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To the Court of Last Resort: A Prosecutorial Roadmap in the Aftermath of State Violence in Chile and Colombia

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To the Court of Last Resort: A Prosecutorial Roadmap in the Aftermath of State Violence in Chile and Colombia

David F. Scollan *

A great deal of academic research and writing has been done on the most glaring examples of war crimes and crimes against humanity. But, only a small cadre of authors have endeavored to identify the ‘lower limit’ of when state action qualifies as these heinous acts. This Note strives to add to that area of legal scholarship aimed at bringing instances of in-country state perpetrated violence out from the behind the veil of sovereign police action and into the spotlight to call them what they are: crimes worthy of international condemnation and punishment. Specifically, this Note unpacks two spasms of state level violence—Chile’s in 2019 and Colombia’s in 2021—both of which occurred in response to public protests and unrest. In doing so, this Note compares the facts of those events where national police forces and militaries were deployed against civilian protestors and highlights

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leading case law from international tribunals and regional human rights courts. Further, this Note applies those facts and persuasive cases to the Rome Statute of the International Criminal Court as the relevant controlling treaty law for war crimes and crimes against humanity prosecutions. As a result, this Note runs its course as an academic 'how-to' guide for those interested in and committed to seeing the most powerful face justice for their actions and those of their subordinates at the International Criminal Court.

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I. INTRODUCTION

The right to assemble for public protest is enshrined in nations’ fundamental governing laws¹ and the community of nations’ guiding international laws.² That right is challenged and battered when police officers or armed government troops use force against protesting citizens to compel them to cease their activity or to dissolve entirely.³ Clashes like these are not confined to our history books, but rather continue to flare up in streets and squares around the world.⁴ Often, they trigger bloody—if not deadly—consequences.⁵

¹ See, e.g., U.S. Const. amend. I, cl. 3; Constitución Política de Colombia art. 37 [hereinafter Colombian Const.]; Constitución Política de la República de Chile art. 13. [hereinafter Chilean Const.].

² See, e.g., U.N. Int’l Covenant on Civ. and Pol. Rts. art. 21, Dec. 16, 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407 [hereinafter ICCPR]; Organization of American States, American Convention on Hum. Rts. art. 15, Nov. 22, 1969, O.A.S.T.S. No. 36, 114 U.N.T.S. 123 [hereinafter ACHR].

³ See Press Release, Office of the United Nations High Commissioner for Human Rights, Colombia Must Urgently Reform How it Polices Protests to Avoid Further Human Rights Violations – UN report, U.N. PRESS RELEASE (Dec. 15, 2021), <https://www.ohchr.org/en/press-releases/2022/01/colombia-must-urgently-reform-how-it-polices-protests-avoid-further-human> [hereinafter OHCHR: Colombia Must Urgently Reform]; see also *US: Protect Peaceful Assemblies; Limit Use of Force: City, State Officials Should Comply with International Standards*, HUM. RTS. WATCH (Oct. 21, 2020, 6:00 AM), <https://www.hrw.org/news/2020/10/21/us-protect-peaceful-assemblies-limit-use-force>; Barbara Sprunt, “‘Scared, Confused and Angry’: Protester Testifies About Lafayette Park Removal.” NPR (June 29, 2020, 1:09 PM), <https://www.npr.org/2020/06/29/884609432/scared-confused-and-angry-protester-testifies-about-lafayette-park-removal>.

⁴ See, e.g., OHCHR: Colombia Must Urgently Reform, *supra* note 3.

⁵ See, e.g., *Colombian Forces Committed ‘Serious’ Abuses During Protests: UN*, AL JAZEERA (Dec. 15, 2021), <https://www.aljazeera.com/news/2021/12/15/colombian-forces-committed-serious-abuses-during-protests-un>; *Colombia’s Police Caused Deaths of 20 People, International Rights Group Says*, NBC NEWS

In 2019 and 2021, respectively, Chile and Colombia each suffered this kind of violence when state actors used fatal force to quell protestors.⁶ In both countries, citizens took to the streets to protest against a confluence of socio-economic circumstances, including, but not limited to, proposed tax increases on public services and benefits in Colombia, and the exclusionary political process and economic inequality in Chile.⁷ These protests quickly spiraled out of control into full-fledged violence between protestors and national security forces—both police *and* military troops.⁸ Critically, in Colombia, public transit systems were irreparably vandalized,⁹ and buildings were burned.¹⁰ Tragically, dozens of civilians were

(June 9, 2021), <https://www.nbcnews.com/news/latino/colombias-police-caused-deaths-20-people-international-rights-group-sa-rcna1147>; Manuel Rueda, *Report links Colombia Police to Deaths of 11 in protests*, AP NEWS (Dec. 13, 2021), <https://apnews.com/article/colombia-violence-caribbean-united-nations-massacres-49272f74176aa4bf6faff45ea3a62314>; Samantha Schmidt & Diana Durán, *Colombian Police Responsible for ‘Massacre’ of 11 people in 2020 protests, U.N.-backed investigators conclude*, WASH. POST (Dec. 13, 2021), <https://www.washingtonpost.com/world/2021/12/13/colombia-police-massacre-2020/>; Julie Turkewitz, *In Colombia, 19 are Killed in Pandemic-Related Protests*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/05/03/world/americas/colombia-protest-deaths.html>; John Barlett & Liam Miller, *Chile Security Forces’ Crackdown Leaves Toll of Death and Broken Bodies*, THE GUARDIAN (Nov. 25, 2019), <https://www.theguardian.com/world/2019/nov/25/chile-protester-killed-mother-army-police-romario-veloz>; *Death Toll in Chile Protests Since October Rises to 27*, PBS NEWS (Dec. 28, 2019), <https://www.pbs.org/newshour/world/death-toll-in-chile-protests-since-october-rises-to-27>.

⁶ See Turkewitz, *supra* note 5; Barlett & Miller, *supra* note 5.

⁷ *Colombian Forces Committed ‘Serious’ Abuses During Protests: UN*, *supra* note 5; Barlett and Miller, *supra* note 5.

⁸ *Colombian Forces Committed ‘Serious’ Abuses During Protests: UN*, *supra* note 5; Barlett and Miller, *supra* note 5.

⁹ Steven Gratton, *A Month on, Colombia Continues to Grapple with Protest Violence*, AL JAZEERA (May 21, 2021), <https://www.aljazeera.com/news/2021/5/27/a-month-on-colombia-continues-to-grapple-with-protest-violence> (discussing burning of Bogota transit infrastructure and buses).

¹⁰ *Id.* (discussing looting and vandalism to Bogota buildings).

killed,¹¹ thousands more were injured,¹² and tens of thousands were arrested and temporarily detained.¹³

Though perhaps these events' ramifications are less far-reaching than those of wars that burn on for decades,¹⁴ the victims of this kind of state-sanctioned repression nonetheless deserve justice—if not, at minimum, the attention of all those who profess academic interest in and a commitment to the rule of law and human rights in the Americas. Moreover, the perpetrators, whether they be individual troops who fired the shots or high-ranking military officers and political figures who okayed the use of deadly force, should bear the full weight of criminal accountability.¹⁵ In addition to these human impacts, these events raise novel legal issues pertaining to human rights, the law of armed conflict, and, compellingly, the further development of international criminal law in an Inter-American context.¹⁶

As such, this Note will examine these episodes, not as instances of policing gone awry during heated protests, but rather as violent conflicts meted out by state actors against their countries' own citizens. Through this lens, the question considered is whether state

¹¹ See OHCHR: Colombia Must Urgently Reform, *supra* note 3; *Death toll in Chile Protests Since October Rises to 27*, *supra* note 5.

¹² See OHCHR: Colombia Must Urgently Reform, *supra* note 3; *Death Toll in Chile Protests Since October Rises to 27*, *supra* note 5.

¹³ J. Patrice McSherry, *Chile's Struggle to Democratize the State*, NACLA (Feb. 24, 2020), <https://nacla.org/news/2020/02/24/chile-struggle-democratize-state-plebescite> [hereinafter *Chile's Struggle*].

¹⁴ See, e.g., Ruth Sherlock, *Syria's Civil War Started a Decade Ago. Here's Where it Stands*, NPR (March 15, 2021, 5:06 AM ET), <https://www.npr.org/2021/03/15/976352794/syrias-civil-war-started-a-decade-ago-heres-where-it-stands>.

¹⁵ See, e.g., *Eyes on Chile: Police Violence and Command Responsibility During the Period of Social Unrest*, AMNESTY INT'L, 16 (Oct. 23, 2020), <https://www.amnesty.org/en/latest/research/2020/10/eyes-on-chile-police-violence-at-protests/> (citing Amnesty International, *Use of force: Guidelines for implementation of the UN Principles on the Use of Force and Firearms by Law Enforcement Officials* (Sept. 2, 2015), <https://www.amnestyusa.org/reports/use-of-force-guidelines-for-implementation-of-the-un-basic-principles-on-the-use-of-force-and-firearms-by-law-enforcement-officials/>) [hereinafter *Amnesty International Eyes on Chile*].

¹⁶ See generally *id.*

forces in Chile and Colombia not only violated citizens' domestic political rights¹⁷ and internationally recognized human rights,¹⁸ but also committed the gravest of criminal conduct: war crimes and crimes against humanity in violation of the Geneva Conventions and the Rome Statute of the International Criminal Court.¹⁹ In considering this query, Part II of this Note will present the relevant historical, factual, and legal background information on the conflicts in Chile and Colombia. Part III will discuss the legal concept of non-international armed conflict as derived through landmark case law, most notably the Inter-American Court on Human Rights case of *Juan Carlos Abella v. Argentina*. Part IV will highlight the work of and unique role that the International Criminal Court ("ICC") can play in bringing state actors to justice. With this foundation, Part V will analyze the violence in Chile and Colombia to determine whether those events can be characterized as non-international armed conflict for the purposes of possible future international litigation for war crimes and crimes against humanity. Thereafter, Part VI will provide a series of recommendations and note outstanding evidentiary gaps an ICC investigation would need to fill. Finally, in Part VII this Note will conclude.

II. BACKGROUND:

A. *Conflict in Chile:*

On October 18, 2019, tens of thousands of Chileans took to the streets, first in the capital of Santiago and then up and down the length of Chile, to protest rampant socio-economic inequality in South America's cradle of neo-liberalism.²⁰ At the time, Chile had one of the highest ratios between the wealthiest and poorest average incomes.²¹ Moreover, decades of privatization of services and

¹⁷ See Colombian Const., *supra* note 1; Chilean Const., *supra* note 1.

¹⁸ See ICCPR, *supra* note 2; ACHR, *supra* note 2.

¹⁹ See Rome Statute of the International Criminal Court, arts. 7, 8, July 17, 1998, UN Doc. A/CONF.183/9 [hereinafter Rome Statute]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter G.C.].

²⁰ See Chile's Struggle, *supra* note 13.

²¹ *Id.*

benefits—including the constitutionally enshrined privatization of water rights in an arid nation—seeded the ground for a bifurcated society: exemplarily healthcare and educational opportunities for the rich who can afford those private services and a decrepit, underfunded, and over-burdened publicly administered social safety net for everyone else.²² Simply, a tale of two Chiles.²³

Tellingly, it was not a major government scandal or corporate windfall that spurred the people to action.²⁴ Rather, a mere four percent raise in fares for Santiago’s metro system (i.e., thirty Chilean pesos, or \$0.04) was the straw that broke the proverbial camel’s back.²⁵ When news of the fare hike broke, university students called for fare evasion, turnstile-hopping, and demonstrations.²⁶ Soon, across the capital, this mass act of political protest careened into chaos: looting, rioting, and the burning of more than twenty metro stations.²⁷ In response to this civil unrest, then President Sebastián Piñera issued a state of emergency, directing Chile’s national police force—*Los Carabineros*—a militarized legacy of Chile’s Pinochet dictatorship, to enforce a nation-wide curfew.²⁸ As the protests and rioting continued and intensified, within days, Piñera declared to his countrymen on national television, broadcasting from the Chilean army’s headquarters, that “we are *at war against a powerful enemy*, who is willing to use violence without any limits.”²⁹ He went on to assert that “we are very aware that (the perpetrators of the riots) have a degree of organization [and] logistics typical of a criminal

²² See generally *id.* (discussing consequences of privatization in healthcare, pensions).

²³ See *id.* See generally CHARLES DICKENS, *A TALE OF TWO CITIES* (1859).

²⁴ Mark Johanson, *How a \$0.04 Metro Fare Price Hike Sparked Massive Unrest in Chile*, VOX (Oct. 29, 2019, 4:20 PM), <https://www.vox.com/world/2019/10/29/20938402/santiago-chile-protests-2019-riots-metro-fare-pinera>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Chile’s Struggle, *supra* note 13; see also Johanson, *supra* note 24.

²⁹ Aislinn Laing and Natalia A. Ramos Miranda, *Chile’s Pinera Extends State of Emergency, Says ‘We are at War’*, REUTERS (Oct. 20, 2019, 9:23 AM), <https://www.reuters.com/article/us-chile-protests/chiles-pinera-extends-state-of-emergency-says-we-are-at-war-idUSKBN1WZ0EP> (emphasis added).

organization.”³⁰ Finally, in the same appearance Piñera called on Chileans to “unite in this *battle* against violence and delinquency.”³¹

As the conflict burned on, *Los Carabineros*’ use of excessive force was well-documented: hundreds of protestors were blinded by rubber bullets, more than thirty Chileans were killed, and reports of injuries rose to the thousands.³² By mid-November 2019, Chile’s Attorney General’s Office was investigating a total of 5,558 cases of victims of so called “institutional violence.”³³ 1,938 cases concerned people injured by firearms and 674 individuals had sustained serious injuries, of which 285 were eye injuries.³⁴ The injured included 834 children and adolescents. Moreover, the U.N. documented more than one-hundred instances of torture and ill-treatment of civilians at the hands of *Los Carabineros* and the Chilean army.³⁵ Of those at least twenty-four involved *Los Carabineros* and army soldiers perpetrating sexual violence against women, men, and children.³⁶ Additionally, U.N. investigators further noted that there were numerous attacks *against* Chile’s security forces and their premises, looting, and destruction of private and public property.³⁷

B. *Conflict in Colombia*

A year after Chile’s spasm of violence,³⁸ Colombia faced violent conflict stemming from what began as economic protests in the

³⁰ *Id.* (emphasis added).

³¹ *Id.* (emphasis added).

³² *Chile Protests Turn Violent on Anniversary*, BBC (Oct. 19, 2020), <https://www.bbc.com/news/world-latin-america-54594707>.

³³ Amnesty International Eyes on Chile, *supra* note 15 (citing Attorney General of Chile’s Press Office, *Fiscalía eleva a 5.558 las víctimas que denuncian violaciones a Derechos Humanos desde el inicio de las manifestaciones sociales* (Nov. 19, 2019), www.fiscaliadechile.cl/Fiscalia/sala_prensa/noticias_det.do?noticiaId=17285 (outlining investigations into allegations of state violence).

³⁴ *Id.*

³⁵ *Chile: UN Calls for Prosecution of Police and Army Over Response to Protests*, THE GUARDIAN (Dec. 13, 2019, 10:40 AM), <https://www.theguardian.com/world/2019/dec/13/chile-un-prosecution-police-army-protests>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

midst of the COVID-19 pandemic.³⁹ Beginning on April 28, 2021, Colombians took to the streets to oppose President Ivan Duque's proposed overhaul of Colombia's taxation system, which would have raised taxes on common goods and services to cover pandemic-induced fiscal shortfalls.⁴⁰ However, average Colombians viewed this tax increase—during a pandemic that had already besieged Colombia's economy—as a broadside to their financial bottom lines.⁴¹

In mid-April, as the protests began and their ranks swelled, the movement quickly “morphed into a widespread expression of anger over poverty and inequality,” which the pandemic only further exacerbated.⁴² In response to growing and increasingly agitated crowds, Colombia's militarized police force—*La Policía Nacional de Colombia*—mobilized.⁴³ Notably, *La Policía Nacional de Colombia* (“*La Policía*”) is not merely a police force, but a battle-tested institution having fought on the front lines with tanks and helicopters in Colombia's long-running counterinsurgency against the FARC guerrillas and other rebel groups.⁴⁴ Moreover, it is the only police force in the Americas, and one of a handful in the world, that is housed in a nation's defense ministry, not a civilian interior ministry or department of justice.⁴⁵ This is relevant because as the protests intensified, *La Policía* officers summarily beat, detained, and killed protestors—employing military-style training and deploying military-style equipment against those civilian victims.⁴⁶ Officers fired live rounds and tear gas canisters from armored vehicles at

³⁹ Stefano Pozzebon, *Colombia Used 'Excessive Force' Against Protesters, Says Human Rights Report*, CNN (July 8, 2021, 2:29 AM), <https://www.cnn.com/2021/07/08/americas/colombia-excessive-force-protests-intl/index.html>.

⁴⁰ *Id.*

⁴¹ Julie Turkewitz, *Why Are Colombians Protesting?*, N.Y. TIMES (June 6, 2021), <https://www.nytimes.com/2021/05/18/world/americas/colombia-protests-what-to-know.html>.

⁴² *Id.*

⁴³ Julie Turkewitz & Sofia Villamil, *Colombia's Police Force, Built for War, Finds a New One*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/2021/05/12/world/americas/colombia-protests-police-brutality.html>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

protestors in the streets of Bogotá, Cali, and other major cities.⁴⁷ In one of the most searing episodes of wanton violence, *La Policía* officers shot into a crowd gathered to hold a vigil service for those who had, up to that point, been killed during the protests.⁴⁸

United Nations investigators concluded that the unrest resulted in forty-six deaths (forty-four civilians and two police officers), with at least twenty-eight civilian casualties attributable to *La Policía*.⁴⁹ Additionally, 103 civilians suffered serious eye injuries as a result of *La Policía* employing excessive force (e.g., tear gas canisters, beatings, rubber bullets, etc.)⁵⁰

III. RELEVANT LEGAL CONCEPTS

For the purpose of determining whether state actors in Chile and Colombia perpetrated War Crimes against their own citizens throughout 2020 and 2021, one must ask if the events at issue meet a level of conflict necessitating the application of the Law of Armed Conflict. If state-sanctioned violence against civilians occurs in the context of an armed conflict, either an international armed conflict or a non-international armed conflict (“NIAC”), then actors are bound to afford civilians certain protections under International Humanitarian Law.⁵¹ However, should violence not qualify as an armed conflict, a War Crimes analysis would be errant; War Crimes can occur only in the context of conflict.⁵² This limitation would still allow for a Crimes Against Humanity analysis, as this Note will discuss in Part IV and Part V.⁵³ Here, given that neither Chile nor Colombia were engaged in international armed conflict with

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Colombian Forces Committed ‘Serious’ Abuses During Protests: UN*, *supra* note 5 (discussing OHCHR Colombia fact-finding conclusion); see Press Release, *supra* note 3.

⁵⁰ Oliver Griffin, *Over 100 Colombia Protesters Suffered Eye Damage by Police in 2021 Marches—Report*, REUTERS (Nov. 26, 2021, 12:45 PM), <https://www.reuters.com/world/americas/over-100-colombia-protesters-suffered-eye-damage-by-police-2021-marches-report-2021-11-26/> (discussing Amnesty International conclusions).

⁵¹ G.C., *supra* note 19, art. 3.

⁵² See, e.g., Rome Statute, *supra* note 19.

⁵³ See *id.* art. 7.

neighboring states, this Note will analyze whether their responses to what began as civilian protests spiraled into full-blown non-international armed conflict.⁵⁴

A. *Law of Armed Conflict and the Legal Development of NIAC*

Historically, a defining characteristic of warfare was the *absence* of codified law and order.⁵⁵ The Hague Regulations on Laws and Customs of War of 1907 and the four Geneva Conventions of 1949⁵⁶ represent the bedrock Law of Armed Conflict, ensuring our worst excesses are curbed during conflict.⁵⁷ Notably, though each convention governs distinct aspects of warfare, all four enshrine similar protections for persons not taking active part in hostilities in so called “Common Article III.”⁵⁸ But in the years following World War II, humanity has seen an explosion of *intra*-state conflict ranging from civil wars and armed insurgencies to sectarian violence and

⁵⁴ See Kathleen Lawand, *Internal Conflicts or Other Situations of Violence – What is the Difference for Victims?*, INT’L COMM. OF THE RED CROSS (Oct. 12, 2012), <https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>. A non-international (or “internal”) armed conflict refers to a situation of violence involving protracted armed confrontations between government forces and one or more organized armed groups, or between such groups themselves, arising on the territory of a State. *Id.* In contrast to an international armed conflict, which opposes the armed forces of States, in a non-international armed conflict at least one of the two opposing sides is a non-State armed group. *Id.* And, the existence of a non-international armed conflict triggers the application of international humanitarian law (IHL), also known as the law of armed conflict, which sets limits on how the parties may conduct hostilities and protects all persons affected by the conflict. *Id.*

⁵⁵ In 1863, U.S. President Abraham Lincoln issued General Orders No. 100: Instructions for the Government of the Armies of the United States in the Field, commonly known as the “Lieber Code,” which was the *first* codification of the laws of war and inspired other 19th century states to enact similar restrictions for their armed forces. Jenny Gesley, *The “Lieber Code” – The First Modern Codification of the Laws of War*, LIBR. OF CONG. (April 24, 2018), <https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/>.

⁵⁶ Hague Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, available at <https://www.refworld.org/docid/4374cae64.html>.

⁵⁷ See generally G.C., *supra* note 19.

⁵⁸ *Id.* art. 3.

terrorism. This seismic shift in *how* conflict occurs and *who* is perpetrating it has upended traditional understandings—necessitating new rules for civilians to be protected under and for combatants to abide by.⁵⁹ Recognizing these changing circumstances, national representatives convened in 1977 to amend the Geneva Conventions.⁶⁰

In doing so, the assembled drafters' revised rules for international armed conflict were promulgated through Additional Protocol I⁶¹ and new regulations for non-international conflict were issued through Additional Protocol II.⁶² Critically, Additional Protocol II bars NIAC actors, both combatants *and* states, from directing attacks against civilians not actively participating in hostilities. While both protocols require the protection of civilians, Additional Protocol I distinguishes that “members of the armed forces of a party to a conflict . . . are combatants, that is to say they have the right to participate directly in hostilities.”⁶³ And “where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group . . . IHL deprives them of protections against direct attack for as long as they remain members of that group.”⁶⁴ As such, under the authority of these international legal instruments, drawing on key definitions from Additional Protocol I, Additional Protocol II should this Note conclude that Chile and Colombia were engaged in NIAC when their state forces shot, maimed, and killed citizens.⁶⁵

With a grounding in the Law of Armed Conflict in mind, this Note can now consider relevant case law to guide its determination as to whether NIAC occurred. If shown, there would be an appropriate foundation for a War Crimes analysis of Chile and

⁵⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977. [hereinafter AP I].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977. [hereinafter AP II].

⁶³ AP I, *supra* note 59, art. 43(3).

⁶⁴ Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, INT'L COMM. ON THE RED CROSS 72 (2009).

⁶⁵ *Id.*

Colombia's state violence against their own people.⁶⁶ Contemporary global affairs are scattered with instances of NIAC.⁶⁷ But, a proverbial 'you know it when you see it' approach is, frankly, insufficient; not all armed conflicts present with the same duration or level of intensity as what one might classically think of for *war*.⁶⁸ NIAC can range from decades-long civil wars and deep-rooted insurgencies at one end of the spectrum to flashpoints of intense violence in a more limited geographic and temporal scope at the other.⁶⁹

As the International Criminal Court is empowered to draw on a variety of legal sources for its interpretation of the Rome Statute,⁷⁰ this Note will frame its War Crimes analysis around the NIAC factors laid out in the Inter-American Court of Human Rights ("IAC-tHR") case of *Abella v. Argentina*.⁷¹ The facts of that case anchor it decidedly toward that 'more limited scope' end of NIAC's spectrum with regard to temporal duration.⁷²

B. *Juan Carlos Abella v. Argentina and Factors for NIAC*

In 1976, a *coup d'état* brought a military junta to power in Argentina.⁷³ The military justified its seizure and maintenance of power as safeguarding Argentina's constitutional order from the internal threat of left-wing terrorists.⁷⁴ However, that military's actions betrayed this supposed commitment to constitutional

⁶⁶ See generally Rome Statute, *supra* note 19, arts. 7–8.

⁶⁷ See *Non-international armed conflicts in Syria*, RULAC OF THE GENEVA ACAD., <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria> (last accessed Feb. 2, 2022) [hereinafter RULAC].

⁶⁸ See, e.g., *Abella v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55/97, ¶¶ 1, 154–56 (Nov. 18, 1997).

⁶⁹ Compare RULAC, *supra* note 67 (discussing Syria's civil war) with *id.* ¶¶ 1, 154–56.

⁷⁰ Rome Statute, *supra* note 19, art. 21 (establishing text of the statute is preeminent but supported by other international tribunals' case law).

⁷¹ *Abella*, ¶¶ 154–56.

⁷² See *id.* (discussing that only thirty hours of violence reached NIAC status).

⁷³ See David M. K. Sheinin, *La Tablada Attack and the Erosion of Civil Rights in Argentina*, 1 MIDDLE ATL. REV. OF LATIN AM. STUD. 77, 77 (2017).

⁷⁴ Catoggio Maria Soledad, *The Last Military Dictatorship in Argentina (1976–1983): The Mechanism Of State Terrorism*, SCIENCESPO (July 5, 2010), <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/last-military-dictatorship-argentina-1976-1983-mechanism-state-terrorism.html>.

governance.⁷⁵ Soon after coming to power, the junta and its agents went about supplanting democracy and curtailing citizens' exercise of basic legal rights through suppression, mass arrests, summary executions, and forced disappearances of alleged dissidents and agitators.⁷⁶ Argentina's "Dirty War" was on.⁷⁷ It would define Argentines' lives for the better part of eight years, from 1976 to 1983.⁷⁸ And, its legacy of systematized state violence, namely the murder of an estimated 30,000 political dissidents, continues to haunt Argentina's national consciousness.⁷⁹

In 1983, following its murderous reign of terror, the junta government collapsed in the wake of Argentina's defeat in the Falklands/Malvinas War⁸⁰ against the United Kingdom over those Southern Atlantic islands.⁸¹ Thereafter, Argentina began its transition back toward democratic constitutional government.⁸² However, those eight years of the military's violent treatment and concerted campaign against Argentina's own citizens left the nation on edge and leery of political instability that could open the door to the return of military rule.⁸³ It was within this context of such recently inflicted national trauma that the aforementioned case of *Abella* arises.⁸⁴ On January 23, 1989, a self-styled revolutionary insurgent group known as the *Movimiento Todos por la Patria* ("MTP") launched an attack against the General Belgrano Mechanized Infantry Regiment No. 3

⁷⁵ *Id.*; see also Frederick E. Snyder, *State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication*, 15 U. MIA INTER-AM. L. REV. 503, 508 (1984).

⁷⁶ Soledad, *supra* note 74.

⁷⁷ Belen Fernandez, *Reappearing the Disappeared of Operation Condor*, AL JAZEERA (Aug. 30, 2014), <https://www.aljazeera.com/opinions/2014/8/30/reappearing-the-disappeared-of-operation-condor/>.

⁷⁸ *Id.*

⁷⁹ See Vladimir Hernandez, *Argentina Marks 'Night of the Pencils'*, BBC (Sept. 16, 2011), <https://www.bbc.com/news/world-latin-america-14910859>.

⁸⁰ Meilan Solly, *A Brief History of the Falklands War*, SMITHSONIAN MAG. (Nov. 23, 2020), <https://www.smithsonianmag.com/history/brief-history-falklands-war-180976349/>.

⁸¹ Soledad, *supra* note 74.

⁸² *Id.*

⁸³ See Sheinin, *supra* note 73, at 84 (discussing Argentina's unsteadied climate of the mid- and late-1980s).

⁸⁴ See *Abella v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55/97, ¶¶ 1, 154-56 (Nov. 18, 1997).

Argentine army base in La Tablada, Buenos Aires Province, Argentina.⁸⁵ MTP's attack was ostensibly motivated out of fear that Argentina would return to military rule.⁸⁶ But, it also ignited while there was growing public disenchantment with the democratic government for failing to criminally prosecute military personnel for their participation in and crimes perpetrated during the "Dirty War."⁸⁷

During the attack, forty-two MTP members laid siege to and, thereafter, seized control of the base.⁸⁸ Upon entering the base, the MTP members used the military weapons they found therein to defend their positions.⁸⁹ In response, Argentina's government mobilized its police *and* military—sending upwards of 3,000 soldiers and officers to quell the MTP fighters and regain control of the base.⁹⁰ The attack and counterattack raged for approximately thirty hours from January 23 through to January 24, 1989.⁹¹ And, in total, twenty-nine MTP members and ten Argentine security personnel were lost in the fight.⁹² Though the violence lasted for less than two days, once order was restored, allegations of and recriminations over violations of international humanitarian law and international human rights law started to fly.⁹³ Namely, that in recapturing the base and putting down the attack, the government's forces had, amongst other acts, tortured MTP combatants, summarily executed four more following their surrender, and deployed internationally banned chemical weapons (e.g., white phosphorous) to dislodge the MTP attackers from the base.⁹⁴ Argentina's initial use of *military* force against the MTP attackers coupled with these ensuing acts seeded the ground for the surviving attackers to assert their status as victims and for non-governmental organizations to raise alarm, seek

⁸⁵ Sheinin, *supra* note 73, at 84.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Abella*, ¶¶ 154–56.

⁸⁹ Lindsay Moir, *Decommissioned? International Humanitarian Law and the Inter-American Human Rights System*, 25 HUM. RTS. Q. 182, 189 (2003).

⁹⁰ Sheinin, *supra* note 73, at 84.

⁹¹ *Id.*

⁹² *See id.* at 84; Moir, *supra* note 89, at 189.

⁹³ Sheinin, *supra* note 73, at 78.

⁹⁴ *Id.*

accountability, and secure justice.⁹⁵ These aims came to a head in the IACtHR's *Abella v. Argentina*.⁹⁶

Now, this Note can consider the factors the IACtHR employed in *Abella* to determine the existence of NIAC.⁹⁷ The IACtHR weighed the following factors to determine whether or not NIAC occurred.⁹⁸ First, that court considered the concerted nature of the MTP attackers' hostile acts (e.g., attacking government property, using weapons, etc.).⁹⁹ Second, that court noted the directed use of the Argentine government's *military* forces against the attackers.¹⁰⁰ And, finally, that court examined the attack's nature and level of violence that ensued—the killing of thirty-nine and the use of military style weapons against the attackers by Argentina's armed forces.¹⁰¹

In doing so, the IACtHR found that NIAC did, in fact, transpire from January 23 to January 24, 1989, when Argentina used military force against the MTP attackers sieging and seizing the military base in La Tablada.¹⁰² And, “despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article III [of the Geneva Conventions], as well as other rules relevant to the conduct of internal hostilities” (e.g., AP II).¹⁰³ Simply put, the court was within its powers to apply international humanitarian law under the Law of Armed Conflict.¹⁰⁴

Drawing on *Abella*'s three-part framework,¹⁰⁵ this Note, like the IACtHR as described above in the context of Argentina's La Tablada attack, seeks to unpack the use of military force against

⁹⁵ See *Abella v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55/97, ¶¶ 154-56 (Nov. 18, 1997).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Abella*, ¶¶ 154-56.

¹⁰² *Id.* (concluding NIAC occurred); see also Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INT'L STUD. 696, 713-14 n. 65 (2013).

¹⁰³ *Abella*, ¶ 156.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

civilians in Chile and Colombia.¹⁰⁶ Though almost forty years separate these instances of state-sanctioned violence, the analytical tools at hand remain primed for use.¹⁰⁷ Later, this Note will apply the three *Abella* factors—(1) nature of hostile acts, (2) response with of military force, and (3) intensity of violence—to determine if the events in Chile and Colombia’s rise to the level of NIAC and, if so, international humanitarian law will apply for possible War Crimes charges (Part V–B).¹⁰⁸ Moreover, this Note’s analysis will, for completeness’ sake, discuss the effect that these events not rising to NIAC would have for the purposes of possible Crimes Against Humanity charges (Part V–C). However, this Note must first examine the unique role the International Criminal Court may have to play in these matters and the statutory elements War Crimes and Crimes Against Humanity prosecutions require under international criminal law.¹⁰⁹

IV. THE INTERNATIONAL CRIMINAL JUSTICE TOOLKIT

In the aftermath of World War II, humanity has collectively endeavored to craft mechanisms and build-out institutions capable of holding those who perpetrate the worst and most heinous crimes against their fellow human beings accountable under the law.¹¹⁰ Those bodies, beginning with the Convention on the Prevention and Punishment of the Crime of Genocide in 1948¹¹¹ and the aforementioned four Geneva Conventions in 1949, have been followed by a series of *ad hoc* situation-specific specialized courts, each contributing to the now wide-reaching cannon of international criminal

¹⁰⁶ Laing & Miranda, *supra* note 29 (discussing use of military force in Chile); Pozzebon, *supra* note 39 (discussing use of military force in Colombia).

¹⁰⁷ *Abella*, ¶¶ 154-56 (outlining NIAC factors).

¹⁰⁸ *Id.*

¹⁰⁹ See Rome Statute, *supra* note 19, preamble, arts. 7-8.

¹¹⁰ Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, U.N. CHRONICLE (Dec. 2012), <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>.

¹¹¹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, U.N.T.S., 277.

jurisprudence.¹¹² For example, *ad hoc* criminal tribunals have been established under the auspices of the victorious Allied Powers in Nuremberg and Tokyo for crimes committed by Nazi German and Imperial Japanese actors in World War II.¹¹³ Those courts, the first of their kind, were charged with establishing international criminal codes *while* applying the standards to the cases before them.¹¹⁴

Further, following the perpetration of War Crimes, Crimes Against Humanity, and Genocide in Rwanda and Yugoslavia in the 1990s, the United Nations established the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia to adjudicate rights violations in those two states and their related conflicts.¹¹⁵

Additionally, the Special Court for Sierra Leone was established in 2002 specifically to criminally prosecute those most responsible for crimes committed during that country's long-running civil war.¹¹⁶ Most critically for this Note's purposes, though, was the establishment in 1998 of a permanent criminal tribunal equipped to hear the most serious cases from around the world: the International Criminal Court.¹¹⁷

¹¹² See, e.g., Legal Information Institute (LII), *International Criminal Tribunals*, CORNELL L. SCH., https://www.law.cornell.edu/wex/international_criminal_tribunals (last accessed Mar. 5, 2022).

¹¹³ Office of the Historian, *The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1945-1952/nuremberg> (last accessed Feb. 3, 2022).

¹¹⁴ See, e.g., Treaties, States and Commentaries, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950*, INT'L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/390?OpenDocument> (last accessed Feb. 3, 2022).

¹¹⁵ See generally International Residual Mechanism for Criminal Tribunals, *About*, U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://www.ir-mct.org/en/about> (last accessed Feb. 3, 2022) (explaining administrative function over former tribunals' cases).

¹¹⁶ See Treaties, States and Commentaries, *Statute of the Special Court for Sierra Leone*, INT'L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=3C3004AAA997AE1BC1256B52004C69B9&action=openDocument> (last accessed Feb. 3, 2022).

¹¹⁷ See generally *Rome Statute of the International Criminal Court*, 1 July 2002, 2187 UNTS (establishing a permanent international criminal court following drafting and signing in Rome) [hereinafter Rome Statute].

A. *The Reach of the International Criminal Court*

The Statute of the International Criminal Court, colloquially known as the “Rome Statute,” established the ICC as a tribunal of last resort to “to *complement*, not replace, national courts.”¹¹⁸ Critically, the ICC “may exercise jurisdiction where national legal systems fail to do so, including where they purport to act but, in reality, are unwilling or unable to genuinely carry out proceedings.”¹¹⁹ It is this balancing act of complementarity that structures the ICC’s procedures and grounds its work: state parties carry the responsibility and right to exercise their jurisdiction over crimes occurring in their territories *but* the ICC can serve as a backstop should state parties fail to do so.¹²⁰ Should state parties come up short, the ICC through its investigatory arm of the Office of the Prosecutor is guided by dual principles of partnership and vigilance.¹²¹ Namely, the ICC can help to empower state parties in a positive and constructive manner to initiate and administer their own investigations and prosecutions within their domestic legal systems.¹²² However, the interest of justice is not merely served by the ICC blindly trusting state parties to meet their Rome Statute commitments fairly and efficiently.¹²³ The ICC itself carries responsibilities to keep a keen eye on state parties during the course of their investigations; and, if necessary, initiate independent investigations and legal proceedings through the Office of the Prosecutor against individuals for possible criminal conduct.¹²⁴

¹¹⁸ *About the Court*, INT’L CRIM. COURT, <https://www.icc-cpi.int/about> (last accessed Feb. 3, 2022).

¹¹⁹ Xavier Agirre et al., *Informal Expert Paper: The Principle of Complementarity in Practice*, OFF. OF THE PROSECUTOR OF THE INT’L. CRIM. COURT, 1, 3 (2003), <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>.

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *See id.*

¹²³ Rome Statute, *supra* note 19, art. 17(1)(b) (discussing state party’s being unwilling or unable to prosecute criminal actors).

¹²⁴ Agirre et al., *supra* note 119, at 3.

B. Prosecution at the International Criminal Court

Should state parties shirk their Rome Statute legal duties to investigate and prosecute criminal conduct, the International Criminal Court requires of its Office of the Prosecutor to satisfy multiple statutory, jurisdictional, and related requirements in order to open an investigation into alleged crimes and to confirm charges against alleged criminal actors.¹²⁵

First and foremost, it must be noted that the ICC's preeminent source of law is the Rome Statute itself.¹²⁶ The Rome Statute places its own text as the supreme law that the ICC *shall* apply, taking precedence over all other sources of law including International Criminal Court texts, such as the *Elements of Crimes* and the ICC's *Rules of Procedure and Evidence*, as well as other legal sources (e.g., other international tribunals' case law, domestic case law, domestic statutory law, etc.).¹²⁷ Should discrepancies arise among legal sources it is the Rome Statute's text that must prevail in guiding the decision making of the ICC.¹²⁸ Here, relevant case law from the International Criminal Court and its sister tribunals, namely the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia is considered below to contextualize statutory requirements.

Further, the Office of the Prosecutor may only seek charges against individuals through demonstrating that the ICC has (1) temporal jurisdiction, (2) personal jurisdiction, and (3) subject matter jurisdiction over those alleged perpetrators.¹²⁹ Regarding temporal jurisdiction, the Rome Statute affirms that the ICC can *only* exercise jurisdiction over crimes committed after the statute's entry into force in a given state party.¹³⁰ And, the Rome Statute engrains the fundamental legal principle that individuals cannot and should not

¹²⁵ Rome Statute, *supra* note 19, arts. 57, 61 (defining Office of the Prosecutor's duties in investigation and confirming charges).

¹²⁶ Rome Statute, *supra* note 19, art. 21(1)(a).

¹²⁷ *See id.*; OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 704–05 (2008).

¹²⁸ TRIFFTERER, *supra* note 127, at 705.

¹²⁹ Rome Statute, *supra* note 19, arts. 7, 8, 11, and 24.

¹³⁰ *Id.* art. 11(1).

be responsible to laws retroactively.¹³¹ Effectively, the ICC cannot hold persons liable under the Rome Statute for alleged conduct prior to the treaty's entry into force.¹³² The Office of the Prosecutor has, historically, rejected requests to investigate and prosecute alleged crimes occurring in parties prior to the Rome Statute's entry into force therein.¹³³ For example, the Office of the Prosecutor did not pursue Crimes Against Humanity allegations against Venezuelan officials after that country's June 2000 ratification of the Rome Statute, but prior to the treaty's entry into force on July 1, 2002.¹³⁴

Turning to personal jurisdiction, the Rome Statute empowers the Office of the Prosecutor to bring charges against criminal perpetrators in two specified instances: (1) in situations occurring in state parties' territories; and (2) when crimes are committed by state parties' nationals, regardless of where they are committed.¹³⁵ Moreover, with regard to subject matter jurisdiction, the ICC's prosecutorial reach is limited to crimes enumerated in the Rome Statute itself.¹³⁶ For the purposes of this Note, the Rome Statute's relevant articles pertain to War Crimes (Article 8) and Crimes Against Humanity (Article 7).¹³⁷ The following paragraphs outline the key elements¹³⁸ for each criminal charge under those articles respectively.

C. *War Crimes Prosecution Requirements*

Under the Rome Statute, War Crimes are considered grave breaches of the four Geneva Conventions to be adjudicated in light of the Law of Armed Conflict writ large.¹³⁹ However, the Rome Statute limits War Crimes to conduct arising during international or

¹³¹ *Id.* art. 24(1); TRIFFTERER, *supra* note 127, at 738.

¹³² Rome Statute, *supra* note 19, art. 24(1); TRIFFTERER, *supra* note 127, at 738.

¹³³ See The Office of the Prosecutor, *Communication Concerning the Situation in Venezuela*, INT'L CRIM. CT. (Feb. 9, 2006), 1, 3, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf (outlining lack of ICC jurisdiction over officials' alleged conduct perpetrated prior to the Rome Statute's entry into force in Venezuela).

¹³⁴ *Id.*

¹³⁵ Rome Statute, *supra* note 19, art. 12(2)(a)(b).

¹³⁶ *Id.* art. 22(1)(2).

¹³⁷ *Id.* arts. 7-8.

¹³⁸ See *id.*

¹³⁹ *Id.* art. 8(2)(a).

non-international armed conflict only; crimes committed during “internal disturbances and tensions” (e.g., riots, isolated and sporadic acts of violence) do not meet the conflict-based threshold War Crimes determination necessitate.¹⁴⁰ Specifically, the Rome Statute constricts Article 8’s application: that Article “does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature.”¹⁴¹ Hence, the Office of the Prosecutor must weigh if the events during which criminal conduct took place occurred within the context of either an internal disturbance or an armed conflict to satisfy the Rome Statute’s Article 8 War Crimes subject matter jurisdiction.¹⁴²

Unlike for sporadic disturbances, the Rome Statute provides legal pathways for War Crimes committed during NIAC and extends international humanitarian law therefrom.¹⁴³ As discussed, a jurisdictional analysis therefore requires the Office of the Prosecutor to determine if hostilities occurred during a NIAC or not.¹⁴⁴ This is so because the ICC lacks subject matter jurisdiction in instances when non-civilian armed combatants directly participate in hostilities and perish as a result.¹⁴⁵ Critically, states are justified in using force against organized armed groups when combatants perpetrate violence against civilians or the state itself.¹⁴⁶ The international community recognizes that “members of organized armed groups . . . cease to be civilians for as long as they remain members by virtue of their continuous combat function.”¹⁴⁷ And, AP II affirms that “members of the armed forces of a party to a conflict . . . are combatants, that is to say they have the right to participate directly in hostilities.”¹⁴⁸ Finally, the International Committee for the Red

¹⁴⁰ See *id.* art. 8(2)(c)(d).

¹⁴¹ See Rome Statute, *supra* note 19, art. 8(2)(f).

¹⁴² *Id.*

¹⁴³ *Id.* art. 8(2)(c).

¹⁴⁴ *Id.*

¹⁴⁵ See Melzer, *supra* note 64, at 70 (highlighting loss of civilian protections for armed combatants—beyond the scope of War Crimes analysis).

¹⁴⁶ See *Abella v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55/97, ¶¶ 154-56 (Nov. 18, 1997).

¹⁴⁷ Melzer, *supra* note 64 at 71; *IHL Database Customary IHL: Rule 6*, INT’L COMM. OF THE RED CROSS (2022), <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule6>.

¹⁴⁸ AP II, *supra* note 62, art. 43(2).

Cross (“ICRC”) maintains that “where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities [as civilians] and become members of an organized armed group . . . international humanitarian law deprives them of protections against direct attack for as long as they remain members of that group.”¹⁴⁹

Should a conflict meet the NIAC threshold, the Office of the Prosecutor must provide the ICC with reasonable basis to open an investigation and, still greater, substantial grounds to believe that the specific elements of a War Crimes charge has been satisfied to confirm charges for prosecution.¹⁵⁰ The Rome Statute mandates that the ICC can only exert subject matter jurisdiction over individuals alleged to have committed War Crimes if those actors did so as “part of a plan or policy or as part of a large-scale commission of such crimes.”¹⁵¹ The International Criminal Court’s supporting text elaborates in greater detail than the treaty itself and can assist the Office of the Prosecutor in ensuring a case is on solid footing prior to presentation to the ICC.¹⁵² The relevant sub-section of *Elements of Crimes* outlines the specific elements of the War Crime of attacking civilians not directly participating in conflict.¹⁵³ First, the perpetrator directed an attack.¹⁵⁴ Second, the object of a perpetrator’s attack was a civilian population or civilian not taking direct part in hostilities.¹⁵⁵ Third, the attack’s perpetrator *intended* that population or those individual civilians to be the object of the attack.¹⁵⁶ Fourth, the conduct at issue took place during NIAC.¹⁵⁷ And, fifth, the attack’s perpetrator was *aware* of the existence of conflict.¹⁵⁸

¹⁴⁹ Melzer, *supra* note 64, at 72.

¹⁵⁰ Rome Statute, *supra* note 19, art. 15 (discussing the role and responsibilities of the Office of the Prosecutor); *id.* art. 51 (opening an investigation); *id.* art. 61 (confirming charges).

¹⁵¹ *Id.* art. 8(1).

¹⁵² See Elements of Crimes of the International Criminal Court, art. 8(2)(e)(i), International Criminal Court (2011) [hereinafter Elements of Crimes].

¹⁵³ See *id.*

¹⁵⁴ *Id.*; Rome Statute, *supra* note 19, art. 7(2)(a) (defining “attack directed against civilian population”).

¹⁵⁵ Elements of Crimes, *supra* note 152.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

In addition to these specific elements for the relevant War Crimes charge, the ICC is obliged under international humanitarian law to prosecute individuals who have violated well-established principles of warfare through their criminal conduct: (1) distinction, (2) proportionality, (3) necessity, and (4) precaution.¹⁵⁹ With regard to distinction, AP I directs states to “distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives” during the course of armed conflict.¹⁶⁰ Military objectives are those that “by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁶¹

On proportionality, state parties should spare civilians and civilian objects from incidental or collateral damage to the maximum extent possible.¹⁶² Incidental damage “must not be excessive in relation to the direct and concrete military advantage” anticipated from an operation.¹⁶³ In practice, commanders can prepare by verifying targets, the time of day an attack occurs, weapons used, and warnings or evacuations.¹⁶⁴ “Attacks directed at military objectives may cause ‘collateral civilian damage’ which is not unlawful per se, provided that the rules of custom prescribing proportionality” are observed.¹⁶⁵ Simply, collateral casualties are permissible if outweighed by military advantage.¹⁶⁶

¹⁵⁹ See, e.g., *Law of Armed Force (LOAC)*, U.S. SPACE FORCE (Mar. 2020), <https://www.schriever.spaceforce.mil/Portals/17/documents/LOAC-Mar%2020.pdf> (outlining basic principles of the law of armed conflict; using the term “humanity” interchangeably with “precaution”).

¹⁶⁰ AP I, *supra* note 59, art. 48.

¹⁶¹ AP I, *supra* note 59, art. 52(2).

¹⁶² *Id.* art. 57; see *Introduction to the Law of Armed Conflict* (2002), INT’L COMM. OF THE RED CROSS, https://www.icrc.org/en/doc/assets/files/other/law1_final.pdf (last accessed Mar. 5, 2022).

¹⁶³ *Introduction to the Law of Armed Conflict*, *supra* note 162, at 12.

¹⁶⁴ *IHL Database Customary IHL: Practice Relating to Rule 16: Target Verification*, INT’L COMM. OF THE RED CROSS (2022), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule16.

¹⁶⁵ *IHL Database Customary IHL: Practice Relating to Rule 14: Proportionality in Attack*, INT’L COMM. OF THE RED CROSS (2022), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule14.

¹⁶⁶ See *id.*

The principle of necessity demands that state parties in conflict refrain from inflicting damage on their enemies when it does not further military objectives.¹⁶⁷ Necessity consists of measures “indispensable for securing the ends of the war, and which are lawful according to modern law and usages of war.”¹⁶⁸ And, that only imperative necessity, where state actors *have no other option*, justifies destruction [of objects] which would otherwise be proscribed.¹⁶⁹

Finally, the principle of precaution enshrined in AP I Article 35 prohibits state parties from using weapons and methods of war-making “to cause superfluous injury or unnecessary suffering” to anyone, whether they be armed combatants or civilians caught in the crossfire of armed conflict.¹⁷⁰

Should the Office of the Prosecutor successfully demonstrate to the ICC that the above discussed subject matter elements as well as the guiding principles of the Law of Armed Conflict in international humanitarian law are satisfied, the ICC may exercise jurisdiction and prosecute individuals accordingly for War Crimes under Article 8 of the Rome Statute.¹⁷¹

D. *Crimes Against Humanity Prosecution Requirements*

In some instances, the Office of the Prosecutor may pursue *both* War Crimes and Crimes Against Humanity charges against a particular defendant.¹⁷² However, in light of the requirement that War Crimes can only be prosecuted if having taken place within NIAC, it is necessary to consider alternative legal pathways for the victims of Chile and Colombia’s state-sanctioned violence if the ICC were

¹⁶⁷ GARY D. SOLIS, INTERNATIONAL HUMANITARIAN LAW IN WAR 258 (2010); *see also* Prosecutor v. Blaškić, Case No. IT –95 –14, Trial Chamber Judgment, ¶ 183 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

¹⁶⁸ Prosecutor v. Kordić, Case No. IT –95 –14/2, Appeals Chamber Judgment, ¶ 686 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2001).

¹⁶⁹ *See id.* ¶¶ 48, 53, 76.

¹⁷⁰ AP I, *supra* note 59, art. 35(2).

¹⁷¹ *See* Rome Statute, *supra* note 19, art. 61 (confirming charges); *Id.* art. 8 (War Crimes).

¹⁷² *See generally* Prosecutor v. Ntaganda, ICC –01/04 –02/06 –309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (June 9, 2014) (charging defendant with both War Crimes and Crimes Against Humanity).

to conclude NIAC was not occurring during those attacks.¹⁷³ As such, Crimes Against Humanity charges for state actors may be appropriate as there is *no* conflict threshold requirement, distinct from War Crimes.¹⁷⁴

The Rome Statute's Article 7 grants the ICC jurisdiction over individuals who have committed Crimes Against Humanity.¹⁷⁵ In order to prosecute state actors for Crimes Against Humanity the Office of the Prosecutor must meet the above discussed temporal and personal jurisdiction requirements akin to War Crimes,¹⁷⁶ but must satisfy separate subject matter jurisdiction elements.¹⁷⁷

A perpetrator must be found to have committed his crimes as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" to be within the ICC's jurisdictional reach for prosecution.¹⁷⁸ As with War Crimes, *Elements of Crimes* expands on that requirement to help guide the Office of the Prosecutor's investigations and prosecutions.¹⁷⁹ First, a perpetrator directed an attack against a civilian population.¹⁸⁰ For an attack to be directed against civilians they must be the *primary object* of the attack, not collateral victims.¹⁸¹ The Office of the

¹⁷³ Rome Statute, *supra* note 19, art. 8 (requiring the existence of an international or non-international armed conflict for War Crimes prosecution).

¹⁷⁴ Compare Rome Statute, *supra* note 19, art. 7 with Rome Statute, *supra* note 19, art. 8 (highlighting the fact Crimes Against Humanity charges do not require the Office of the Prosecutor demonstrating crimes took place during an armed conflict).

¹⁷⁵ Rome Statute, *supra* note 19, art. 7.

¹⁷⁶ See *id.* art 11, 24.

¹⁷⁷ *Id.* art. 7.

¹⁷⁸ *Id.*

¹⁷⁹ See *Elements of Crimes*, *supra* note 152, art. 7.

¹⁸⁰ Situation in the Republic of Kenya, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 79 (Mar. 31, 2010), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF; Situation in the Republic of Côte D'Ivoire, ICC-02/11-14-Corr, Corrigendum to Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, ¶ 29 (Nov. 15, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_18794.PDF.

¹⁸¹ Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 76 (June 15, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF; Prosecutor v. Kunarac, Case

Prosecutor must provide substantial grounds to believe an attack did not merely affect a “limited and randomly selected group of individuals.”¹⁸² Additionally, targeting civilians or their property is a criminal offense when not justified by necessity.¹⁸³

Second, a Crimes Against Humanity prosecution requires that an attack be part and parcel to a state or organizational policy to target civilians.¹⁸⁴ Third, in order to exert subject matter jurisdiction for Crimes Against Humanity the ICC must weigh whether an attack is characterized as widespread or systematic in nature.¹⁸⁵ A widespread attack is defined by being large-scale massive, frequent, conducted seriously and collectively, and directed against a multiplicity of victims.¹⁸⁶ Notably, the International Criminal Court in its Pre-Trial Chamber decisions in *Prosecutor v. Bemba* and *Prosecutor v. Katanga* held that Crimes Against Humanity attacks must affect a large geographic area or, when confined to a small area, are directed against a large number of civilians.¹⁸⁷ Alternatively to being widespread, an attack can be systematic to secure the subject matter jurisdiction of the ICC over alleged conduct.¹⁸⁸ The organization of a state actor’s attack and the improbability of that attack being random characterize those acts as systematic.¹⁸⁹

In addition to these three general requirements for subject matter jurisdiction, the Rome Statute provides specific elements for each of the crimes that can be considered Crimes Against Humanity.¹⁹⁰

No. IT –96 –23/1, Appeals Chamber Judgment, ¶ 91-92 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002) (emphasis added).

¹⁸² *Bemba*, at ¶ 77; *Kunarać*, at ¶ 90.

¹⁸³ *Prosecutor v. Blaškić*, Case No. IT –95 –14, Trial Chamber Judgment, ¶ 180 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

¹⁸⁴ *Situation in the Republic of Kenya* at ¶ 79; *Situation in the Republic of Côte d’Ivoire* at ¶ 29.

¹⁸⁵ *Id.*

¹⁸⁶ *Bemba*, at ¶ 83.

¹⁸⁷ *Id.*; *Prosecutor v. Katanga*, ICC –01/04 –01/07 –717, Decision on the Confirmation of Charges, ¶ 395 (Sept. 30, 2008), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF.

¹⁸⁸ Rome Statute, *supra* note 19, art. 7(1).

¹⁸⁹ *Katanga*, at ¶ 394; *Prosecutor v. Kunarać*, Case No. IT –96 –23/1, Appeals Chamber Judgment, ¶ 94 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

¹⁹⁰ Rome Statute, *supra* note 19, art. 7(1) (including murder and other inhumane acts).

Here, attention should be paid to the crimes of (1) murder and (2) other inhumane acts that intentionally cause great suffering or serious injury to an individual's body or to mental or physical health ("other inhumane acts").¹⁹¹ For murder, as with the general elements discussed above, Crimes Against Humanity are predicated on a civilian population being an attack's object.¹⁹² And, the ICC in *Katanga* and *Bemba*, and the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić* have affirmed, an individual must kill with the intent to do so and the knowledge of their actions to be convicted of Crimes Against Humanity murder.¹⁹³ Regarding other inhumane acts, these acts constitute Crimes Against Humanity when they exemplify similar nature and gravity of other specific Article 7 crimes (e.g., murder).¹⁹⁴ As this charge carries a greater degree of indeterminacy compared to other crimes, the ICC should interpret it "conservatively and [it] must not be used to expand uncritically" the scope of Crimes Against Humanity beyond reason.¹⁹⁵ For example, the ICC has previously found in its Pre-Trial Chamber's decision in *Prosecutor v. Muthaura* that other inhumane acts can constitute bodily injuries (e.g., forced circumcision, amputation, mutilation) and the mental suffering of families who witnessed their loved ones' murders.¹⁹⁶

Should the Office of the Prosecutor successfully demonstrate to the ICC that the above discussed subject matter elements are met, the ICC may exercise jurisdiction and confirm charges against

¹⁹¹ See *id.* arts. 7(1)(a)(k) (outlawing "murder" under subsection (a) and "other inhumane acts" under subsection (k)).

¹⁹² *Prosecutor v. Blaškić*, Case No. IT-95-14, Trial Chamber Judgment, ¶ 198 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

¹⁹³ Rome Statute, *supra* note 19, art. 30(1); *Katanga*, at ¶ 401; *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 135 (June 15, 2009); *Blaškić*, at ¶ 198.

¹⁹⁴ Mark Klamberg, Commentary on The Law Of The International Criminal Court 60 (2017).

¹⁹⁵ *Prosecutor v. Muthaura*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 269 (Jan. 23, 2012).

¹⁹⁶ *Id.* ¶¶ 267-68, 270-77.

individuals accordingly for Crimes Against Humanity, murder and other inhumane acts, per Article 7 of the Rome Statute.¹⁹⁷

E. Gravity Prosecution Requirements

In addition to satisfying the relevant temporal, personal, and subject matter jurisdiction elements as discussed, crimes—both War Crimes and Crimes Against Humanity—must demonstrate sufficient *gravity* to reach the International Criminal Court for prosecution.¹⁹⁸ The Rome Statute requires cases before the ICC, as the court of last resort, to be of the most serious concern to the world.¹⁹⁹ Critically, the Preamble of the Rome Statute affirms that “grave crimes threaten the peace, security, and well-being of the world.”²⁰⁰ However, neither the Rome Statute nor *Elements of Crimes* define gravity, necessitating that the Office of the Prosecutor consider relevant case law as a guide in formulating possible charges.²⁰¹

In *Prosecutor v. Lubanga*, the ICC held that for the gravity threshold to be satisfied two factors should be considered: (1) if the conduct was systematic or large-scale and (2) the *alarm* the conduct caused within the international community.²⁰² By requiring conduct to meet this gravity standard, the ICC can allocate its finite resources to the most serious matters and “exclude isolated instances of criminal activity.”²⁰³ In this vein, gravity serves a gatekeeping function, deterring judicial inefficiency and resource waste by preventing the investigation, prosecution, and trial of “peripheral” cases.²⁰⁴

¹⁹⁷ Rome Statute, *supra* note 19, art. 7, 61 (confirming charges).

¹⁹⁸ *Id.* art. 17(d).

¹⁹⁹ KLAMBERG, *supra* note 194, at 213.

²⁰⁰ Rome Statute, *supra* note 19, Preamble.

²⁰¹ *Id.* art. 17(d). *See generally* Elements of Crimes, *supra* note 152 (failing to define “gravity”).

²⁰² Prosecutor v. Lubanga, ICC –01/04 –120 –Red, Prosecutor’s Document in Support of the Appeal, ¶ 19 (Jan. 28, 2011) (discussing Pre –Trial Chamber’s two –prong analysis weighing large –scale impact with social alarm).

²⁰³ KLAMBERG, *supra* note 194, at 213.

²⁰⁴ Situation in the Republic of Kenya, ICC –01/09 –19 –Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 56 (Mar. 31, 2010), https://www.icc – cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF.

F. *Evidentiary Prosecution Requirements*

Furthermore, the Rome Statute requires the Office of the Prosecutor to demonstrate to the ICC that “there is sufficient evidence to establish substantial grounds” to believe that a defendant committed the crimes alleged.²⁰⁵ In *Lubanga*, the ICC defined “substantial grounds” as requiring the prosecution (1) to bring concrete and tangible evidence in support of its charges and (2) to demonstrate a clear direction in reasoning to support specific allegations.²⁰⁶ Thereafter, the ICC’s Pre-Trial Chamber shall confirm or decline to confirm the charges, or adjourn and provide further instruction to the Office of the Prosecutor.²⁰⁷

V. PROSECUTION FOR STATE VIOLENCE IN CHILE AND COLOMBIA

A. *War Crimes: NIAC in Chile and Colombia Under Abella?*

With a firm grounding in the jurisdictional, gravity, and evidentiary requirements for War Crimes and Crimes Against Humanity, this Note can now turn its attention toward considering ICC prosecution as a possible remedy for victims of state violence in Chile and Colombia, relying on the analytical framework of *Abella*’s NIAC analysis.²⁰⁸

1. NIAC in Chile?

Conflict and state violence in Chile transpired over the course of more than a month from mid-October 2019 through late-November 2019.²⁰⁹ This temporal duration far exceeds the mere thirty-hours of conflict in *Abella*’s La Tablada attack where the IACtHR found NIAC had occurred.²¹⁰ Further, the nature of the attacks is akin to

²⁰⁵ *Id.* at 28.

²⁰⁶ Prosecutor v. Lubanga, ICC –01/04 –01/06 –803 –tEN, Decision on the Confirmation of Charges, ¶ 39 (Jan. 29, 2007).

²⁰⁷ *Id.*

²⁰⁸ *Abella v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55/97, ¶¶ 154-56 (Nov. 18, 1997) (NIAC factors).

²⁰⁹ Amnesty International Eyes on Chile, *supra* note 15, at 15 (showing total instances of violence from mid-October through late-November 2019).

²¹⁰ See *Abella*, at ¶¶ 154-56 (highlighting the limited duration of thirty hours).

Abella where Argentina's security forces were responding to MTP members' attack and seizure of public property as both were characterized with the targeting of state security forces and state property by protestors *and* violence against those protestors in response.²¹¹

Moreover, as in *Abella*, the attacks in Chile were similarly characterized with state actors, including President Piñera, ordering both the militarized Pinochet-era *Los Carabineros* national police and the Chilean army to wage a war against those protestors.²¹² This kind of state violence constitutes NIAC because Chile, like Argentina in *Abella*, used both police forces *and* army soldiers evidencing this was a military conflict with military objectives, not merely an internal disturbance being met with run-of-the-mill police law enforcement activity.²¹³

Finally, the intensity of the conflict further weighs toward concluding NIAC occurred Chile under an *Abella* analytical framework as the number of casualties were comparable—thirty-nine in Argentina and approximately thirty in Chile respectively.²¹⁴ Moreover, Chile's state violence also caused large-scale injuries to the protestors including hundreds of eye injuries from rubber bullets as well as alleged sexual violence by state forces.²¹⁵

As such, guided by the IACtHR's determination of NIAC in *Abella*, so too should the ICC reach a similar determination in the

²¹¹ See *id.*; *Chile protests turn violent on anniversary*, BBC (Oct. 19, 2020), <https://www.bbc.com/news/world-latin-america-54594707>; Turkewitz, *supra* note 41 (emphasis added).

²¹² See *Abella*, at ¶¶ 154–56; Laing and Miranda, *supra* note 29 (quoting President Piñera declaring war against Chilean protestors); *Chile: UN Calls for Prosecution of Police and Army Over Response to Protests*, *supra* note 35 (highlighting both *Los Carabineros* and the Chilean army were perpetrating state violence).

²¹³ See *Abella*, at ¶¶ 154–56; Laing & Miranda, *supra* note 29; *Chile: UN Calls for Prosecution of Police and Army Over Response to Protests*, *supra* note 35.

²¹⁴ Sheinin, *supra* note 73, at 77 (highlighting causality totals in La Tablada attack); Amnesty International Eyes on Chile, *supra* note 15, at 15 (showing total casualties from Chile's violence from mid-October through late-November 2019).

²¹⁵ Amnesty International Eyes on Chile, *supra* note 15, at 15 (highlighting additional effects of Chile's violence from mid-October through late-November 2019 including eye injuries); *Chile: UN Calls for Prosecution of Police and Army Over Response to Protests*, *supra* note 35 (highlighting both *Los Carabineros* and the Chilean army were perpetrating state violence including sexual violence).

case of state violence in Chile in light of the relevant facts and analysis put forth here.²¹⁶

2. NIAC in Colombia?

In a similar vein to the conflict shaking Chile to its national security foundations, Colombia also experienced state violence arising out of street protests for more than a month from mid-April to mid-May 2021.²¹⁷ Again, this temporal duration far exceeds the mere thirty-hours of conflict in *Abella*'s La Tablada attack where the IACtHR found NIAC had occurred.²¹⁸ Additionally, the nature of the attacks resemble *Abella* where Argentina's national security forces met the MTP members' attack on, seizure of, and destruction of public property—the military base—as there and in Colombia the violence showcased the targeting of state property by protestors and security forces responding with violence against those protestors.²¹⁹ Specifically, Colombian protestors killed one *La Policía* officer, injured hundreds more, and perpetrated arson on a state police station with officers still inside.²²⁰

As in *Abella*, the violence marring Colombia's streets and cities was similarly characterized by security forces committing the discussed human rights abuses. Thereafter, Colombia's President Duque came to the armed forces' defense affirming that, "saying that there could be any possibility that the Colombian police will be seen as a systematic abuser of human rights . . . will be not only unfair, unjust, but [also] without any base, any ground."²²¹ This kind of state violence constitutes NIAC as it did in *Abella* because

²¹⁶ See Sheinin, *supra* note 73, at 77 (highlighting causality totals in La Tablada attack); Amnesty International Eyes *supra* note 15, at 15 (showing total casualties and other injuries from Chile's violence from mid-October through late-November 2019); *Chile: UN Calls for Prosecution of Police and Army Over Response to Protests*, *supra* note 35 (highlighting both *Los Carabineros* and the Chilean army were perpetrating state violence including sexual violence).

²¹⁷ Turkewitz, *supra* note 41; Stella Cooper et al., *Videos Show the Violent, and Deadly, Ways Colombian Police Quell Protests*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/05/27/video/colombia-protests-cali-police-video.html>.

²¹⁸ See *Abella*, at ¶¶ 154-56 (highlighting the limited duration of thirty hours).

²¹⁹ See *id.*; Turkewitz, *supra* note 41.

²²⁰ *Id.*

²²¹ *Id.*; see *Abella*, 55/97 ¶¶ 154-56.

Colombia, like Argentina, deployed militarized force with its *La Policía* officers, which, given their combat training, equipment, defense ministry chain-of-command, and field experience battling FARC, represent a military force.²²²

Lastly, the intensity of the conflict between Colombia's government forces and the street protestors further supports concluding NIAC occurred in Colombia under an *Abella* analytical framework as the number of casualties in Colombia exceeded those in Argentina with at least forty-six perishing in this conflict compared to thirty-nine at La Tablada.²²³ Moreover, Colombia's state-perpetrated actions further caused non-lethal, yet severe, injuries from the firing of projectiles at close range to protestors, beating and clubbing detained protestors while in *La Policía* custody.²²⁴

As such, the ICC could reach a similar determination in the case of state violence in Colombia in light of the relevant facts and analysis advanced here that this conflict clearly met the durational, intensity, and militarized-force elements to be considered NIAC under international law and compared to the IACtHR's conclusions in *Abella*.

B. *War Crimes: General and Specific Elements Violations?*

To pursue War Crimes prosecutions against Chilean and Colombian state actors for the violence meted-out toward their people, the Office of the Prosecutor would need to provide substantial grounds to believe that both governments were acting to further "part of a plan or policy or as part of a large-scale commission of such crimes."²²⁵ In the absence of direct evidence of a plan or policy, the ICC can rely on circumstantial evidence to prove criminal liability of defendants.²²⁶ Accordingly, given Chilean and Colombian state officials were aware of and responding to wide-scale protests and violence for more than a month in both conflicts, concluding that their efforts to quell the unrest through a plan or policy is not a

²²² Turkewitz, *supra* note 41; *Abella*, ¶¶ 154-56.

²²³ See Turkewitz, *supra* note 41; Sheinin, *supra* note 73, at 77 (highlighting causality totals in La Tablada attack).

²²⁴ See Cooper et al., *supra* note 217.

²²⁵ Rome Statute, *supra* note 19, art. 8(1).

²²⁶ TRIFFTERER, *supra* note 127, at 757.

strenuous logical leap to make or inference to draw thereby satisfying that general requirement for War Crimes.²²⁷

1. War Crimes in Chile?

With regard to specific elements of War Crimes as defined in *Elements of Crimes*, Chile's state actors may be liable as they directed *Los Carabineros* and the army to engage the protestors.²²⁸ Chilean state officials, including President Piñera, *intended* that the civilian protestors be the object of security force attacks.²²⁹ State forces committed this violent conduct in the context of NIAC, as discussed previously.²³⁰ Moreover, President Piñera's own words betray his *mens rea* understanding that Chile was in fact in the grips of NIAC,²³¹ thereby satisfying the conflict awareness element necessary for War Crimes prosecution. A War Crimes prosecution may run-a-ground with regard to the element requiring "the object of a perpetrator's attack [to be] a civilian population or civilian not taking direct part in hostilities"²³² Chilean defendants would likely argue that they believed the protestors to be part and parcel to highly organized criminal networks who, by attacking state institutions and

²²⁷ See Cooper et al., *supra* note 217; Amnesty International Eyes on Chile, *supra* note 15 at 15 (detailing specific allegations of abuses over the duration of the conflict); *Chile: UN Calls for Prosecution of Police and Army Over Response to Protests*, *supra* note 35 (highlighting both *Los Carabineros* and the Chilean army were perpetrating state violence throughout the conflict).

²²⁸ See Rome Statute, *supra* note 19, art. 8; *Elements of Crimes*, *supra* note 152, art. 8(2)(a)(1); *Chile: UN Calls for Prosecution of Police and Army Over Response to Protests*, *supra* note 35 (highlighting both *Los Carabineros* and the Chilean army were perpetrating state violence throughout the conflict).

²²⁹ See Laing & Miranda, *supra* note 29 (discussing Piñera's indiscriminate call for Chileans to unite and wage war against the protestors).

²³⁰ See Sheinin, *supra* note 73, at 77 (highlighting causality totals in La Tablada attack); Amnesty International Eyes on Chile, *supra* note 15 at 15 (showing total causalities and other injuries from Chile's violence from mid-October through late-November 2019); *Chile: UN Calls for Prosecution of Police and Army Over Response to Protests*, *supra* note 35 (highlighting both *Los Carabineros* and the Chilean army were perpetrating state violence including sexual violence).

²³¹ See Laing & Miranda, *supra* note 29 (discussing Piñera's indiscriminate call for Chileans to unite and wage war against the protestors); *Elements of Crimes*, *supra* note 152, art. 8 (requiring awareness of conflict).

²³² *Elements of Crimes*, *supra* note 152, art. 8(2)(b)(i).

personnel, ought not be considered civilians for a War Crimes analysis.²³³

2. War Crimes in Colombia?

With regard to specific elements of War Crimes as defined in *Elements of Crimes*, Colombia's state actors may be liable as they directed the militarized and combat-tested *La Policía* to quell the protestors with force.²³⁴ Proving that Colombian officials, especially President Duque, *intended* that the civilian protestors be the object of security force attacks proves a steeper hill to climb in the absence of direct evidence as in the case of Chile where Piñera gave voice to his warfare mentality with his bombastic speechmaking.²³⁵ However, it may be argued that as the conflict burned on for more than a month, Colombian officials were on notice and failed to act to prevent the loss of civilian life and possessed the awareness of the existence of NIAC.²³⁶ The Office of the Prosecutor would also have the difficult task of providing substantial grounds to believe "the object of a perpetrator's attack was a civilian population or civilian not taking direct part in hostilities."²³⁷ Colombian defendants could raise arguments that in the context of Colombia's long-running war against FARC that these police-involved deaths and injuries pale in comparison and were law enforcement activity in a country that remains in transition from war to peace failing to rise to War Crimes.²³⁸

²³³ See Laing & Miranda, *supra* note 29 (discussing Piñera's characterization of the protestors as possessing a high degree of logistical prowess akin to criminal organizations, not merely civilian demonstrators); Melzer, *supra* note 64, at 72 (highlight loss of civilian protections for direct participants in hostilities during armed conflict).

²³⁴ See Rome Statute, *supra* note 19, art. 8; Elements of Crimes, *supra* note 152, art. 8; see also Turkewitz & Villamil, *supra* note 43.

²³⁵ See Laing & Miranda, *supra* note 29 (discussing Piñera's indiscriminate call for Chileans to unite and wage war against the protestors).

²³⁶ See Elements of Crimes, *supra* note 152, art. 8(2)(b)(i).

²³⁷ *Id.*

²³⁸ See, e.g., Turkewitz & Villamil, *supra* note 43 (discussing Colombia's history with armed conflict and *La Policía*'s role therein).

C. *Crimes Against Humanity: General and Specific Elements Violations?*

Acknowledging prosecuting Chilean and Colombian state actors for War Crimes may bear some challenges, especially regarding the necessity of demonstrating those officials were targeting civilians not participating in hostilities.²³⁹ Further, accountability for Crimes Against Humanity is characterized by less challenging terrain on which the Office of the Prosecutor would find footing to mount its cases.²⁴⁰

1. Crimes Against Humanity in Chile and Colombia

Given the elemental hurdles are lower for providing substantial grounds to believe Crimes Against Humanity have been perpetrated,²⁴¹ and in light of the factual similarities²⁴² between the violence in Chile and Colombia possible charges will be considered conterminously.

In both Chile and Colombia dozens of civilians died as a result of state actors' violence over the course of weeks.²⁴³ Criminal accountability for a Crimes Against Humanity charge of murder would be appropriate for each instance under the Rome Statute's Article 7.²⁴⁴ Moreover, in addition to the dozens of civilian deaths, hundreds of recorded injuries sustained at the hands of state forces ought to be charged as Crimes Against Humanity other inhumane acts for causing heinous injury to civilians over weeks of conflict.²⁴⁵

²³⁹ Elements of Crimes, *supra* note 152, art. 8(2)(b)(i).

²⁴⁰ Compare Elements of Crimes, *supra* note 152, art 7 with Elements of Crimes, *supra* note 152, art. 8 (highlighting art. 7 does *not* require NIAC existence or awareness and art. 8 does).

²⁴¹ See Elements of Crimes, *supra* note 152, art. 7.

²⁴² See, e.g., Turkewitz, *supra* note 41; Amnesty International Eyes on Chile, *supra* note 15, at 15 (highlighting the factual similarities in casualty totals, state forces employed).

²⁴³ See, e.g., Turkewitz, *supra* note 41; Amnesty International Eyes on Chile, *supra* note 15, at 15 (highlighting the factual similarities in casualty totals, state forces employed).

²⁴⁴ See Rome Statute, *supra* note 19, art. 7.

²⁴⁵ *Id.* art. 7(1)(k) (considering Crimes Against Humanity other inhumane acts).

VI. RECOMMENDATIONS

A. *Charting a Path Toward International Criminal Accountability?*

Having considered the publicly available facts, several recommendations can be made for future Chilean and Colombian investigation and prosecution as well as possible International Criminal Court action. Should Chile and Colombia be unable or unwilling to genuinely investigate and prosecute their state officials for their acts of commission and omission in response to their national protests, or if those states as members of the Rome Statute request action, the ICC could open an investigation and pursue further prosecution.²⁴⁶ In addition to Chile's then President Piñera and Colombia's President Duque, the victims of state violence may believe it necessary to call on the Office of the Prosecutor to exercise its powers to expand the scope of criminality accountability to include additional actors as culpable superiors for forces criminal conduct (e.g., top ranking *La Policía* commanders in Colombia, army generals and *Los Carabineros* leadership in Chile).²⁴⁷

Should an ICC Pre-Trial Chamber allow for the Office of the Prosecutor to open an investigation into Chile and Colombia's abuses, charges against individual actors could only be confirmed as discussed above if (1) the Office of the Prosecutor provides substantial grounds to believe that the ICC would have jurisdiction over the conduct,²⁴⁸ (2) the cases would be admissible supported by evidence of criminal wrongdoing,²⁴⁹ and (3) the case satisfies the gravity requirements.²⁵⁰ Here, given both Chile and Colombia are (1) state parties to the Rome Statute,²⁵¹ (2) state abuses have already been

²⁴⁶ See *id.* art. 53 (describing pathways to investigation and prosecution).

²⁴⁷ Rome Statute, *supra* note 52, art. 28 (enshrining culpability for superiors derived from their subordinates' criminal conduct).

²⁴⁸ *Id.* arts. 7, 8, 11, 12, 24 (regarding relevant forms of jurisdiction).

²⁴⁹ *Id.* arts. 61, 69 (confirming charges and considering evidence to support prosecution).

²⁵⁰ *Id.* art. 17(1)(d).

²⁵¹ United Nations, *Rome Statute of the International Criminal Court [Ratification] Status*, U.N. TREATY COLLECTION (Mar. 6, 2022), (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&)

well-documented through government sources and media reports,²⁵² and (3) the violence affected thousands in each country²⁵³ the Office of the Prosecutor and the ICC's Pre-Trial Chamber could determine that these thresholds are satisfied for prosecution if not for both Rome Statute Article 8 War Crimes and Rome Statute Article 7 Crimes Against Humanity, at least for the latter.

VII. CONCLUSION

As has been outlined in the preceding sections of this Note, the state-perpetrated violence in both Chile and Colombia not only necessitates accountability measures at the domestic level but would be well-within the ambit of the International Criminal Court as the criminal tribunal of last resort for the most serious threats to peace and security. Critically, though being colored by distinct facts, the situations in Chile and Colombia both present to those countries' governments—as Rome Statute state parties—and the international community more broadly, damning case studies in the excesses of state-perpetrated violence against civilians rising to Crimes Against Humanity and possibly War Crimes.

In highlighting these contemporary instances of state violence within our Western Hemispheric neighborhood, this author has endeavored to showcase how the work of legal scholars and practitioners need not stand still nor those actors be satisfied with the status quo of international criminal law. Rather, it is the responsibility of those interested in, concerned with, and in possession of advanced training on human rights, criminal law, and mechanisms for the redress of state-inflicted harms to use our platforms to advocate for the strengthening of institutions like the International Criminal Court in service of humanity.

In an effort to contribute to that critical task, this Note has unpacked the circumstances leading up to state violence in Chile and Colombia, those spasms of violence in and of themselves, relevant

clang=en. The Rome Statute entered into force in Chile on June 29, 2009, and in Colombia on August 5, 2002. *Id.*

²⁵² See, e.g., *Chile Protests Turn Violent on Anniversary*, *supra* note 32; Turkewitz, *supra* note 41.

²⁵³ *Chile Protests Turn Violent on Anniversary*, *supra* note 32; Turkewitz, *supra* note 41.

legal concepts ranging from non-international armed conflict theory and persuasive case law through the statutory requirements of prosecution at the International Criminal Court under the Rome Statute. In doing so, it is the hope of this author that a clear and convincing argument has been advanced to support criminal accountability for state actors in Chile and Colombia at the international level.

Given spatial limitations, this work does not purport to be exhaustive. But it has aimed to contribute to the widening academic and professional dialogue within Inter-American geopolitical and legal affairs to highlight instances of criminal wrongdoing and support efforts to bring perpetrators to justice. The International Criminal Court waits for those who have violated the human rights of their people and failed to comply with state party obligations under the Rome Statute.