It also remains to be seen what influence this award will exert outside the tobacco context in view of the arguably special characteristics of tobacco. In particular, as a globally recognized public health threat, tobacco is already heavily regulated and is not a necessity. These conditions would not apply, for example, to the current global efforts to regulate the accessibility and availability of obesogenic foods, which nonetheless are a significant global public health threat and are linked to the global epidemic of chronic noncommunicable diseases.

NICOLE D. FOSTER
University of the West Indies, Barbados

International human rights—universal jurisdiction—political prisoners—remedies—state responsibility—Inter-American Commission on Human Rights

DE LEOPOLDO LÓPEZ**.** No. 17.393-2015. *At* http://suprema.poderjudicial.cl/SITSUPPORWEB/. Corte Suprema de Justicia de Chile, November 18, 2015; December 28, 2015.

In two remarkable decisions, the Supreme Court of Chile (Court or SCC) held that the government of Venezuela, in detaining and mistreating two of its own citizens inside its own territory, violated those individuals' internationally protected human rights. In the proceedings, the Court relied on the principle of universal jurisdiction, since the prisoners were not in Chile's custody or territory at the time of the rights violations, are not nationals of Chile, and have no other relevant connection to Chile. The remedies adopted by the Court were also unique. In its first ruling, the SCC ordered the Chilean government to request that the Inter-American Commission on Human Rights (Commission) send a delegate to Venezuela to investigate the detention of the two prisoners.[1] When the government refused to comply, the SCC issued a second ruling and sent the request directly to the Commission.[2] On February 4, 2016, the Commission refused to comply, noting that it was "not subject to the jurisdiction of domestic courts."[3]

The two prisoners, Leopoldo Eduardo López Mendoza and Daniel Omar Ceballos Morales, are political activists and members of Voluntad Popular, which is opposed to the ruling party of President Maduro of Venezuela. They were arrested and detained amid antigovernment protests in Venezuela in February and March 2014. Ceballos, then the mayor of San Cristóbal in Táchira State, was subject to two judicial proceedings, one relating to charges of criminal association and rebellion, and the other to contempt of court for disobeying an order requiring the removal of barricades set up by protesters. He was convicted of the latter in March 2014, sentenced to twelve months in prison, and dismissed from office. López is a former mayor of the Chacao Municipality of Caracas and founder of Voluntad Popular. He was charged with

[1] Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 noviembre 2015, "López, Leopoldo," Rol de la causa: 17.393-2015 (Chile), *at* http://suprema.poderjudicial.cl/SITSUPPORWEB/ (in Spanish) (limited access). Quotations below of this decision were translated by the author; unofficial translations of all three decisions in the case are on file with the author at nmpetrie@gmail.com.

[2] C.S.J., 28 diciembre 2015, "López, Leopoldo," Rol de la causa: 17.393-2015, protección, *at* http://suprema.poderjudicial.cl/SITSUPPORWEB/ (in Spanish) (limited access).

[3] Letter from Elizabeth Abi-Mershed, deputy executive secretary, Inter-American Commission on Human Rights, to Jorge Saéz Martín, secretary, Supreme Court of Chile (Feb. 4, 2016) (translation on file with author), *quoted in CIDH desconoce "jerarquía" de la Corte Suprema de Chile tras fallo a favor de opositor venezolano*, EMOL.COM, Feb. 16, 2016, *at* http://www.emol.com (search "CIDH jerarquía").

various counts, including incitement to commit crimes, criminal association, and damage to public property. In September 2015, López was convicted and sentenced to nearly fourteen years in prison. In support of one of the charges against him, the prosecution had relied, in part, on extraordinary evidence that López had used "subliminal" messages to incite others to commit crimes.

The detention and convictions of López and Ceballos have received international condemnation. The two have remained high-profile prisoners, in part by engaging with media and activists through actions such as a hunger strike in May 2015, when they demanded "freedom for political prisoners." In August 2014, the United Nations Human Rights Council's Working Group on Arbitrary Detention found that López and Ceballos were being arbitrarily detained and recommended their release;[4] not long afterward, the UN High Commissioner for Human Rights similarly called for their immediate release.[5] Despite the international attention and the expiration of the twelve-month sentence of Ceballos, both men remain in prison. López is detained in Ramo Verde military prison, mostly in solitary confinement in a seven-by-ten-foot cell without electricity, and only a small, high window for light. Ceballos was moved from prison to house arrest in August 2015 for health reasons, but returned to prison in August 2016 after the government claimed he was planning to escape and coordinate violence at protests on September 1, 2016.

On May 25, 2015, husband and wife John Londregan and María Victoria Villegas Figueroa lodged a writ of protection (*recurso de protección*) with the Valparaíso Court of Appeals in Chile on behalf of López and Ceballos. Londregan is a professor of politics and international affairs at Princeton University and Villegas is a Chilean lawyer. Their application did not refer to any connection with the prisoners or Venezuela. Rather, Villegas has said that her motivation in filing the writ of protection was a sense of moral obligation to protect human rights for future generations, which was spurred by discussions with Venezuelan friends.[6] Indeed, the applicants had previously filed another action in Chile on behalf of a different Venezuelan political prisoner that also relied on universal jurisdiction, although jurisdiction regarding that claim was rejected.[7]

In Chile, the writ of protection is a constitutional action that can be lodged when, as a result of arbitrary or illegal acts or omissions, an individual suffers privation, disturbance, or threat in the exercise of certain rights and guarantees.[8] The applicants invoked Articles 5, 19, and 20 of the Chilean Constitution and the doctrine of universal jurisdiction, claiming that the Venezuelan government had deprived the two protesters of their internationally protected rights, including equal protection under the law and the protection of private life. In particular, they

[4] Human Rights Council, Opinions Adopted by the Working Group on Arbitrary Detention, No. 26/2014, UN Doc. A/HRC/WGAD/2014/26 (Nov. 3, 2014) (adopted Aug. 26, 2014) (López); *id.*, No. 30/2014, UN Doc. A/HRC/WGAD/2014/30 (Nov. 3, 2014) (adopted Aug. 28, 2014) (Ceballos).

[5] Press Release, UN Office High Commissioner for Hum. Rts., UN Human Rights Chief Urges Venezuela to Release Arbitrarily Detained Protestors and Politicians (Oct. 20, 2014), *at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15187.

[6] Video: Maria Victoria Villegas Figueroa, Lawyer, and plaintiff in *López & Ceballos* Case, Address at Princeton University Conference: Human Rights in the Americas: Are We Serious? (May 6, 2016), *at* http://web.princeton.edu/sites/jmadison/calendar/videos.html [hereinafter Princeton Conference].

[7] Corte de Apelaciones de Valparaíso [C. Apel.] [court of appeals], 21 febrero 2015, "Ledezma, Antonio," Rol de la causa: 60-2015, amparo, *at* http://corte.poderjudicial.cl/SITCORTEPORWEB/ (in Spanish) (limited access).

[8] CONSTITUTIONAL LAW IN CHILE, paras. 505–09 (Javier Couso et al. eds., 2013).

relied on the protections of the right to life and to physical and psychological integrity, guaranteed by Article 19(1) of the Chilean Constitution.[9]

The Court of Appeals of Valparaíso denied the application on grounds that it lacked jurisdiction to hear the claims regarding the Venezuelan citizens, given that the acts in question had been committed (and their effects felt) outside Chile.[10] The applicants appealed, and on September 28, 2015, the Supreme Court of Chile (by a 3-2 majority) reversed the lower court's decision, holding that Chilean courts did have jurisdiction over their claims on the basis of what the applicants had labeled "universal jurisdiction for the protection of human rights" (1st sec.). The SCC stated that although territoriality remains the key principle defining a state's jurisdiction, courts may in certain cases consider extraterritorial events even in the absence of a jurisdictional nexus such as nationality (3d sec.). Acknowledging that it could cite no precedent for the adoption of precautionary measures in cases invoking universal jurisdiction, the Court nonetheless held that it had authority to act because precautionary measures that tend to make human rights effective should be possible (6th sec.). The SCC cited various authorities in support of its conclusion on jurisdiction, including (1) *jus cogens* norms; (2) treaties such as the Geneva Conventions of 1949; (3) customary international law; (4) academic treatises; and (5) decisions of other courts invoking universal jurisdiction in criminal cases, as well as in civil law cases on such matters as family and commercial law (3d, 6th secs.).

The SCC noted that three circumstances are required before universal jurisdiction can be invoked: (1) the courts that would customarily have jurisdiction have failed to act; (2) the jurisdiction and competence to act derive from a "suitable" source of international law; and (3) the national legislation to be applied in the forum state does not conflict with international law (3d sec.).

With regard to the courts that ordinarily have jurisdiction, the SCC stated that López and Ceballos had been subjected to seemingly "illegitimate" trials, noting in particular that the prosecutor in López's case had subsequently admitted that the trial had been politically motivated (an "official invention") (5th sec.). As for a suitable source of law, the SCC held that the right to life was clearly established by international law instruments such as the Universal Declaration of Human Rights, and that this right was reflected in Article 19(1) of the Chilean Constitution (4th & 9th secs.).

The argument concerning lack of conflict with the law of the forum state was more complex. The applicants argued, and the SCC appeared to accept, that any objection to the exercise of jurisdiction on the basis that it would interfere with Venezuela's sovereignty was negated by the second paragraph of Article 5 of the Chilean Constitution, which states that "[t]he exercise of sovereignty recognizes as a limitation the respect for the essential rights that emanate from human nature" (8th sec.). Moreover, the Article 19(1) rights invoked in the application were not limited by nationality or location (9th sec.).

Finally, the SCC characterized the Valparaíso Court of Appeals as a "respective court" under Article 20 of the Chilean Constitution, which enables a person to resort "to the *respective* court of appeals" when the right to life is threatened. In defining this term, the SCC turned to the Auto Acordado, procedural rules specifying that the court of appeals that will hear a case is the

[9] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE Art. 19(1).

[10] C. Apel. de Valparaíso, 28 septiembre 2015, "López, Leopoldo," Rol de la causa: 1850-2015, protección, 6th–10th secs., *at* C. Apel., *supra* note 7 (in Spanish) (limited access).

one "in whose jurisdiction the arbitrary or illegal act or omission was committed" (9th sec.). The SCC held that the effect of the illegal acts was produced in Valparaíso, given that the applicants were domiciled in Valparaíso and affected "in a personal and direct way" by the rights violation (*id.*). Judge Aránguiz, who wrote the majority judgment, has since stated that this direct effect was the "abuse of [the applicants'] own humanity."[11]

By way of remedy, the SCC ordered the Chilean government to request that the Commission (an independent entity of the Organization of American States (OAS)) send a delegate to Venezuela to inspect the conditions of detention of López and Ceballos, specifically concerning the prisoners' health and deprivation of liberty. These findings, together with the delegate's assessment of Venezuela's compliance with the relevant international treaties, were to be reported to the OAS General Assembly so that the OAS could take all advisable measures for the protection of the prisoners' rights and then report back to the SCC on its actions (10th sec.). The Chilean government refused to send the request, on the grounds that such a decision fell within its exclusive power to conduct international relations on behalf of the state. On December 28, 2015, the SCC issued a new order, sending the request directly to the Commission, which in turn rejected it on February 4, 2016.[12]

* * * *

Whether or not the SCC decisions had any positive impact on the treatment of López and Ceballos is open to question. From the perspective of international law, however, the Court's decisions were both novel and notable in several respects.

Most significantly, in its first ruling, the SCC found that Chilean law guarantees certain rights when they are violated by a foreign government against its own citizens in its own territory. That is an extraordinary claim of universal prescriptive jurisdiction. Granted, since the Court based its decision on the idea that the impact of the violations had been felt by individuals living within Chile, one might argue that the jurisdictional assertion was not purely "universal." But this view would be a mischaracterization of the Court's reasoning, since the effect that was said to have been produced in Chile was in fact an affront to all humanity (and was therefore truly universal, potentially entitling any court in any country to assert comparable jurisdiction). Although the SCC held that under Chilean law the applicants had to be domiciled in Chile to bring the action, this ruling did not deviate from the universality principle because the Court still asserted jurisdiction in the absence of any other recognized jurisdictional nexus between those applicants (or Chile itself) and the rights violation, such as the "nationality" or the "protective" principle.

The decisions are also unique as assertions of universal jurisdiction, as they address ongoing human rights violations, in contrast to most previous universal jurisdiction cases, which contemplated remedies for past violations of the law. Moreover, most assertions of universal jurisdiction by domestic courts have focused on punishing the *perpetrators* of international crimes or human rights violations, either criminally or through an award of civil damages; here, the objects of the Court's orders were the Chilean government and the Commission (Venezuela itself was not a party to the proceedings and did not make representations). Finally, the SCC's

[11] Video: Carlos Aránguiz, Judge of Supreme Court of Chile, Keynote Address at Princeton Conference, *supra* note 6 (May 5, 2016).

[12] *See supra* text at notes 2–3.

decisions arose from a constitutional action, which is different from other cases where universal civil jurisdiction has been asserted, for example, in tort proceedings (as under the U.S. Alien Tort Statute).[13] The SCC did not grapple with these unique features of the case, and it is therefore helpful to start an analysis of the SCC's jurisdictional assertions from first principles.

Jurisdiction refers to the distinct, yet related, concepts of jurisdiction to prescribe and to enforce.[14] Where states assert prescriptive jurisdiction over people or events occurring within another state's territory, they generally do so on the basis of a principle connecting the forum state and the people or events, such as "active" or "passive" personality or the "protective" principle. The notion of universal jurisdiction is one such principle, which asserts that the very nature of the offense in question is so heinous that the offender becomes an "enemy of mankind" (or *hostis humani generis*) and thus subject to the jurisdiction of any other state. On the other hand, enforcement jurisdiction occurs when the executive or judiciary of a state gives effect to its rules so as to seek compliance or punish noncompliance. Therefore, the SCC decisions were also an expression of enforcement jurisdiction, since they sought to compel compliance with the rights obligations that the Court held were being breached. It is irrelevant to the determination that the Court was exercising enforcement jurisdiction that the desired outcome did not result; what matters is that the Court took action to enforce its finding about a rights violation in Venezuela. Further, the SCC's assertion of enforcement jurisdiction was partly extraterritorial because it took action outside Chile by appealing to the Commission to investigate and report on Venezuela's actions. The extraterritorial aspects of both the SCC's prescriptive and enforcement jurisdictional assertions raise the most interesting questions for international law.

Given that the SCC's reasoning was not thoroughly articulated, it is more fruitful to consider how, in theory, the state of Chile might justify the propriety of the SCC's jurisdictional assertions under international law; recall that the acts of the SCC were acts of the state of Chile for the purposes of the international law of attribution of state responsibility.[15] Chile could seek to rely on three key arguments in justifying the SCC's decisions; each of them should be rejected. The broadest argument finds its origins in the decision of the Permanent Court of International Justice (PCIJ) in the *S.S. Lotus* case.[16] The decision is frequently cited for its dictum that international law does not limit prescriptive jurisdiction regarding persons, property, and acts outside a state's territory unless an existing rule prohibits it.[17] Yet Chile's ability to rely on *Lotus* faces a few hurdles. First, the *Lotus* approach to prescriptive jurisdiction is now widely rejected. In the words of Judges Higgins, Kooijmans, and Buergenthal in the *Arrest Warrant* case, the *Lotus* "dictum represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies."[18] Second, even if the *Lotus* approach were applicable, the exercise of universal civil jurisdiction has increasingly been

[13] 28 U.S.C. §1350 (2015).

[14] Note that publicists and courts do not use these terms consistently, and "jurisdiction to adjudicate" is also used.

[15] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries Thereto, Art. 4 & cmt. (1), *in* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, [2001] 2 Y.B. Int'l L. Comm'n 30, 40, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC Articles].

[16] S.S. Lotus (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10.

[17] *Id.*, pp. 18–19.

[18] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3, 78, para. 51 (Feb. 14) (joint sep. op., Higgins, Kooijmans, Buergenthal, JJ.).

protested by states, which suggests the existence of restrictions on its application under international law. Finally, to the extent that the SCC's decisions expressed enforcement jurisdiction, the PCIJ noted explicitly that states were precluded from exercising enforcement jurisdiction outside their territory, absent a permissive rule or treaty provision.[19]

The reversal of the *Lotus* approach seems to be increasingly supported by states and commentators. Under this approach, states are precluded from exercising prescriptive jurisdiction extraterritorially absent a rule allowing it such as the principle of universal jurisdiction, whose parameters are determined by international law under treaty or custom. Accordingly, Chile would have to justify its exercise of jurisdiction on the basis of a permissive rule of customary international law, since it cannot point to any relevant treaty provision.[20]

The strongest evidence of state practice in support of universal civil jurisdiction in recent years has been litigation under the U.S. Alien Tort Statute. But no other state has enacted comparable legislation, and *Kiobel v. Royal Dutch Petroleum Co.* severely curtailed the operation of the statute.[21] Of course, *Kiobel* says more about U.S. law than international law, yet it still diminished the strongest evidence of state practice regarding universal civil jurisdiction. The remaining state practice, which has been attributed to the exercise of universal jurisdiction in the civil context, is limited and does not support a broad right to assert universal civil jurisdiction, since the jurisdictional assertions either are not truly universal or arise in very restricted circumstances; examples include cases under the so-called *forum necessitatis* doctrine and as *actions civiles* in Europe.

Another argument in support of a permissive rule for universal civil jurisdiction relies on the increasing acceptance by many states of universal criminal jurisdiction for specific crimes such as piracy, war crimes, and crimes against humanity. In the words of Justice Breyer in *Sosa v. Alvarez-Machain*, universal civil jurisdiction "would be no more threatening" to other states than universal criminal jurisdiction.[22] But there are significant differences between asserting criminal jurisdiction over a crime that is widely accepted as giving rise to universal jurisdiction under treaty or custom, especially where the defendant is present in the forum state or failure to prosecute may lead to impunity, and unilaterally claiming civil jurisdiction over treatment by a foreign state of its own citizens within its own territory. At present, no rule under customary international law or treaty provision justifies the latter.

Rather than rely on universal jurisdiction per se, Chile might argue that the SCC was giving effect to an obligation *erga omnes* or *erga omnes partes,* in line with Article 48 of the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.[23] Presumably, no applicable international legal norm would have been violated if the SCC had simply rendered a judgment criticizing the Venezuelan government for

[19] S.S. Lotus, *supra* note 16, at 18–19.

[20] The strongest claim for universal civil jurisdiction under treaty law relates to torture, from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art.14, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85. *See* Comm. Against Torture, General Comment No. 3 (2012): Implementation of Article 14 by States Parties, para. 22, UN Doc. CAT/C/GC/3 (Nov. 19, 2012). But even that is questionable. *See* Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (Kingdom of Saudi Arabia) [2006] UKHL 26, [2007] 1 AC 270, para. 20 (Lord Bingham), para. 46 (Lord Hoffmann) (appeal taken from Eng.).

[21] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

[22] Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

[23] ILC Articles, *supra* note 15, Art. 48.

its arrest and treatment of the protesters, for example, by reminding it to respect the provisions of an international instrument to which both Chile and Venezuela subscribe, such as the American Declaration of the Rights and Duties of Man. Such a finding, while likely to have been objectionable to the Chilean executive and to Venezuela, would essentially have amounted to a form of diplomatic communication or protest. The Court, however, went further, by engaging in more than informal enforcement measures regarding breach by Venezuela of its international obligations. Under Article 42 of the ILC Articles (and its comment (2)), Chile needs a more specific entitlement to justify its actions.

In accordance with Article 48 of the ILC Articles and the *erga omnes* principle, Chile could argue that it was invoking Venezuela's responsibility for the breach of an internationally accepted obligation, owed either to a group of states (for example, OAS member states) or to the international community as a whole. Such an argument would still be problematic. It is far from clear that any relevant obligation exists, since the right to life and freedom from arbitrary detention have not been firmly established as giving rise to obligations owed to the international community as a whole, or to a group of states that includes Venezuela and Chile. Finally, even if there is such an obligation, the SCC exercised remedies that exceeded those available under the ILC Articles, which are limited to requesting the cessation (or assurance of nonrepetition) of the internationally wrongful act, seeking reparation on behalf of the prisoners, or (arguably) adopting countermeasures.[24]

Two further arguments that Chile might raise are worth mentioning. One relies on a concept that Cedric Ryngaert has labeled "jurisdictional responsibility," which would impose a duty on the Chilean courts to exercise jurisdiction over certain unlawful acts occurring in other countries—in effect, obliging national courts to take action with regard to abuses elsewhere in the world.[25] But at present there is little evidence that this concept has been accepted by states. The other argument rests on the principles of diplomatic protection and would assert that the right of diplomatic protection could validly be extended to non-nationals in other countries. This argument also fails to find a tenable basis in current international law or practice.

None of these points excuses the treatment of López and Ceballos by Venezuela; its violations of their civil and political rights are unacceptable and entirely deserving of condemnation. By the same token, however, the decisions of the SCC must also be evaluated by relevant principles of international law, particularly those relating to the exercise of extraterritorial jurisdiction. Regardless of the intent behind them, they cannot be justified on the basis of contemporary theories of jurisdiction, and any precedential value in the decisions should therefore be viewed with a high degree of caution.

NICHOLAS PETRIE

[24] *Id.*, Arts. 30, 48(2) & cmts. (11)–(12) (reparation); pt. 3, ch. II, cmt. (8), & Art. 54 & cmts. (1–6) (countermeasures).

[25] CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 161–62 (2d ed. 2015).