mujeres Sobrevivientes contends that the greatest barrier has been a heteronormative vision of gravity.<sup>232</sup> She argues that judges cannot conceive of damage to freedom, sexuality, or integrity, although this damage is the most important to survivors.<sup>233</sup>

Culture also played a role in normalizing sexual violence. Some viewed sexual violence as a mere continuation, albeit in extreme form,

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En general, el concepto de “tortura” esta [sic] asociado a suplicios y tormentos extremos, y que se habían hecho parte de la historia de las violaciones de los derechos humanos; colgamiento, parrilla, la aplicación de corriente, pau de arara, teléfono etc. . . . Los golpes, los malos tratos y, en el caso de las mujeres, los abusos sexuales, no son fácilmente identificables en ese contexto con la “tortura” de acuerdo como se maneja este en los contextos de experticia sobre el tema. Desde dicha perspectiva las vejaciones sexuales y la violación quedaban excluidas de la tortura siendo consideradas a lo mas como maltratos.

SECRETO A VOCES, *supra* note 12, at 53.

230. Concepción is 500 km south of Santiago.

231. Interview with Ester Hernández Cid, *supra* note 96 (“[A] cá nunca se habló de delitos. Se habló de *excesos*.”).

232. Interview with Beatriz Bataszew, *supra* note 99 (“heteronormativa visión de gravedad”).

233. *Id.*, *supra* note 97 (“[J]ueces no logran dimensionar el daño producido . . . a nuestra corporal, la sexual y a nuestra dignidad y a nuestra libertad . . . esto para nos. es lo más significativo.”).

of more quotidian forms of violence against women.<sup>234</sup> The report *Sin Tregua* captures the sentiment repeated in many interviews that dictatorship-era sexual violence was merely an extreme expression of views about women and gender and a general acceptance of violence against women: “Only recently has the emphasis shifted toward transitional or peace processes, taking into account the continuum of violence and its role of discipline and control over women’s bodies.”<sup>235</sup>

The failure of the justice system to address dictatorship-era sexual violence is in keeping with its failure to address contemporary forms of sexual violence. As in many countries, the Chilean judicial system still convicts but a small fraction of rape and sexual assault cases and buys into many rape myths.<sup>236</sup> Hillary Hiner explained that even today, “[t]here is a lot of victim blaming, and it is something that is expressed in the press a lot, like what was she wearing, was she intoxicated.”<sup>237</sup>

Of course, Chile is not alone in failing to translate factual reports of crimes into criminal prosecutions, even in the world of ICL. At least initially, the *ad hoc* international criminal tribunals were guilty of much of the same. In the landmark *Akayesu* case, which

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234. Interview with Lawyer, Human Rights Program, *supra* note 71; *see also* SECRETO A VOCES, *supra* note 12, at 53 (“La dificultad de las mujeres para evaluar su paso por la tortura desde su condición de género se explica en parte, por las características masculinas del concepto de ‘tortura’ que manejan las mujeres, como por la legitimación social de la violencia en contra de las mujeres.”).

235. SIN TREGUA, *supra* note 173, at 7 (“Ha sido sólo recientemente que el énfasis se ha desplazado hacia los procesos transicionales o de paz, dando cuenta del *continuum* de la violencia y de su rol disciplinador y de control sobre los cuerpos de las mujeres.”); *see also* Interview with María José Castillo, *supra* note 99 (stating that legal education in Chile is male-centric and that only very recently have law faculties incorporated domestic violence); Interview with Lorena Fries Monleón, *supra* note 32 (stating that now there is a greater consciousness of violence against women); Interview with Lawyer, Sub-Secretariat for Human Rights, *supra* note 160 (emphasizing the critical role of cultural norms as normalizing sexual violence against women and the recent cultural shift for women to reclaim the narrative and speak out about their experiences (“ya no queremos callar más”)).

236. *See, e.g.*, Leslie Ayala C., *Fallos que marcan: Cuando los jueces no les creen a víctimas de violación*, LA TERCERA, (May 20, 2018.), <https://www.latercera.com/reportajes/noticia/fallos-marcan-cuando-los-jueces-no-les-creen-victimas-violacion/171310/> [<https://perma.cc/DQ8F-H4WK>] (Chile) (“El Ministerio Público explica que la alta tasa de absolución, respecto de otros delitos, se da porque en algunos casos los jueces ocupan argumentos de género o culturales para desacreditar el testimonio de las víctimas.”).

237. Interview with Hillary Hiner, *supra* note 167.



recognized the crime of genocidal rape, the court stumbled upon rape allegations somewhat haphazardly, and some commentators have contended that it was as though no one wanted to hear it.<sup>238</sup>

These cultural barriers may be shifting, at least among judges dealing with human rights cases. Minister 1, when asked if societal attitudes played a role in delaying complaints and judicial action, said: “this has been changing . . . opening . . . we are bringing light to the problem. Trying to understand it, to confront it. Judges are more conservative—we always arrive last.”<sup>239</sup> Nevertheless, “this change has arrived. There are many situations, where court decisions [deal with the issue]. Recognizing that it is a situation where the tribunals have to make decisions.”<sup>240</sup> He also noted: “now we have a broader view of gender.”<sup>241</sup> One Supreme Court justice interviewed likewise noted: “we are educating ourselves [on gender issues] at a tremendous pace.”<sup>242</sup>

#### E. Reluctance of Survivors to Come Forward with Claims of Sexual Violence?

One explanation for delays in addressing sexual violence through criminal prosecutions is that survivors have not wanted to bring their claims to the courts. This explanation is controverted. All of the human rights judges interviewed indicated that only recently have they seen claims of sexual violence. Feminist activists and lawyers also acknowledge that women were reluctant to participate in a judicial process they perceived to have failed them. However, many refute the argument that survivors refused to report the sexual

238. Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, in HUMAN RIGHTS ADVOCACY STORIES 193, 200 (Deena R. Hurwitz & Margaret L. Satterthwaite eds., 2009) (“[I]t is noteworthy how few details were solicited from the witnesses, almost as if no one wanted to touch the material or failed to immediately recognize its significance.”).

239. Interview with Min. 1, *supra* note 31 (“[E]sto se ha ido cambiando . . . abriendo . . . visibilizamos el problema. Pero entonces ahora tenemos que tratar de entenderlo, de comprenderlo, y saber como abordarlo . . . los jueces [somos] mas conservadores—siempre llegamos al final.”).

240. *Id.* (“[E]ste cambio ya llegó. Y creo que hay muchas situaciones, donde decisiones de los tribunales [abordan el tema] . . . Reconociendo que es una situación que los tribunales tienen que tomar decisiones.”).

241. *Id.* (“[A]hora . . . [tenemos] una mirada de genero más amplia.”).

242. Interview with SC2, Justice of the Supreme Court of Chile, in Santiago, Chile (May 28, 2018) (“[E]stamos educandonos a una velocidad tremenda.”). Name removed to protect confidentiality. Interview recording and notes on file with the author.

violence out of shame or stigma, and instead assert that it was more that nobody wanted to hear about it.<sup>243</sup>

### 1. Silence of Survivors?

Some have attributed lack of justice on matters of sexual violence to survivors' reluctance to come forward with allegations of sexual violence. Some human rights judges interviewed stated that only recently have they seen complaints alleging sexual violence and noted that it was difficult for victims to speak about their experiences with sexual violence.<sup>244</sup> Lawyers and activists acknowledge that many survivors of sexual violence have never even told family members, spouses, or their children about their experiences.<sup>245</sup> Bataszew of Mujeres Sobrevivientes says that sometimes women will approach her at demonstrations and talk for the first time about sexual violence they have experienced.<sup>246</sup> Hillary Hiner adds that some survivors, particularly those with a public face, may not want to come forward due to potential professional repercussions and a desire not to be perceived as victims.<sup>247</sup> She notes that even former President Michelle

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243. Cf. CLAUDIA BACCI ET AL., "... Y NADIE QUERÍA SABER." RELATOS SOBRE VIOLENCIA CONTRA LAS MUJERES EN EL TERRORISMO DE ESTADO EN ARGENTINA 88–89 (2012) (making this argument in Argentina).

244. See Interview with Min. 2, *supra* note 31; Interview with Min. 3, *supra* note 31; Interview with Min. 5, *supra* note 31.

245. Interview with Ester Hernández Cid, *supra* note 96 (“[S]ilencio impuesto y silencio de las mujeres—'cómo voy a contar a mi hijo, a mi pareja, lo que paso...’”); see also *Interponen primera querrela por violencia sexual sufrida por una mujer en dictadura*, LA TERCERA (Dec. 7, 2010), <http://www2.latercera.com/noticia/interponen-primera-querrela-por-violencia-sexual-sufrida-por-una-mujer-en-dictadura/> [https://perma.cc/5ZKP-MW4X] (Chile). Feminist human rights lawyer Camila Maturana noted that:

Es necesario considerar que muchas de las mujeres violentadas cargan con la vergüenza y el estigma que acarrea la violencia sexual, sin mencionar incluso aquellas que han tenido hijos/as producto de las violaciones vividas. La mayoría de las mujeres ni siquiera ha sido capaz de relatar lo ocurrido a sus familiares más cercanos: padres, hijos, parejas.

*Id.*

246. Interview with Beatriz Bataszew, *supra* note 99 (noting that survivors often still feel guilty about what they did or what they didn't do that might have changed things).

247. Interview with Hillary Hiner, *supra* note 167 (“They will say in their interviews, ‘I’ll talk about everything, but I don’t want to talk about rape.’ . . . They don’t want to be seen as victims.”).

Bachelet, herself a survivor of torture, does not speak much about her own experiences at the hands of the dictatorship.<sup>248</sup>

Some survivors (and now complainants in sexual violence cases) contest the argument that the failure of the judicial system to address sexual violence stems from victims' silence. Beatriz Bataszew explains that she gave a judicial declaration in 1976 denouncing rape and sexual violence, but it went nowhere.<sup>249</sup> She gave many statements over the years in other cases reiterating her account of the sexual violence but, until her most recent complaint, courts never initiated any investigation into it.<sup>250</sup> Other survivors likewise have spoken very publicly about the sexual violence they endured for decades.<sup>251</sup> According to the human rights lawyer Magdalena Garcés, "the women complained about this years ago" and always put it in their complaints.<sup>252</sup>

Some argue that the shame explanation for the longstanding silence on sexual violence and lack of prosecutions is a cop-out or is at

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248. *Id.* (explaining that there are "very few references to her own personal experiences with human rights").

249. Interview with Beatriz Bataszew, *supra* note 99; *see also* Bataszew Complaint, *supra* note 27, at 4 (on file with author) (stating she had denounced the rape in a statement she gave for another case in 1976, but the rape was only referred to in her statement as humiliating treatment).

250.

Este antecedente es de particular relevancia, por cuanto habiendo conocido de las torturas y vejaciones sexuales sufridas, el tribunal no inició ninguna investigación de oficio ni en ese momento ni en las múltiples declaraciones que he prestado en calidad de testigo en las investigaciones relativas a las desapariciones, ejecuciones y torturas de compañeros y compañeras con los que compartí cautiverio.

Bataszew Complaint, *supra* note 27, at 4.

251. *See, e.g.,* Temma Kaplan, *Reversing the Shame and Gendering the Memory*, 28 SIGNS: J. WOMEN CULTURE & SOC'Y 1, 180 (2002) (recounting a survivor's experience of brutal sexual violence and describing her efforts to tell her story, even from prison, where a fellow prisoner sent into exile smuggled out her written account); Joyce Wadler, *PUBLIC LIVES: Years After Torture, a Cry Against Pinochet*, N.Y. TIMES (Feb. 3, 1999), <https://www.nytimes.com/1999/02/03/nyregion/public-lives-years-after-torture-a-cry-against-pinochet.html> (on file with the *Columbia Human Rights Law Review*) (recounting an interview with the same survivor in which she describes the torture and sexual violence inflicted on her and her eventual release).

252. Interview with Magdalena Garcés, *supra* note 97 ("[L]as mujeres denunciaron desde muchísimos años. En las querellas siempre ponía la violencia sexual en una parte especial.").

least overblown.<sup>253</sup> The scholar Paulina Gutiérrez argues that the real issue is a society that cannot accept that it has used sexual violence as a habitual form of torture and that there is a need to move to a reality where it is “possible to share and give new meaning” to these experiences.<sup>254</sup>

Interviews offered glimpses of the discomfort with which some actors in the judicial system approach the issue of sexual violence. One human rights lawyer interviewed, who routinely handles cases of disappearance and death, said that he did not go looking for sexual violence cases because they were too upsetting (“demasiado fuerte”).<sup>255</sup> A lawyer from Corporación Humanas noted that even a human rights judge very attuned to sexual violence issues had trouble saying the words pertaining to the sexual violence during a reenactment of the scene of the crime.<sup>256</sup> Although these are but two examples, they suggest a discomfort with broaching the issue of sexual violence that

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253. This argument is made forcefully in Argentine literature on sexual violence. One report on sexual violence in Argentina notes that this silence was less about shame and stigma and more that people did not want to hear about the sexual violence. BACCI ET AL., *supra* note 243, at 89 (quoting one woman’s testimony that people always told her not to talk about the sexual violence because it hurt her, and describing her realization that in fact the problem was that it hurt them and that nobody wanted to know). “Y después me di cuenta que en realidad le hacía muy mal al que escuchaba, porque eso lo obligaba a tomar partido, a darse por enterado, ¿no? Y nadie quería saber. Y han tenido que pasar treinta años por ejemplo, para que podamos hablar de algunas cosas.” *Id.*; see also Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 48 CORNELL INT’L L.J. 639, 650 (2015) (“[N]ot only victims of sexual violence may find it difficult to speak or hear about sexual violence. Others in different capacities (within the legal settings of tribunals or otherwise) and . . . [without] involvement in sexual violence as such find it similarly difficult to speak or hear about conflict-related sexual violence.”).

254. Paulina Gutiérrez, *La Obstinada Presencia del Horror: La Violencia Sexual como Tortura Política*, in MEMORIAS DE OCUPACIÓN: VIOLENCIA SEXUAL CONTRA MUJERES DETENIDAS DURANTE LA DICTADURA, *supra* note 174, at 74 (“[C]abe preguntarse qué sucede con una sociedad que soporta mal la posibilidad que la violencia sexual haya sido empleada como forma habitual de tortura. . . . [R]equiere de una serie de operaciones de develamiento que . . . trascende[n] desde el orden de ‘lo no dicho’ hacia una realidad posible de compartir y resignificar.”).

255. Interview with Human Rights Lawyer in Santiago, Chile, 2017 (using the word “fuerte,” which literally means strong, but here I believe the lawyer means it in the sense of “hard” or “upsetting”).

256. Interview with María José Castillo, *supra* note 99 (“no logra verbalizar”).

exists even today, and even among actors in the thick of human rights cases.

## 2. Process Is Traumatic and Re-victimizing

Many interviewees, from judges to lawyers to representatives of survivor organizations, listed the traumatic nature of the judicial process as a key reason survivors have been reluctant to come forward and thus why the issue of sexual violence has been overlooked in criminal prosecutions.<sup>257</sup> At least for some victims, the prospect of having to relive the traumatic events through the legal process was a barrier. According to Minister 1, victims did not file complaints, because “they couldn’t bring themselves to file a complaint . . . with the courts, normally there is a secondary victimization. The thing you want to forget, you have to talk about over and over again.”<sup>258</sup>

Interviewees indicated that antiquated criminal procedures and lack of training for judicial actors in how to conduct sexual violence investigations have exacerbated matters. Just as the crimes are charged under the old criminal code, so too are they adjudicated using the old criminal procedures. Bataszew explained that survivors’ trip through the courts has been “very violent” and that the judicial staff are not prepared to incorporate a human rights and gender perspective.<sup>259</sup>

According to several interviewees, the whole process under the old criminal procedure is “revictimizing.”<sup>260</sup> Survivors give statements

257. Interview with Svenska Arensburg, *supra* note 192; Interview with Lawyer, Sub-Secretariat for Human Rights, *supra* note 160; Interview with Cristián Cruz, *supra* note 43 (remarking that many victims do not speak of their experience to avoid being revictimized); Interview with Eduardo Contreras Mella, *supra* note 160; Interview with Min. 2, *supra* note 31; Interview with Min. 3, *supra* note 31 (noting that it is a “very hard thing to return to relive that trauma,” or in the original Spanish, a “tema muy fuerte de volver a revivir todo ese trauma”).

258. Interview with Min. 1, *supra* note 31 (“[S]e inhibían . . . hacer una querrela por tortura, más una tortura con conoctración sexual . . . porque los tribunales normalmente generan la victimización secundaria . . . lo que tu quieres olvidar tienes que contar reiteradamente.”).

259. Interview with Beatriz Bataszew, *supra* note 99 (stating that survivors’ process through the tribunals has been very violent because the clerks “no tienen la preparación para tomar en consideración o tomar en perspectiva derechos humanos y menos de género,” that survivors are “sometidas a un . . . nuevo ultraje,” and that the process is “profundamente maltratador para las mujeres”).

260. Interview with Lawyer, Sub-Secretariat for Human Rights, *supra* note 160 (noting that the litigation process “is revictimizing,” or in the original Spanish,

to the investigating judge in an open space.<sup>261</sup> The lawyer noted that more than once, when a survivor went to give her statement, the perpetrator was giving his statement at the next desk over.<sup>262</sup> Until 2006, gynecological exams were required in all cases involving allegations of sexual violence.<sup>263</sup> Now, judges increasingly follow the procedures set out in the Istanbul Protocol on Torture, but still require gynecological exams in some cases.<sup>264</sup> Judges have also put rape survivors through reconstruction of scenes—where they go to the place where they were tortured and reenact the scene—which is very hard on victims.<sup>265</sup> Moreover, with the first torture complaints, there were no specialized human rights judges for torture, only for execution and disappearance.<sup>266</sup> Particularly in those early days, judges and their staff were ill-equipped to handle the cases sensitively.

Even with specialized judges attempting to adhere to best practices set out in human rights standards such as the Istanbul Protocol, the process of having to recount their experiences is traumatic for survivors.<sup>267</sup> Judges often have to stop testimony and resume another day because the victim is too upset to continue.<sup>268</sup> This

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“es revictimizante”); *see also* Interview with María José Castillo, *supra* note 99 (noting that the process is “muy revictimizante” and stating that one survivor told her, “I’ve spent 42 years testifying” [“llevo 42 años declarando”]); Interview with Svenska Arensburg, *supra* note 192 (“[S]e sienten muy victimizadas por el sistema . . . la situación del proceso [medical examinations, reconstruction of scenes, probing interviews] es muy violenta para ellas.”).

261. Interview with Lawyer, Sub-Secretariat for Human Rights, *supra* note 160 (describing “relatos en un espacio abierto”).

262. *Id.* (“Más de una vez [cuando la víctima fue a declarar], el perpetrador hacía su examen en el escritorio de al lado.”).

263. Interview with María José Castillo, *supra* note 99 (noting that gynecological exams are still performed, but they are no longer required in every case).

264. *Id.*

265. Interview with Svenska Arensburg, *supra* note 192 (“[V]an al lugar donde fue torturada . . . [y] el policía se pone en la posición que ella relata . . . elijen a la persona más parecida a como ella era de joven . . . y esa persona va realizando lo que ella dice . . . la situación del proceso es muy violenta para ellas.”).

266. Interview with Lawyer, Sub-Secretariat for Human Rights, *supra* note 160 (“En las primeras querellas de tortura—ni siquiera [había] jueces especializados . . . en 2001 con el auto-acordado [habían] jueces especiales, pero solo para ejecución y desaparición, no para tortura.”). Later, specialized judges were assigned for torture cases as well. *Id.*

267. Interview with Min. 2, *supra* note 31.

268. *Id.*

trauma is typical of cases of sexual violence in conflict. As Anne-Marie de Brouwer explains:

Many survivors of conflict-related sexual violence suffer from depression, anxiety, post-traumatic stress disorder, low self-esteem, and suicidal thoughts, and speaking about the atrocities brings back painful and traumatic memories. Furthermore, when victims speak in court, the demanding legal structure may require victims to speak before complete strangers in detail about very intimate and painful experiences.<sup>269</sup>

Moreover, reconciling the goals of accountability and healing for victims can be difficult. As an Argentine report on dictatorship-era sexual violence describes, there is a paradox inherent in such efforts to address sexual violence:

Sexual violation implicates extreme forms of violation of privacy and personal intimacy that at the same time break the rigid division between public and private spaces as well as the rules for men and women in each of these spaces. . . . “How to combine the necessity of constructing a public narrative while at the same time permitting the recuperation of intimacy and privacy?” We understand that on occasions it is necessary to take care of and even reconstitute “intimacy.”<sup>270</sup>

Survivors also may be reluctant to put themselves through this renewed trauma with so little chance of any remedy. According to Cristián Cruz, they have had good reason to believe that nobody would do anything about their cases.<sup>271</sup>

It bears noting that because dictatorship-era human rights cases are handled under the older criminal procedural system and the Human Rights Program only assists families of the disappeared or executed, the onus is on the survivor to file a complaint. Thus, the lack

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269. de Brouwer, *supra* note 253, at 649.

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La violencia sexual implica formas extremas de violación de la privacidad y la intimidad personales que a su vez rompen la rígida división entre espacios públicos y privados así como las prescripciones para varones y mujeres en cada uno de ellos. Jelin se pregunta entonces: “¿Cómo combinar la necesidad de construir una narrativa pública que al mismo tiempo permita recuperar la intimidad y la privacidad?” Entendemos que en ocasiones, es preciso cuidar e incluso reconstruir “la intimidad.”

BACCI ET AL., *supra* note 243, at 14.

271. Interview with Cristián Cruz, *supra* note 43.

of a government office charged with bringing criminal charges on behalf of survivors of dictatorship era abuses means not just a lack of legal assistance for survivors, but also a lack of a state role in initiating and investigating cases. This victim/survivor-initiated model stands in contrast to the international criminal courts in which prosecutors drive the process.

In sum, the role of the silence of survivors of sexual violence is contested and appears to vary from case to case. For at least some survivors, a desire not to make public humiliating and traumatic experiences, a desire not to be painted as a victim, a desire to avoid reliving the trauma in a legal environment ill-suited to sensitive handling of claims, and even fear of retaliation have prevented them from turning to the courts until recently, if at all.

#### F. Fragmentation of Human Rights Movement

Fragmentation of the human rights movement and survivor organizations likewise may have contributed to delays in confronting the issue of sexual violence under the dictatorship. These groups divide in various ways, including along political, geographic, and gender lines.

One difficulty in putting the issue of sexual violence front and center in the public sphere was the lack of cohesion among survivor organizations. There are many groups throughout the country and, historically, they have been less coordinated and united than groups of family members of executed political prisoners (“*ejecutados políticos*”) and the disappeared.<sup>272</sup> Survivors have gone on to do widely different things with their lives. Their politics and levels of interest in engaging in activism and litigation vary significantly.

The incorporation of a gender perspective, or lack thereof, has led to one line of division in the human rights movement in Chile. Human rights organizations were slow to embrace feminism and gender rights as a priority. According to feminist scholars, Chilean leftist parties and organizations were willing to include women in the fight for class struggle, but without any agenda to address the particular gendered problems of women in Chile’s patriarchal society.<sup>273</sup> Moreover, after the country’s transition to democracy,

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272. *Id.*; Interview with Hillary Hiner, *supra* note 167.

273. See Judy Maloof, *Chilean Women and Human Rights*, in VOICES OF RESISTANCE: TESTIMONIES OF CUBAN AND CHILEAN WOMEN 126–27 (Judy Maloof



female survivors of sexual violence were concerned that attempts to bring attention to the violence they suffered would somehow detract from the attention given to other cases and divide the human rights movement.<sup>274</sup>

Even today, human rights organizations are accused of failing to take into account gender rights. According to Hillary Hiner, human rights organizations often do not think about gender in connection with political violence, and instead maintain “that it all boils down basically to political militancy . . . [even with] women in human rights groups . . . it is really difficult to approach the topic of gender.”<sup>275</sup> Beatriz Bataszew of Mujeres Sobrevivientes cites this failure of human rights organizations to prioritize women’s rights and the experiences of female survivors as one of the reasons for forming a separate women’s survivor organization.<sup>276</sup>

Even feminist organizations are fragmented<sup>277</sup> and have been so historically. As Judy Maloof explains:

Many members of [the feminist groups of the 1970s] were middle- and upper-class women, whose concerns were sometimes far removed from those of poor and working-class women. In fact, women in the poblaciones were often suspicious of “academic” feminists—privileged women who lived in nice homes in wealthy neighborhoods and who came to the poblaciones to preach to their less educated sisters about women’s equality, even while many of them were exploiting poor women by using them as underpaid domestic servants.<sup>278</sup>

Although working class women’s organizations emerged in the 1980s in response to economic crisis,<sup>279</sup> the fragmentation remains even after

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ed. & trans., 1999) (citing JULIETA KIRKWOOD, *LA POLÍTICA DEL FEMINISMO EN CHILE* (1983)).

274. Interview with Lorena Fries Monleón, *supra* note 32 (“[H]asta entonces [the time of the Valech Report] las mujeres no querían querellarse . . . porque eso dividía el movimiento de los derechos humanos.”).

275. Interview with Hillary Hiner, *supra* note 167.

276. Interview with Beatriz Bataszew, *supra* note 99.

277. Interview with Hillary Hiner, *supra* note 167.

278. Maloof, *supra* note 273, at 127–28.

279. *Id.* at 128–33 (including the Comité de Defensa de los Derechos de la Mujer (CODEM), Mujeres de Chile (MUDECHI), Movimiento de Mujeres Pobladoras (MOMUPO), the “ollas comunes,” and craft workshops among the newly-formed working class women’s organizations).

the transition to democracy. According to Hiner, while some women continued to be aligned with the movement against neoliberal capitalism and class struggle, other “women who did survive torture . . . afterwards became very important members of [the] Concertación [post-dictatorship coalition] government.”<sup>280</sup>

These divisions in human rights and feminist organizations are based on more than political disagreement. Distance, and the lack of resources to bridge it, compound the fragmentation. Ester Hernández, the leader of a feminist organization in Concepción, noted: “[with] the [feminist and human rights] movements—the idea was always to grow stronger from the activities of others,” but due to financial constraints, illnesses, and the like, “you wind up working in your territory.”<sup>281</sup>

#### IV. WHY NOW?

All of these impediments to prosecution beg the question—why now? What has inspired the most recent wave of sexual violence prosecutions? Recent cases centering on sexual violence seem to build on a changed culture of political mobilization in which survivors are speaking more openly about gender and sexual violence. Survivors and human rights lawyers note that survivors felt compelled to come forward and seek justice when they saw sexual violence being inflicted on female student protesters in 2011. This feminist movement in turn is bolstered by greater incorporation of international norms and examples set by neighboring countries. Finally, there is a sense among survivors that time is running out—if they want to bring attention to this issue via criminal prosecutions, it is now or never.

##### A. Reclaiming Agency / Shifting the Narrative of Victimhood

Regaining agency and shifting the narrative of victimhood seems to be an important impetus behind recent efforts to bring perpetrators of sexual violence to justice. Survivors have attempted to ensure that their experiences not be forgotten in a number of ways—through memorials, books compiling survivor testimony, murals,

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280. Interview with Hillary Hiner, *supra* note 167.

281. Interview with Ester Hernández Cid, *supra* note 96 (remarking that for “[l]os movimientos—la idea siempre fue de potenciarse con actividades de otras . . . [but due to illness, lack of resources, etc.] sigues trabajando en tu territorio”).

plays, and activism.<sup>282</sup> Survivors are also asserting agency by attempting to take control of the narrative in the judicial sphere. One way they assert their agency is by filing criminal complaints and pushing back on the legal labels for the harms inflicted on them through the label PSV.<sup>283</sup>

Feminist activist Beatriz Bataszew's description of the survivors' decision to turn to the courts centers on this notion of resisting the stereotype of victimhood and reasserting one's own multi-dimensional identity. She explains that, at one point, "the press began to pay attention [to the issue of sexual violence]," but they were only interested in the "sensational and morbid details."<sup>284</sup> Nobody cared about "your story, your goals, what you did afterwards. Another element—this implicated a contextualization of victimhood—'poor little thing' the perpetuation of the situation of victimhood." So, Bataszew explains, around 2012–2013, she and many others decided, "I'm not doing any more interviews . . . we are going to prove it [in court]."<sup>285</sup> According to Bataszew, "the most important reparation for our lives [is that] they recognize us as fighters . . . That they recognize us that way or realize that we have overcome the trauma because we continue being the women we have always been . . . It shows a sense of continuity."<sup>286</sup>

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282. Interview with Ester Hernández Cid, *supra* note 96 (describing the many efforts of the group La Monche in Concepción to bring attention to the issue of sexual violence); *see also* Interview with Hillary Hiner, *supra* note 167 (describing the different efforts to memorialize the experiences of female political prisoners beyond the judicial system).

283. *See supra* Part II.D.1.

284. Interview with Beatriz Bataszew, *supra* note 99 (stating that "la prensa se empieza a [prestar atención]," but they were only interested in the "detalles sensacionales . . . y morbos[os]").

285. *Id.* (recalling that "su historia, su propósitos, lo que hicieron después . . . otro elemento—esto se marcaba una contextualización de víctima—'pobrecita' perpetuación de la situación de víctima . . . yo ya no voy más a entrevistas . . . muchas de nosotras . . ." so around 2012–13, they decided, "vamos a tratar de evidenciar").

286. *Id.* (noting that "la reparación más significativa para nuestras vidas . . . nos reconoce como luchadores . . . el hecho que nos reconozcan así o de cuenta que hemos superado el trauma porque seguimos siendo las mujeres que siempre hemos sido—anti-capitalista, anti-patriarcal . . . marca un sentido de continuidad").

## B. Feminist Mobilization

The increased judicial attention to sexual violence also seems to stem from the greater space for women's voices in civil society and shifting views on violence against women.<sup>287</sup> In the last ten to fifteen years, the Southern Cone has seen greater feminist mobilization, particularly around the topic of gender violence. This mobilization has most recently manifested itself in movements such as #NiUnaMenos (#MeToo's Latin American cousin), which migrated from Argentina to Chile, and the wave of feminist protests and student "tomas" (take overs) at universities and schools in Chile. Speaking of the turn to sexual violence crimes in military dictatorships in Latin America generally, Brazilian scholar Mariana Joffily explains:

[T]he re-definition of violence against women and in particular sexual crime in civil law—the fruit of years of struggle by the feminist movement, together with new thinking on the place of women in society, brought to public debate with the development of gender studies—has contributed to the creation of a social space for listening which is able to receive denunciations of abuse suffered during the military dictatorships with a new level of understanding.<sup>288</sup>

Thus, as harms against women became a subject of discussion, so too do the harms against women in the dictatorship.

In Chile, feminist activism related to sexual violence took a variety of forms, but eventually included a strategy to turn to the courts. As Hillary Hiner has noted, this lifting of the silence has included: political mobilization and the forming of organizations for

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287. When asked, "why now?," Lorena Fries attributed the latest round of strategic litigation related to sexual violence to two trends: a cultural shift in views on violence against women combined with a greater incorporation of international norms. Interview with Lorena Fries Monleón, *supra* note 32. Fries makes the same point in her introduction to the report *Sin Tregua*: "[T]ambién da cuenta del desarrollo en paralelo que ha tenido el derecho de las mujeres a vivir una vida libre de violencia y de los aportes que han permitido instalarlo en el discurso de Naciones Unidas como un fenómeno estructural y sistémico de subordinación de las mujeres." *SIN TREGUA*, *supra* note 173, at 8 (describing the dramatic development ("desarrollo vertiginoso") of international human rights law and the parallel development of the right of women to be free from violence and the introduction of structural feminism in UN discourse).

288. Mariana Joffily, *Sexual Violence in the Military Dictatorships of Latin America: Who Wants to Know?*, 13 SUR 165, 170 (2016).

survivors of sexual violence;<sup>289</sup> women’s protests geared at securing recognition of memorials at notorious sexual torture sites;<sup>290</sup> as well as a few strategic impact litigation cases.<sup>291</sup> Professor Arensburg explained in her interview that, starting around 2003, activists and survivors created a public voice for these issues through documentaries, publications, theses, and the like, but “with time [they began] recognizing that they ha[d] to do something judicial.”<sup>292</sup>

Survivor complainants and feminist lawyers were also galvanized by highly publicized instances of sexual violence against girls and women in student protests in 2011 and 2012. Patterns of violence seen in the dictatorship repeated themselves in these student demonstrations, where young girls at protests were arrested, stripped, touched, sexually taunted, and called whores (“putas”).<sup>293</sup> Interviewees repeatedly cited the phenomenon of sexual violence against student protesters in recent years as an outgrowth of the culture of impunity surrounding the dictatorship’s use of sexual violence as a tool of repression, particularly against women.<sup>294</sup> Some survivors of

289. Hiner, *Nunca más*, *supra* note 97, at 255 (noting the formation of organizations like the Colectivo de Mujeres Sobrevivientes Siempre Resistentes).

290. *Id.* (noting protests aimed at recovering memorial sites to recognize sexual violence against women on certain dates of significance for human rights and feminism in Chile, including September 11, the day of the coup, and November 25, the International Day for the Elimination of Violence against Women).

291. *See id.*

292. Interview with Svenska Arensburg, *supra* note 192 (“[D]espués del 2003 . . . se creó una voz pública que permitió documentales, publicaciones, . . . tesis de estudiantes sobre [violencia sexual] . . .”).

293. Interview with Beatriz Bataszew, *supra* note 99; Interview with María José Castillo, *supra* note 99; *see also* CASA MEMORIA JOSÉ DOMINGO CAÑAS, TORTURA EN CHILE: INFORME PARA SU PRESENTACIÓN AL SUB COMITÉ PARA LA PREVENCIÓN DE LA TORTURA (SPT) ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS 5 (Apr. 4, 2016) (“Hemos recibido antecedentes de mujeres menores de edad, adolescentes, sindicalistas, madres de estudiantes detenidas(o) en manifestaciones y mujeres y hombres mapuche.”).

294. Interview with Lawyer, Sub-Secretariat for Human Rights, *supra* note 160 (arguing that the gendered violence today against “mapuche” women and student protesters is an extension of the sexual violence of the dictatorship and saying that feminists want people to “understand it not only as a situation of the past, but rather of the present” [“comprenderlo no sólo como situación del pasado, sino actual”]); Interview with Lawyer, Human Rights Program, *supra* note 71; Interview with Beatriz Bataszew, *supra* note 99 (noting sexual violence against young student activists and stating that “the crimes keep repeating themselves . . . today [it is] a recurring practice in Chile” [“los crímenes siguen repitiendo . . . hoy día [es] una práctica recurrente en Chile”]); Interview with

dictatorship-era violence felt compelled to file complaints (“querellar”) because they perceived that the patterns of using sexual violence to quiet women who dared to have a political voice during the dictatorship persisted in modern times due to this “culture of impunity.”<sup>295</sup>

Thus, the nascent litigation of sexual violence in Chile is closely tied to the feminist movement. The early complainants in recent sexual violence cases are not just anyone—they, and in many instances, their lawyers,<sup>296</sup> identify as feminist human rights activists.<sup>297</sup> It is part of the conscious agenda of these feminist groups to dedicate resources to this cause. These lawyers and complainants view sexual violence of the past as tied in to the contemporary problems relating to police sexual abuse of protestors and detainees, especially student demonstrators.

### C. Seizing on Developments in International Law

Advances in international law also helped set an example for accountability for sexual violence crimes and have offered a framework for discussion and advocacy. The 1990s and early 2000s saw major advances in the recognition of violence against women in international criminal law through judgments by the *ad hoc* tribunal recognizing rape as a war crime, crime against humanity, and genocide, and fleshing out a series of sexual and gender crimes in the Rome Statute of the International Criminal Court. Simultaneously, women’s rights and sexual violence issues were getting a lot more attention on the international level outside of ICL. As Joffily notes, a series of

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Lawyer, Women’s Ministry, *supra* note 152 (noting the use of sexual violence in the student protests of 2011 and stating, “if we do not bring attention to it, it will keep happening” [“si no visibiliza va a seguir continuando”]).

295. Interview with Beatriz Bataszew, *supra* note 99; Interview with Lawyer, Human Rights Program, *supra* note 71; Interview with María José Castillo, *supra* note 99.

296. As noted above, *supra* note 69, Corporación Humanas is a feminist human rights organization bringing the cases of two complainants of dictatorship-era sexual violence.

297. Hillary Hiner, who has interviewed scores of survivors as part of a national research project on the Chilean reparation schemes, noted in her interview that the women who are bringing court cases typically count on strong social networks and already belong to human rights or feminist groups. Interview with Hillary Hiner, *supra* note 167 (“They are the sort of women that absorb that shock or that impact of all the frustration, and see themselves as . . . pioneers. I think it also helps them seeing their historical relevance . . . I also think that they are probably outside of the norm.”).

international declarations and conventions from the 1990s “not only helped to established [sic] new bases for understanding sexual violence, but also created international legislation for dealing with this subject.”<sup>298</sup>

Feminists in Chile were paying attention to these international developments. For example, as early as 2004, the report *Secreto a voces* cited the ICTR case *Prosecutor v. Akayesu* for its progressive definition of rape and for the proposition that rape is torture, as well as for the proposition that sexual violence against women is grave and deserving of classification as a crime against humanity. *Secreto a voces* also pointed to Rwanda and the former Yugoslavia to exemplify the proposition that sexual violence is directed primarily at women, a controversial proposition, and further that sexual violence can serve as the *actus reus* for genocide, sexual slavery, and torture, among other crimes.<sup>299</sup> *Secreto a voces* also noted that the Rome Statute of the ICC builds on this legacy of attention to sexual violence.<sup>300</sup> Likewise, the report *Sin Tregua* discussed advances in the *ad hoc* tribunals recognizing a broader conception of war crimes, crimes against humanity, and genocide<sup>301</sup> and noted that the “importance [of the Rome Statute] . . . lies in the criminalization of sexual and gender violence.”<sup>302</sup>

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298. Joffily, *supra* note 288, at 171. Joffily notes a number of important milestones in women’s rights from the 1990s on the international level that advanced “new understanding of women’s status and the nature of violence directed at them,” including the Vienna Declaration of 1993, the Declaration on the Elimination of Violence against Women (1993), and the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women (1994) (known as the Belem do Para Convention). *Id.*

299. SECRETO A VOCES, *supra* note 12, at 11 (“Las experiencias de conflicto armado en Ruanda y en la Ex Yugoslavia sirvieron para confirmar que este tipo de violencia se ejerce mayoritariamente contra las mujeres, y que puede incluso llegar a ser constitutiva de crímenes tales como el genocidio, la esclavitud sexual y la tortura entre otras.”).

300. *Id.* at 11–12 (“Sobre la base de estos antecedentes, se inicia el proceso de elaboración del Estatuto de Roma que crea la Corte Penal Internacional,” which makes criminal “un conjunto de conductas expresivas de la violencia de género, como crímenes de lesa humanidad y crímenes de guerra.”).

301. SIN TREGUA, *supra* note 173, at 22 (noting the caselaw of the *ad hoc* tribunals “marca un hito en la justicia penal internacional que permite avanzar en una aplicación más amplia de los conceptos de crímenes de guerra, crímenes contra la humanidad y genocidio”).

302.

This invocation of ICL is unsurprising, as at least a couple of key Chilean human rights players have experience in ICL. Lorena Fries, the director of Corporación Humanas who also served as the Sub-Secretary for Human Rights under Michelle Bachelet,<sup>303</sup> participated in the negotiations leading up to the Rome Statute in the late 1990s. As is apparent from their briefing, lawyers working at or who have worked at Corporación Humanas are knowledgeable about the Rome Statute and ICL. Likewise, Rodrigo Lledó, the former legal director of the Ministry of Interior (now Ministry of Justice and Human Rights) Human Rights Program, has a Ph.D. specializing in international criminal law from Spain.<sup>304</sup> These are only a couple of examples, but they are examples of critical human rights institutions that have had in their midst experts in ICL who in turn have helped in turn to create others. Many of the younger lawyers working in the dictatorship-era human rights cases also studied ICL with Professor Claudia Cárdenas at the University of Chile.<sup>305</sup>

Important developments in women's rights and accountability on the international stage in the area of human rights also may have contributed to recent attention to sexual violence in the Chilean cases. In addition to the Rome Statute, Lorena Fries points to the Beijing Fourth World Conference on Women as an important milestone.<sup>306</sup> Although both the Rome Statute and the Beijing Conference post-dated the Rettig Commission, and the Valech Commission was slow to pick up on their lessons, the Peruvian truth commission incorporated these

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[E]l Estatuto de Roma (1998) es la culminación de un proceso que equilibra la búsqueda de sanción a los responsables y las normas del debido proceso que garantizan derechos a los procesados, con la inclusión de los intereses de las víctimas al proceso; pero su importancia también radica en la criminalización de la violencia sexual y de género . . . .

*Id.*

303. She has worked in other human rights roles in Chile: as the Director of Corporación Humanas and as the head of the Instituto Nacional de Derechos Humanos (INDH).

304. Skype Interview with Rodrigo Lledó Vasquez, *supra* note 40.

305. Interview with Lawyer, Women's Ministry, *supra* note 152.

306. Interview with Lorena Fries Monleón, *supra* note 32 (“[P]asó Beijing y el Estatuto de Roma.”); *see also* SIN TREGUA, *supra* note 173, at 28 (“[L]a CEDAW . . . la Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra las Mujeres dan cuenta de dicha especificidad en materia de violencia, la que logra transversalizarse en el Estatuto de Roma con la incorporación de conductas que afectan principal o exclusivamente a las mujeres por el hecho de ser tales.”).



developments in international law to a far more significant degree.<sup>307</sup> Feminist groups in South America took note and began incorporating international norms into domestic activism and strategic litigation. Likewise, the Inter-American Court also helped to push international norms condemning violence against women into the domestic arena.<sup>308</sup> During this time period, the court issued a series of judgments demanding that national jurisdictions prosecute and punish those responsible for sexual and gender crimes.<sup>309</sup>

Thus, developments in international law and women's rights elsewhere have helped to give Chilean lawyers and judges more to work with to address sexual violence in Chile. A few key "norm entrepreneurs" have helped to incorporate these international developments into arguments in the courts.

#### D. Greater Judicial Openness to International Norms

Alongside these political and cultural shifts, Chilean courts have grown much more open to international norms than before, including norms related to women's rights. Up until 2000, the judiciary was still closely linked to the dictatorship.<sup>310</sup> With changes in

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307. Interview with Lorena Fries Monleón, *supra* note 32; *see also* Joffily, *supra* note 288, at 171–73 (noting that Peru had innovated by “always taking into account the difference in the way that violence was experienced and continued to be experienced by men and women,” and that they had a member of the commission tasked with raising awareness of gender bias and treating sexual violence as a human rights violation worthy of prosecution and not just “collateral damage”).

308. *See Judgments of the Inter-American Court*, OAS, [http://www.oas.org/en/iachr/women/decisions/ia\\_court\\_hr.asp](http://www.oas.org/en/iachr/women/decisions/ia_court_hr.asp) [<https://perma.cc/AC2M-YCU2>] (linking to Inter-American Court decisions involving violence against women and other cases with gender implications).

309. *See, e.g.,* González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 286 (Nov. 16, 2009) (finding Mexico in violation of the rights to life, personal integrity, personal liberty, and non-discrimination in failing to investigate the brutal deaths of women in Ciudad Juárez); Rosendo Cantú v. México, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 179–82 (Aug. 31, 2010) (finding Mexico in violation of Ms. Cantú's rights under the American Convention by failing to investigate and punish perpetrators for her rape).

310. Interview with Lorena Fries Monleón, *supra* note 32 (“[C]uando empezó Chile con Rettig . . . los jueces . . . eran herederos de la dictadura. Ha sido en las nuevas cortes . . . la incorporación del derecho internacional.”); *see also* SÉBASTIAN BRETT, INT'L COMM'N OF JURISTS, CHILE: A TIME OF RECKONING: HUMAN RIGHTS AND THE JUDICIARY 74 (1992) (noting that the Chilean judiciary, unlike the post-

personnel, the Supreme Court shifted left<sup>311</sup> and gradually became more receptive to international law arguments and to human rights issues generally.<sup>312</sup> According to Lorena Fries, the Court began to show an awareness of human rights and international law starting in 2008.<sup>313</sup> Minister 2 also noted that there has been a massive shift in the judiciary's reliance on international law. The Minister contends that, in all contexts, judges and advocates now turn to international law constantly.<sup>314</sup>

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dictatorship judiciaries of other Latin American countries, emerged "intact and untouched" after the transition to democracy despite changes in other branches of government and the judiciary's complicity during the dictatorship).

311. NAOMI ROHT-ARRIAZA, PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS 72–73 (2006) (noting that, as a result of expansion in the number of justices and offers of generous retirement packages, 50% of justices were post-Pinochet appointees by 1998).

312. See also Roberto Garretón, *Los tribunales con jurisdicción penal durante la transición a la democracia en Chile*, in JUSTICIA TRANSICIONAL EN IBEROAMÉRICA 69, 76, n.13 (2009) ("La Corte tuvo un cambio vegetativo de sus miembros durante la dictadura, de modo que al momento de la transición toda ella había sido nombrada por Pinochet."); Fernández, *supra* note 209, at 471–72 (describing the first times in 1998 where the Chilean Supreme Court began to break from past caselaw by finding the amnesty "ineffective" and allowing cases to proceed, and ascribing the shift to changes in the personnel of the criminal chamber of the Supreme Court).

313. Interview with Lorena Fries Monleón, *supra* note 32.

314. Interview with Min. 2, *supra* note 31.

[E]n general yo creo que [el reconocimiento de algunos] derechos humanos abrió el camino para la protección de otros derechos humanos . . . [P]rimero 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. . . . 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 . . . 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 19 . . . 20 . . . y 21 [derechos fundamentales] se aplica todo el tiempo.

*Id.*

The Chilean judiciary has shown increasing acceptance of the international norm in favor of criminal accountability for human rights violations.<sup>315</sup> Human rights judges now also acknowledge the need to view the dictatorship-era human rights cases in the context of international norms relating to sexual violence.<sup>316</sup> Minister Carroza, in an interview given to the press after taking statements in a sexual violence case, stated that although the legislation of the time must be applied, courts should conceive of these crimes as inclusive of the international concept of torture.<sup>317</sup>

### E. Regional Momentum

Chilean activists and litigants have also drawn from regional efforts at justice for sexual violence.<sup>318</sup> Lawyers and activists interviewed emphasized the importance of a strong network of human rights and women's organizations in Argentina (CELS), Peru, Mexico,

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315. Interview with Min. 3, *supra* note 31 (noting that *Almonacid* was a big wake-up call for Chilean judges).

316. See *supra* Part IV.C.

317. Villa Grimaldi / Corporación parque por la Paz, *Tortura en Dictadura*, REBELIÓN, Dec. 3, 2014, at 4 (Chile).

[P]ese a que la legislación de la época es la que debe aplicarse, que hablaba de apremios ilegítimos y más bien las torturas eran consideradas como lesiones, pero en estos casos, en vista de estos convenios internacionales, donde definitivamente se ha ido estableciendo y definiendo lo que es la tortura, sobre todo que ya hay ciertos convenios que ya han sido ratificados por Chile, pese a que fueron con posterioridad, eso sí, pero en ese sentido creemos que hoy día tenemos los elementos suficientes para establecer y determinar qué entendemos por tortura . . . Estos tratos inhumanos, degradantes, los cuales eran considerados como un concepto general, pero que tal vez no recibían el nombre de tortura, pero sí eran tratos crueles, inhumanos, degradantes, de alguna manera eran producidos por estos apremios ilegítimos y deben ser considerados dentro de lo que es el concepto internacional.

*Id.*

318. The Argentines have had some success in prosecution for sexual violence under the junta. Hiner, *Nunca más*, *supra* note 97, at 255. For information on the Argentine human rights cases focusing on sexual violence, see Montañez et al., *supra* note 149, at 683, 693–700; Lorena Balaradini et al., *Violencia de género y abusos sexuales en los centros clandestinos de detención: Un aporte a la comprensión de la experiencia argentina*, in HACER JUSTICIA: NUEVOS DEBATES SOBRE EL JUZGAMIENTO DE CRÍMENES DE LESA HUMANIDAD EN ARGENTINA 20–21 (2011).

Chile, and Brazil that inspire and assist one another.<sup>319</sup> For example, a group of human rights and feminist NGOs from Chile, Argentina, Colombia, and Guatemala jointly produced a report in 2008 discussing reparations for victims of sexual violence during dictatorships and armed conflicts in light of developments in international law relating to women's rights as human rights, sexual violence as war crimes and crimes against humanity per the *ad hoc* tribunals and the Rome Statute.<sup>320</sup> Lorena Fries of Corporación Humanas coordinated the project.<sup>321</sup>

Chilean advocates also take inspiration and draw arguments from their neighbors. In the complaint it prepared in Bataszew's case, for example, Corporación Humanas notes regional trends and points to a recognition in Argentine cases of the need "to judge crimes of sexual violence as such and not merely subsumed as a form of abuse, granting a judicial response to these claims in the framework of the transitional justice process."<sup>322</sup>

#### F. Now or Never

Finally, there is a sense of urgency. Perpetrators and survivors are getting older and, often, sicker, and survivors believe that their time to bring attention to the issue of sexual violence and to move the law forward is running out.<sup>323</sup> People in the human rights community in Chile lament the phenomenon of "biological impunity," whereby defendants escape punishment due to their own deaths or the deaths of witnesses.<sup>324</sup> For example, in the A.B. case—in which the Human Rights Program fought hard for the preservation of *apremio ilegítimo*

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319. Interview with Lawyer, Sub-Secretariat for Human Rights, *supra* note 160 (discussing regional movements towards litigation and activism around human rights cases); Interview with Lawyer, Women's Ministry, *supra* note 152; Interview with María José Castillo, *supra* note 99; Interview with Svenska Arensburg, *supra* note 192; Interview with Beatriz Bataszew, *supra* note 99 (citing Argentina and Peru as examples of countries with strong human rights networks).

320. SIN TREGUA, *supra* note 173, at 5, 22.

321. *Id.* at 2.

322. Bataszew Complaint, *supra* note 27, at 18.

323. Interview with Hillary Hiner, *supra* note 167 (noting that women felt that with the 40th anniversary they had to talk more, particularly older women closer to the feminist movement because they are getting older and sick); *see also* Interview with Ester Hernández Cid, *supra* note 96 (noting that one of the complainants in the first case alleging PSV had died).

324. *See, e.g.*, Interview with Magdalena Garcés, *supra* note 97 ("[E]l paso de tiempo es nuestro peor amigo . . . la impunidad biológica.").

charges based on sexual violence charges in the indictment—the case against the relevant defendant was dismissed due to his death.<sup>325</sup> Survivors and complainants are also dying.<sup>326</sup> With crimes that occurred some thirty to forty-five years ago, survivors are well aware that time is not on their side.

#### V. LESSONS FROM THE CHILEAN TRANSITIONAL JUSTICE EXPERIENCE ON SEXUAL VIOLENCE

The Chilean experience of delayed accountability for sexual violence offers some important lessons for ensuring that sexual violence is taken seriously in domestic prosecutions for human rights violations.

The bad news: the cultural and political climate can be a significant obstacle to judicial accountability. For one, it may prevent victims of sexual violence from coming forward. Moreover, even where victims do come forward, if judicial actors—including investigators, lawyers, and judges—are not open to broaching the issue, prosecutions for sexual violence may be delayed, may be swept under the rug for charges deemed more serious, or may not happen at all. The recent litigation focusing on the issue of sexual violence in Chile has required not only a determined group of survivor-activists with the support of feminist and human rights lawyers willing to bring the complaints, but also a judiciary willing to receive and investigate them. This dynamic is something of a feedback loop—survivors are more likely to pursue claims if they believe that the judges will do something about them.

The good news: progress on prosecution of sexual violence made at the international and regional level appears to help. Although, as described above, delays in prosecution have been enormously problematic due to the loss of physical evidence and witnesses (resulting from illness and death), as well as the deaths of perpetrators, domestic human rights actors have been able to draw on developments in international human rights and criminal courts. The example of international prosecutions for sexual violence, and of prosecutions in other countries, helps give domestic actors rhetorical support to advocate for change.

Another piece of good news is that the incorporation of the Rome Statute and other human rights conventions into domestic law

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325. See *supra* Part II.C.

326. Interview with Ester Hernández Cid, *supra* note 96.

seems to matter. At least one of the obstacles to prosecutions of sexual violence has been the Chilean code's narrow definition of rape at the time of the offense. Definitional problems are vastly ameliorated, at least prospectively, by incorporation of more liberal crime definitions from the Rome Statute. Chilean courts will have even stronger arguments for turning to international case law to interpret domestic law, possibly including matters of proof and theories of liability, when charges are drawn from law enacted to conform with international conventions. Chile, like many States Parties to the Rome Statute, has passed legislation criminalizing crimes against humanity, war crimes, and genocide, as provided by the Rome Statute. Although the incorporation of the Rome Statute into Chilean law may not be precise,<sup>327</sup> it incorporates crimes such as torture, rape, forced pregnancy, forced sterilization, and other forms of sexual violence, which, at least prospectively, would render prosecutions for rape (when they meet the umbrella requirements for genocide, crimes against humanity or war crimes) easier to prosecute, prove, and punish meaningfully.<sup>328</sup>

Separate from legislation domesticating the Rome Statute, Chile passed legislation criminalizing torture in 2016. Whether and how to explicitly address sexual torture was heavily debated.<sup>329</sup> The

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327. See generally 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 REVISTA DE DERECHO (VALDIVIA) 169, 171–79 (2014) (Chile) (comparing the elements of crimes against humanity in the Chilean code's incorporation of the Rome Statute to crimes against humanity under international law).

328. Unlike the Rome Statute, the Chilean crimes against humanity legislation does not explicitly criminalize sexual slavery, but Cárdenas believes that the general "slavery" provision of the law would include sexual slavery. See *id.* at 182. The law's rape provision, which, other than the elements of the crime that make it international, incorporates by reference the national criminal code provisions on rape, likewise remains more restrictive. See *id.*; see also Catalina Lagos, *Aniversario de la adopción del Estatuto de Roma: las deudas pendientes con las mujeres chilenas*, THE CLINIC (July 19, 2013), <https://www.theclinic.cl/2013/07/19/aniversario-de-la-adopcion-del-estatuto-de-roma-las-deudas-pendientes-con-las-mujeres-chilenas/> [https://perma.cc/T2NJ-TQSU] (Chile) (arguing that Chile's statute criminalizing war crimes, crimes against humanity, and genocide falls short of international law and lamenting the failure to change the definition of rape from "penetration" to "bodily invasion" more generally).

329. Law No. 20968, *Tipifica Delitos de Tortura y de Tratos Crueles, Inhumanos, y Degradantes*, Noviembre 11, 2016, D.O. (Chile); see also BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE, *HISTORIA DE LA LEY N° 20.968—PART 2*, at 51–52 (2016) (debating whether sexual violence is a form of torture that needs to

final statute provides that rape and other acts of sexual violence can constitute acts of torture and, in fact going further than international law, explicitly includes “sexual harm,” distinguished from physical or psychological harm, as a basis for the crime of torture.<sup>330</sup>

Nevertheless, the Chilean example suggests ways to make efforts to prosecute perpetrators of sexual violence more effective. These suggestions apply to domestic actors seeking to prosecute sexual violence domestically, as well as staff of international courts looking to support domestic prosecutions.

First, resources, resources, resources. As noted above, there is no government entity in Chile with a mandate to bring cases on behalf of survivors, including survivors of sexual violence. Whether funded by the government, foundations, NGOs, the United Nations, or other sources, resources to support investigation and prosecution of sexual violence are critical in ensuring that sexual violence is treated as a serious crime and prosecuted. Moreover, resources should be directed at health and psychological support for survivors who come forward, as well as to regions of countries where resources are scarcer still.

Second, investigations into human rights abuses should include investigations of sexual and gender-based violence from the very beginning. The Chilean experience demonstrates that questions matter; many survivors did not mention sexual violence earlier because they did not understand the inquiry into human rights violations to include their experience. Unsurprisingly, when the questions focus on enforced disappearance and executions and not on sexual violence, so too will the prosecutions. As Anne-Marie de Brouwer notes:

The key to including sexual violence crimes in indictments requires an investigative plan that includes and is open to evidence of these crimes, includes preparation in advance of the field investigation, and relies on a checklist of elements of crimes to be proven. Furthermore, while gathering evidence, the needs of the survivor must be prioritized to the extent possible. . . .<sup>331</sup>

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be treated separately or whether it was already included in the concept of torture based on serious physical or psychological harm).

330. This feature of the Chilean torture legislation is unique to Chile and reflects the efforts of feminist groups to bring attention to the issue of sexual violence.

331. de Brouwer, *supra* note 253, at 662.

Investigations must explore the possibility of sexual violence against people of all genders, not only women. Again, it is hard to tease out whether the increased attention to sexual violence against women in the dictatorship is due to the greater use of sexual violence against them as an intentional and gendered tool of repression or due to a system that has overlooked sexual violence against men and the fact that feminist organizations have played such a significant role in putting the issue on the table.

Finally, facilitating cross-pollination of ideas is critical. International criminal courts and lawyers have developed expertise in investigating and prosecuting sexual violence, as have lawyers and judges in other countries.<sup>332</sup> This expertise should be deployed to support domestic jurisdictions dealing with atrocities involving sexual and gender-based crimes. So far, it has led to publications on lessons learned about the investigation and prosecution of sexual violence at the international tribunals, as well as a host of best practice manuals.<sup>333</sup> Language barriers may decrease the utility of these

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332. As noted above, Argentina has adjudicated a number of cases for sexual violence during its dictatorship. *See supra* note 149 and accompanying text.

333. *See* PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 379–86 (Serge Brammertz & Michelle Jarvis eds., 2016) (offering lessons from the ICTY); OFFICE OF THE PROSECUTOR FOR THE INT'L CRIMINAL TRIBUNAL FOR RWANDA, PROSECUTIONS OF SEXUAL VIOLENCE: BEST PRACTICES MANUAL FOR THE INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE CRIMES IN POST-CONFLICT REGIONS: LESSONS LEARNED FROM THE OFFICE OF THE PROSECUTOR FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 81–82 (2014) (offering lessons from the International Criminal Tribunal for Rwanda (ICTR)). Scholars, think tanks, and others have also attempted to distill lessons from the international tribunals and offer best practice manuals. *See, e.g.*, VALERIE OOSTERVELD, PROCEDURAL STEPS ADDRESSING SEXUAL AND GENDER-BASED VIOLENCE: THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND ITS APPLICATION IN THE SPECIAL COURT FOR SIERRA LEONE (2014) <http://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/ii-procedures-addressing-sexual-gender-violence-legacy-application-oosterveid.pdf> [<https://perma.cc/HRZ2-7L3V>] (noting measures including protecting victim and witness identities, courtroom support, and evidentiary approaches to reduce retraumatization, including the rejection of a corroboration requirement, rules restricting inquiries into consent, or prior sexual conduct of the victim); KETTY ANYEKO ET AL., U.S. INST. FOR PEACE, PB 206, IMPROVING ACCOUNTABILITY FOR CONFLICT-RELATED SEXUAL VIOLENCE IN AFRICA (2016), <https://www.usip.org/publications/2016/06/improving-accountability-conflict-related-sexual-violence-africa> [<https://perma.cc/6L4H-U3PU>] (laying out key findings and policy recommendations regarding the responses to conflict-related SGBV drawn from research and discussions with individuals from the US, Uganda, Kenya, Liberia,



publications in domestic jurisdictions absent translation. Thus, translating best practice materials, or at least summaries thereof, would greatly increase their utility in domestic jurisdictions.

Although some advocates in Chile have a sophisticated understanding of international criminal law on sexual violence and other relevant international instruments, this has not been true of all actors in the judicial system. Trainings and even secondments of personnel from international organizations, international courts, and national systems that have handled similar types of cases, as well as amicus briefs—as seen in Chile’s Plaza Constitución case—could help to ensure that investigators, lawyers, and judges benefit from the experiences of other legal systems in matters of sexual violence.

### CONCLUSION

The Chilean transitional justice experience suggests that prosecutions for sexual violence are not a foregone conclusion even in a country with an active docket of human rights prosecutions and abundant evidence of the systemic use of sexual violence as a tool of repression. This Article has attempted to explain obstacles to prosecutions for sexual violence and to explore the social, cultural, and legal changes that may have led to a recent push for legal accountability. In Chile, bringing sexual violence to the fore has required the sustained efforts of feminist activists and a small group of lawyers whose efforts have been aided by developments in international law, increased openness to international law in the domestic legal system, and changing cultural views on the role of women and the acceptability of sexual violence.

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Sierra Leone, South Sudan, Uganda, and the Democratic Republic of the Congo); SARA FERRO RIBEIRO & DANAÉ VAN DER STRATEN PONTHOZ, U.K. FOREIGN & COMMONWEALTH OFFICE, *INTERNATIONAL PROTOCOL ON THE DOCUMENTATION AND INVESTIGATION OF SEXUAL VIOLENCE IN CONFLICT: BEST PRACTICE ON THE DOCUMENTATION OF SEXUAL VIOLENCE AS A CRIME OR VIOLATION OF INTERNATIONAL LAW* 11 (2d ed. March 2017) (setting out basic principles on documenting sexual violence as a violation of international law).