UniCEUB
ISSN 2237-1036

REVISTA DE DIREITO INTERNACIONAL
BRAZILIAN JOURNAL OF INTERNATIONAL LAW

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VOLUME 17 • N. 2 • 2020

POPULISMO E DIREITO INTERNACIONAL /
POPULISM AND INTERNACIONAL LAW

Sumário

doi: 10.5102/rdi.v17i2.6689

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Abstract

This article aims to evaluate the role of Chilean superior courts in protecting the rights of migrants by applying international norms. The methods used are inductive-deductive and analysis-synthesis. The jurisprudence analysis allows us to observe how the national judge incorporates international standards through different rules of interpretation and argumentation. While statistical analysis, to measure the frequency and trend of various variables. The sample contains cases of expelled aliens from the last ten years, finding that the courts expressly referred to treaties in their reasoning only in a ten per cent. The most used treaty has been the Convention on the Rights of the Child, followed by the American Convention on Human Rights. With their implementation, courts have found several parameters that are relevant to consider before to expel an alien. Then, the research contributes to emphasise the role of national courts in protecting the rights of migrants. Applying international norms directly or, at least, their parameters in an extensive interpretation to favour the realisation of human rights.

Keywords: Aliens expulsion. Application of International Law. Chilean courts. Protection actions. Rights of migrants

Resumo

Este artigo tem como objetivo avaliar o papel dos tribunais superiores chilenos na proteção dos direitos dos migrantes por meio da aplicação das normas internacionais. Os métodos utilizados são indutivo-dedutivo e análise-síntese. A análise da jurisprudência permite observar como o juiz nacional incorpora as normas internacionais por meio de diferentes regras de interpretação e da argumentação durante a análise estatística, para medir a frequência e tendência de várias variáveis. A amostra contém casos de estrangeiros expulsos nos últimos dez anos, constatando que os tribunais se referiram expressamente aos tratados em seu raciocínio apenas em dez por cento. O tratado mais utilizado é a Convenção sobre os Direitos da Criança, seguida pela Convenção Americana sobre Direitos Humanos. Com sua implementação, os tribunais encontraram vários parâmetros que são relevantes a serem considerados antes de expulsar um estrangeiro. Em seguida, a pesquisa contribui para enfatizar o papel dos tribunais nacionais na proteção

* Recebido em 15/04/2020
Aprovado em 12/10/2020

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dos direitos dos migrantes. Aplicar as normas internacionais diretamente ou, pelo menos, seus parâmetros em uma interpretação ampla para favorecer a efetivação dos direitos humanos.

Palavras chave: Expulsão. Estrangeiro. Aplicação do Direito Internacional. Cortes chilenas. Direitos dos migrantes.

1 Introduction

Chile is part of the systems for the protection of human rights. It is an active member of the United Nations and the Organization of American States and has ratified major general human rights treaties. Therefore, it has given express consent to compromise on the implementation of mechanisms to safeguard these rights. It is noteworthy that systems of human rights protection are complementary to domestic law.[1] Thus, with migration rights, at the universal level, we can consider the ratification of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR), the Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, 2220 UNTS 3 (ICRMW). At the regional level, we can consider the American Convention on Human Rights 1969, B-32 OAS (ACHR).

In this context, Chilean courts should apply international norms protecting the rights of migrants[2] in the judicial review of their expulsion. Specifically, there is a general duty to respect and guarantee human rights. It is projected to all State organs and manifests as a duty to ensure adequate protection (*effet utile*), which implies not to attempt to harmonise international and internal norms in the highest possible degree with a systematic and finalist interpretation.[3] Indeed, Article 5 Constitution of the Republic of Chile states[4] the duty to respect and promote the rights of the human person imposed on State bodies. Among these bodies, it additionally corresponds to the courts' respect and promotion of the human rights protected by the international system.[5] Therefore, the research aims to verify whether, over the last ten years, Chilean judges have achieved *adequate protection* of migrant rights by the application of international norms in deportation cases[6].

The Chilean law on migration, Decree-Law No. 1094, 1975 (DL 1094), refers mainly to the rules on entry and stay in the country, the types of visas, administrative sanctions, and grounds for expulsion. Long-standing and conceived under a paradigm in which national security prevailed, it lacks recognition of the rights of migrants in line with the standards developed in international human rights law. Previous to both, the Constitution and the ratified international treaties; it even iterates provisions enacted in the first half of the twentieth century, such as the Residence Act, 1918 (Act No. 3446, which prevents entry into the country or the residence therein of undesirable elements) and the Passport Regulation, 1937 (Decree No. 315). Therefore, it does not respond to the parameters that it should consider as a democratic State and as part of the international systems of the protection of human rights.[7]

[1] DÍAZ TOLOSA, Regina Ingrid. *Aplicación del ius cogens en el ordenamiento jurídico interno*. Santiago: Thomson Reuters, 2015. p. 246; DÍAZ TOLOSA, Regina Ingrid. Ingreso y permanencia de las personas migrantes en Chile: Compatibilidad de la normativa chilena con los estándares internacionales. *Estudios Constitucionales*, Talca, v. 14, n. 1, p. 181-2, ene./jun. 2016.

[2] In this article we use the terms "migrants", "aliens" or "foreigners", indistinctly to refer to "*[a]n individual who does not have the nationality of the State in whose territory that individual is present*". INTERNATIONAL ORGANIZATION FOR MIGRATION. *Glossary on Migration*. Geneva: IOM, 2019. p. 8.

[3] Nash, Claudio. El principio *pro persona* en la jurisprudencia de la Corte Interamericana de Derechos Humanos. In: Nogueira, Humberto (ed). *Diálogo judicial multinivel y principios interpretativos favor persona y de proporcionalidad*. Santiago: Librotecnia, 2013. p. 169-70.

RIETIKER, Daniel. *Effectiveness and Evolution in Treaty Interpretation*. 2019. Available at: https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0188.xml Access on: 1st Sep. 2020.

[4] As Kelsen would say, this is constitutional recognition of the binding force of international treaties. See KELSEN, Hans. As relações sistemáticas entre o direito interno e o direito internacional público. *Brazilian Journal of International Law*, Brasilia, v. 10, n. 3, p. 61, 2013.

[5] NASH, Claudio; NÚÑEZ, Constanza. Los usos del derecho internacional de los derechos humanos en la jurisprudencia de los tribunales superiores de justicia en Chile. *Estudios Constitucionales,* Talca, v. 15, n. 1, p. 16–17, ene./jun. 2017; NÚÑEZ, Constanza. Bloque de constitucionalidad y control de convencionalidad en Chile: avances jurisprudenciales. *Anuario de Derechos Humanos,* Santiago, v. 11, p. 164, ene./dic. 2015.

[6] This means giving protection to migrants applying as a *minimum*, rules of the international standards of human rights.

[7] CERIANI, Pablo. Luces y sombras en la legislación migratoria latinoamericana. *Nueva Sociedad,* n. 233, p. 77, mayo/jun. 2011; INSTITUTO NACIONAL DE DERECHOS HUMANOS. *Situación de los derechos humanos en Chile*. Santiago: INDH, 2013. p. 269;

Then, the principle of the impossibility of invoking internal law to evade international obligations assumed by a State, of which the positive expression results in the State's duty to harmonise domestic legislation with the international order, has been collected at the universal and regional conventional level (Article 2.2 ICCPR 1966, 999 UNTS 171 and Article 2 ACHR 1969, B-32 OAS). Consequently, the general obligation of States to respect and guarantee human rights is not limited to avoiding the overlapping of transgressive behaviours of such rights but also implies they must take necessary actions for their exercise and enjoyment. Among them, the positive review of domestic legislation in eliminating any discrepancies with international norms.[8] If the legislature has not done its duty adequately and the international principle of impossibility to invoke the law to circumvent the obligation to protect human rights without compromising the responsibility of the State arises, then whether national courts could, in legal cases submitted to its resolution, directly implement the international norm and to what extent or amplitude.[9]

In Chile, the conventional international human rights norms incorporate *automatically* by the express constitutional mandate of Article 5, paragraph 2 and being human rights treaties *self-executing*[10], the consecration of rights and guarantees are directly applicable by national judges.[11] Now, if the clauses were not sufficiently comprehensive and detailed to allow direct application,[12] the State may not invoke the inadequacy of its domestic

FRIES, Lorena. Discriminaciones a los migrantes. In: Le Monde diplomatique (ed.) *Migraciones*. Conferencia Internacional sobre Migraciones y Derechos Humanos: Estándares y prácticas. Santiago: Editorial Aún creemos en los sueños, 2013. p. 50; PÉREZ, Carmen Gloria. Migraciones. Evolución de la jurisprudencia internacional. *Revista de Derecho,* Concepción, v. LXXXI, n. 233-234, p. 72, ene./dic. 2013; BELLOLIO, Álvaro; ERRÁZURIZ, Hernán. *Migraciones en Chile*. Oportunidad ignorada. Santiago: Ediciones L y D, 2014. p. 90; CENTRO DE DERECHOS HUMANOS. Derechos de los migrantes y refugiados. In: *Informe Anual de Derechos Humanos en Chile 2014*, Santiago: Ediciones Universidad Diego Portales, 2014. p. 337; DOÑA, Cristián; MULLAN, Brendan. Migration Policy and Development in Chile. *International Migration*, Geneva, v. 52, n. 5, p. 10, oct. 2014; GALDÁMEZ, Liliana. Algunos criterios del Tribunal Constitucional sobre el estatuto jurídico de las personas extranjeras en Chile. *Revista Chilena de Derecho y Ciencia Política,* Santiago, v. 5, n. 3, p. 129-30, sept./dic. 2014; BASSA, Jaime; TORRES, Fernanda. Desafíos para el ordenamiento jurídico chileno ante el crecimiento sostenido de los flujos migratorios. *Estudios Constitucionales*, Talca, v. 13, n. 2, jul./dic. 2015, p. 118; DELLACASA, Francisco; HURTADO, José María. *Derecho Migratorio Chileno*. Santiago: Editorial Jurídica de Chile, 2015. p. 22-41; DOMÍNGUEZ, Cecilia. Derecho chileno migratorio a la luz del derecho migratorio internacional. *Revista Chilena de Derecho,* Santiago, v. 43, n. 1, p. 195, abr. 2016; CONCHA, S. Propuestas para regular las migraciones en Chile y la obstinación del securitismo. *URVIO, Revista Latinoamericana de Estudios de Seguridad,* Quito, n. 23, p. 115-6, dic. 2018/mayo 2019; VARGAS, Francisca. Una ley de migraciones con un enfoque de derechos humanos. In: CENTRO DE DERECHOS HUMANOS. *Informe Anual de Derechos Humanos en Chile 2018*. Santiago: Ediciones Universidad Diego Portales, 2018a. p. 488; ANINAT, Isabel; SIERRA, Lucas. Regulación inmigratoria: Propuestas para una mejor reforma. In: ANINAT, Isabel; VERGARA, Rodrigo (ed.). *Inmigración en Chile*. Una mirada multidimensional. Santiago: Fondo de Cultura Económica and Centro de Estudios Públicos, 2019. p. 35-6.

[8] National law must dissolve the obstacles for the implementation of obligations from international law. DIAZ TOLOSA, Regina Ingrid. *Aplicación del ius cogens en el ordenamiento jurídico interno*. Santiago de Chile: Thomson Reuters, 2015. p. 253-259.

[9] Certainly, Chilean courts can contribute to greater protection of the rights of migrants through the application of international norms, especially when dealing with ratified international treaties, which according to our Constitution constitute a limit to the exercise of sovereignty. ALEINIKOFF, T. Alexander. International Legal Norms on migration: substance without architecture. In: CHOLEWINSKI, Ryszard; PERRUCHOUD, Richard; MACDONALD, Euan. (ed.). *International Migration Law*. The Hague: T.M.C. Asser Press, 2007. p. 469, indicate that migrants are often subject to discriminatory treatment, violations of due process, and other forms of abuse. These problems are not from a lack of human rights norms but insufficient implementation and enforcement.

[10] This means that "*provisions of the published international treaties which do not require the adoption of internal acts for their application are directly applicable*". The distinction between self-executing and non-self-executing treaty provisions took up in 1995 by Russian Law, more details at Cassese, Antonio. The implementation of international rules within national systems. In: INTERNATIONAL Law. New York: Oxford University Press, 2005. p. 227. Also, SHAW, Malcolm N. International law and municipal law. In: INTERNATIONAL Law. 6. ed. New York: Cambridge University Press, 2008. p. 176-7. It would seem that a similar situation would occur regarding treaty enforcement by Brazilian courts, although MAGALHÃES, Breno Baía. O sincretismo teórico na apropriação das teorias monista e dualista e sua questionável utilidade como critério para a classificação do modelo brasileiro de incorporação de normas internacionais. *Brazilian Journal of International Law,* Brasilia, v. 12, n. 2, p. 89, 2015, states that in certain cases Brazilian courts have refused to apply human rights treaties directly because they consider that some of their rules are not *self-executing*.

[11] Indeed, BROWNLIE, Ian. The reception of international law in other states. In: PRINCIPLES of Public International Law. 7. Ed. New York: Oxford University Press, 2008. p. 48 states that *"[a] number of countries adhere to the principle that treaties made in accordance with the constitution bind the courts without any specific act of incorporation*". See also, IGLESIAS, Alfonso J. Reflexiones sobre la implementación de los tratados internacionales por los tribunales domésticos. *Anuario Español de Derecho Internacional,* Pamplona, v. 29, p. 173, ene./dic. 2013; DEL TORO, Mauricio. *Jueces, mundialización y derecho internacional de los derechos humanos*: (deberes, responsabilidades *y* posibilidades de la judicatura en el mundo contemporáneo). 2015. Tesis (Doctorado), Universidad Complutense, Madrid, 2015. p. 328.

[12] BERTELSEN, Raúl. Rango jurídico de los tratados internacionales en el derecho chileno. *Revista Chilena de Derecho*, Santiago, v. 23, n. 2/3, p. 221, mayo/ago. 1996.

law for compliance of international provisions.[13] In such cases, at least, clauses should serve as guidance to promote the *realisation of human rights*,[14] while the legislature does not dictate the necessary measures to provide domestic operational standards.[15]

Therefore, as a working hypothesis, we maintain that, by the application of international norms, the judgments of our superior courts can provide protective remedies for the rights of migrants, without regard to the existing emptiness of a *human rights-based approach*[16] in domestic immigration law. National judges are obliged to protect the rights of migrants effectively and, as organs of a State, which is a part of the systems of international law for the protection of human rights, can apply international norms directly, without the necessity of national immigration law includes them in their articles. The resolutions of the judges cannot be manifestly incompatible with the applicable international norms; on the contrary, to the greatest extent possible[17], they should coordinate them with the rest of the domestic legal system.

Thus, this research aims to evaluate the role of national judges in protecting the rights of migrants. In a system where there are treaties on human rights ratified and published, but old domestic legislation that does not expressly incorporate those international standards. Its methodology includes the documentary technique and jurisprudence and statistical analysis. Therefore, there is an analysis-synthesis method[18] in the reading and systematisation of national and international immigration law.

The analysis of cases allows us to observe how the national judge incorporates international norms. The different rules of interpretation and argumentation applied for the protection of the rights of migrants (inductive-deductive method[19]). Also, a quantitative approach allows us to measure and analyse, through statistical procedures[20], the frequency and trend of various variables. Including, the percentage and frequency of expulsion grounds, clandestine entries, accept or reject legal actions, application of international standards, among others.

[13] NOGUEIRA, Humberto. Aspectos fundamentales de la reforma constitucional 2005 en materia de tratados internacionales. In: LA CONSTITUCIÓN reformada de 2005. Santiago: Librotecnia, 2005. p. 399.

[14] By *realization of human rights*, we understand, measures to guarantee the rights adequately considering the priorities, particularities, and diversity of the population -in this case, migrant-, especially, the principles of equality, non-discrimination, participation, and inclusion. See, NACIONES UNIDAS DERECHOS HUMANOS – PARAGUAY. *Glosario de términos claves en materia de derechos humanos y enfoque de derechos*. 2016. p. 6. Available at: https://acnudh.org/load/2019/07/Glosario-de-t%C3%A9rminos-claves-en-materia-de-DDHH.pdf Access on: 2nd Sept. 2020. CASTILLA, Karlos. El principio pro persona en la administración de justicia. *Cuestiones Constitucionales, Revista Mexicana de Derecho Constitucional,* México D.F., n. 20, p. 66, ene./jun. 2009; AGUILAR, Gonzalo. La Corte Suprema y la aplicación del Derecho Internacional: un proceso esperanzador. *Estudios Constitucionales*, Talca, v. 7, n. 1, p. 133, ene./jun. 2009; CASTILLO, Luis. La relación entre los ámbitos normativos internacional y nacional sobre derechos humanos. *Estudios Constitucionales,* Talca, v. 10, n. 2, p. 252-4, jul./dic. 2012; MELÉNDEZ, Felipe. *Instrumentos internacionales sobre derechos humanos aplicables a la administración de justicia*: estudio constitucional comparado. 8. ed. Bogotá, Fundación Konrad Adenauer; Editorial Universidad del Rosario. 2012. p. 131-2; TRONCOSO, Claudio. Derecho internacional, Constitución y derecho interno. *Revista de Derecho Público* Santiago, v. 77, p. 458-60, jul./dic. 2012; ZÚÑIGA, Francisco. Personas jurídicas y derechos humanos en el sistema interamericano. A propósito del principio pro homine o favor persona. In: NOGUEIRA, Humberto (ed). *Diálogo judicial multinivel y principios interpretativos favor persona y de proporcionalidad*. Santiago: Librotecnia, 2013. p. 222-32.

[15] REDONDO, María Belén. El juez humanista: el nuevo guardián del derecho en el paradigma neoconstitucional. *Cuestiones Constitucionales, Revista Mexicana de Derecho Constitucional,* México D. F., n. 40, p. 142-3, ene./jun. 2019; TRONCOSO, Claudio. Derecho internacional, Constitución y derecho interno. *Revista de Derecho Público,* Santiago, v. 77, p.456-58, jul./ dic. 2012.

[16] UNITED NATIONS SUSTAINABLE DEVELOPMENT GROUP. *Human Rights-Based Approach*. 2020. Available at: https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach Access on: 2nd Sept. 2020, states that "*human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyze inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress and often result in groups of people being left behind*".

[17] About extensive interpretation, see CÓRDOVA, Miguel Ángel. Radiografía constitucional del principio *pro persona. Cuestiones Constitucionales, Revista Mexicana de Derecho Constitucional*, México D. F., n. 42, p. 179-80, ene./jun. 2020.

[18] VILLABELLA ARMENGOL, Carlos Manuel. Los métodos en la investigación jurídica. Algunas precisiones. In: GODÍNEZ MÉNDEZ, Wendy Aide; GARCÍA PEÑA, José Heriberto (coord.). *Metodologías*: enseñanza e investigación jurídicas. 40 años de vida académica. Homenaje al doctor Jorge Witker. México D.F.: Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, 2015. p. 937.

[19] VILLABELLA ARMENGOL, Carlos Manuel. Los métodos en la investigación jurídica. Algunas precisiones. In: GODÍNEZ MÉNDEZ, Wendy Aide; GARCÍA PEÑA, José Heriberto (coord.). *Metodologías*: enseñanza e investigación jurídicas. 40 años de vida académica. Homenaje al doctor Jorge Witker. México D.F.: Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, 2015. p. 938.

[20] HERNÁNDEZ SAMPIERI, Roberto; FERNÁNDEZ COLLADO, Carlos; BAPTISTA LUCIO, María del Pilar. *Metodología de la investigación*. 6. ed. México D.F.: Mc Graw Hill, 2014. p. 19.

We construct a sample of sentences for the statistical analysis, filtering the cases on expulsions from *Amparo* actions base data provided by the Communication Department's Supreme Court[21]. Then, we could access exhaustively all the judgments included in ten years,[22] and not just one limited selection of reviews obtained in search engines of electronic jurisprudence bases.[23]

Therefore, as shown in Table 1, we construct a sample of 676 cases divided into constitutional *Amparo* (Article 21 Chilean Constitution) and particular action claim in case of expulsion (Article 89 DL 1094).

Table 1. Actions in cases of expulsion, 2008-18 period

TYPE OF ACTION	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	Total
Amparo Art. 21 Constitution	1	2	4	6	12	67	57	73	82	166	60	**530**
Special Claim Art. 89 DL 1094	4	13	22	25	24	24	16	5	5	4	4	**146**

We present the research results in two parts. First, the sample is analysed, distinguishing the two legal claims used in the protection of expelled foreigners: The action claim provided for in Article 89 DL 1094 and the constitutional *Amparo* action (*habeas corpus*). Second, we explain how the higher courts have applied -directly or as an additional parameter- international human rights law in resolving these cases of expulsion, distinguishing the two most applied treaties: CRC and ACHR.

2 Legal claims in cases of the expulsion of aliens

2.1 The extraordinary action claim of Article 89 Decree Law 1094, 1975

Article 89 DL 1094 provides for a particular action claim in case of expulsions, which can be criticised *a priori* as insufficient for the real and effective guarantee of migrants since it suffers from restrictions and time limits that render it illusory in practice:[24]

1. Only proceed against the expulsions ordered by the Supreme Decree of the Ministry of Interior. Article 84, paragraph 1 DL 1094 provides that Presidential Decree signed by the Minister of Internal Affairs under the formula, "By order of the President of the Republic" ordering the measure. Therefore, this action claim is not useful if the Regional Governor was who decree the expulsion by a Resolution. Specifically, in the cases of (a) tourist permit holders or those who extend their stay with that expired permit (Article84 paragraph2 DL 1094) and, (b) aliens who have entered or attempted to enter the country clandestinely (Decree No 818 of the Ministry of Interior of 1983, which delegates to internal government authorities that indicate the powers related to foreigners, updated by Decree No 2911, 2000).

2. Once notification is provided of the expulsion order, the deadline for filing is extremely short, only 24 hours. Moreover, there is no obligation for the Chilean Investigations Police to report on the available resources, and only the applicant or his family, can fill it out; but the applicant could be under detention, and the family residing outside the national territory.[25]

3. There is only one instance in the Supreme Court. The absence of the principle of the right of appeals in cases of claims against expulsion has been a widely denounced situation by some organisations of civil society.[26] However, the jurisprudence of the Constitutional

[21] The data was obtained from a *public information request* filed on 9 May 2018. We requested the details of the constitutional *amparo* appeals and special actions of claims in expulsion cases. The purpose is to compare those cases known by the Supreme Court (SC), either via appeal in constitutional *amparo* or via special action claim. The database of the judgments received contains 7372 cases, that were filtered by us since the processing system of the SC cannot obtain detailed information by the subjects for which an appeal of *amparo* stands.

[22] March 2008 to March 2018, since on 9 April 2018 a process of regularization of migrants started (Exempt Resolution No. 1965 of the Ministry of Interior and Public Security) therefore, from that date, the claims filed to review deportation orders were accepted by this circumstance. VARGAS, Francisca. Derechos de las personas migrantes y refugiadas: Cambios en materia migratoria en Chile. In: CENTRO DE DERECHOS HUMANOS. *Informe Anual de Derechos Humanos en Chile 2018*. Santiago: Ediciones Universidad Diego Portales, 2018. p. 259-263.

[23] LINOS, Katerina; CARLSON, Melissa. Qualitative Methods for Law Review Writing. *The University of Chicago Law Review*, Chicago, v. 84, n. 1, p. 217-220, 2017, warn of the risks of the selective choice of court cases, as they could influence the results of the analysis and its conclusions.

[24] DIAZ TOLOSA, Regina Ingrid. *Aplicación del ius cogens en el ordenamiento jurídico interno.* Santiago: Thomson Reuters, 2015. p. 206-7; BASSA, Jaime; TORRES, Fernanda. Desafíos para el ordenamiento jurídico chileno ante el crecimiento sostenido de los flujos migratorios. *Estudios Constitucionales*, Talca, v. 13, n. 2, p. 118, 2015.

[25] DOMÍNGUEZ, Cecilia. Derecho chileno migratorio a la luz del derecho migratorio internacional. *Revista Chilena de Derecho*, Santiago, v. 43, n. 1, p. 200, abr. 2016.

[26] CHIARELLO, Leonir (ed). *Las políticas públicas sobre migraciones y*

Court remarks that, to settle in only one instance, "*no matter a violation of due process, since a prior administrative stage contemplated*" (CHILE. Constitutional Court, No. 1252–2008, 28 April 2009) and "*although our Constitution requires a due process enshrines the review of sentences, this does not mean the right to a second hearing*" (CHILE. Constitutional Court, No 1432–2009, 5 August 2010).[27]

In the jurisprudence analysed, the filing of this action claim triples or quadruples between 2009 and 2014 and then returns to four or five per year. We group the cases according to their results in inadmissible, rejected, and accepted. The action was accepted only 19 per cent of the cases, while 34 per cent ended without being seen by the SC (see Table 2). This situation is because procedural action has limitations, as indicated above (i.e. the type of expulsions required and the short time to file them). In fact, in analysing the inadmissible cases, the impact of these constraints precluding access to justice for the expelled immigrants can be observed (see Table 3): 66 per cent of the cases were inadmissible for not being an expulsion order issued by the Supreme Decree of the Ministry of Interior, and 32 per cent were inadmissible because the alien filed the claim extemporaneously.

Table 2. Particular action claim filed to the SC classified according to their results

	Inadmissible	Rejected	Accepted	Total
2008	2	2	0	4
2009	4	9	0	13
2010	11	8	3	22
2011	9	13	3	25
2012	8	15	1	24
2013	8	8	8	25
2014	1	7	8	15
2015	2	2	1	5
2016	1	3	1	5
2017	2	0	2	4
2018	2	2	0	4
Total	**50**	**69**	**27**	**146**

Table 3. Particular action claim filed to the SC classified according to their ground of inadmissibility

Year	Inadmissible	Regional Governor expulsion order	Extemporaneous	Another reason
2008	**2**	1	1	0
2009	**4**	0	4	0
2010	**11**	6	4	Previous amparo (1)
2011	**9**	5	4	0
2012	**8**	8	0	0
2013	**8**	7	1	0
2014	**1**	1	0	0
2015	**2**	1	1	0
2016	**1**	1	0	0
2017	**2**	1	1	0
2018	**2**	2	0	0
Total	**50**	**33**	**16**	**1**

2.2 The constitutional Amparo, a claim actionable against all types of expulsion

Like we can see above, the particular action claim of Article 89 DL 1094 have been ineffective, while the constitutional *Amparo* has been suitable for protection against all kinds of expulsion.[28] Indeed, during the period 2008–18, it was recorded as a progressive increase of its interposition (see Table 1) and used proportionately more than the extraordinary action claim (see Figure 1). We group the cases according to their result in rejected or accepted. The action was accepted in 56 per cent of the cases and rejected in the remaining 44 per cent (see Table 4). Therefore, we can see a more significant quantitative protection impact for immigrants in comparison to action claim of Article 89 DL 1094 (see Figure 2). In examining the accepted constitutional *Amparo's* sample, the application of international law is not a jurisprudential trend. Indeed, only 55 cases, of the sample of 530, refer to international norms as a source integrated to the normative plexus to consider when interpreting the meaning and scope of the rights of migrants in cases of expulsion, equivalent to only ap-

la sociedad civil en América Latina. Los casos de Bolivia, Chile, Paraguay y Perú. New York: Scalabrini International Migration Network Inc. 2013. p. 184.

[27] NAVARRO, Enrique. El debido proceso en la jurisprudencia del Tribunal Constitucional de Chile. *Anuario de Derecho Constitucional Latinoamericano,* v. 19, p. 141-2, 2013.

[28] HENRÍQUEZ, Miriam. El habeas corpus contra las expulsiones ilegales y arbitrarias de migrantes. *Revista de Derecho Aplicado LLM UC,* Santiago, n. 1, p. 5, jul. 2018.

proximately ten per cent of the total sample and 18 per cent of the cases were accepted (see Table 5. Note that, between 2008 and 2010, there were no cases in which the courts directly applied international norms in their reasoning). The most frequently referred international norm is the CRC (71 per cent),[29] followed by the ACHR (13 per cent) (see Table 6).

Figure 1. Actions of claim filed by aliens in cases of expulsion

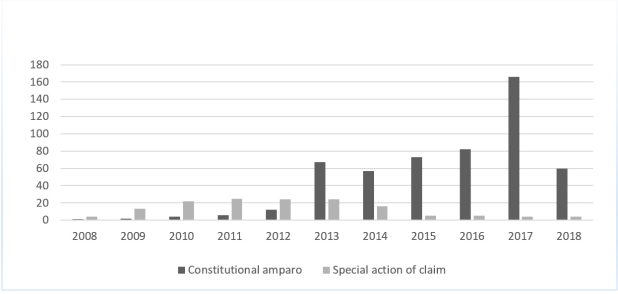

Table 4. Constitutional Amparo actions in cases of expulsion classified according to their results

	Rejected	Accepted	Total
2008	1	0	1
2009	2	0	2
2010	4	0	4
2011	5	1	6
2012	7	5	12
2013	31	36	67
2014	42	15	57
2015	39	34	73
2016	27	55	82
2017	61	105	166
2018	12	48	60
Total	**231**	**299**	**530**

[29] Which does not surprise us, since as KALVERBOER, Margrite *et al*. The Best Interests of the Child in Cases of Migration Assessing and Determining the Best Interests of the Child in Migration Procedures. *International Journal of Children's Right*s, Leiden, v. 25, n. 1, p. 114, jun 2017; LANGROGNET, Fabrice. The best interests of the child in French deportation case law. *Human Rights Law Review*, Nottingham, v. 18, n. 3, p. 568-71, sept. 2018, states the obligation to consider the best interest of the child is considered as an international source of independent protection and its relevance has been increasing in the field of immigration law as a legal framework applicable in forced expulsions of aliens. Then, for a brief historical overview of the best interest of the child, see STATZ, Michele; HEIDBRINK, Lauren. A Better 'Best Interests': Immigration Policy in a Comparative Context. *Law & Policy*, Denver, v. 41, n. 4, p. 367-8, oct. 2019.

Figure 2. The result of actions of claim filed by aliens in cases of expulsion (%)

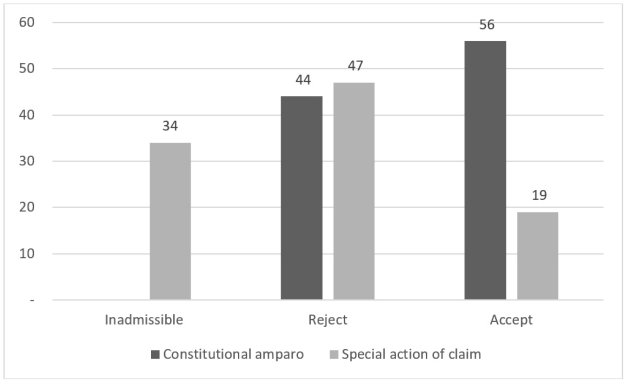

Table 5. Application of international norms in accepted constitutional Amparo

Year	Applies IL	% of the total	Total of accepted constitutional Amparo
2011	1	100%	1
2012	2	40%	5
2013	13	36%	36
2014	3	20%	15
2015	10	29%	34
2016	5	9%	55
2017	12	11%	105
2018	9	19%	48
Total	**55**	**18%**	299

Table 6. No international standards applied welcomed shelters

	Frequency	% of the total
UDHR 1948	1	1,8%
ICCPR 1966 and ICRMW 1990	1	1,8%
Mercosur Agreement	1	1,8%
'Treaties'	2	3,5%
Convention Arica-Tacna	4	7%
ACHR 1969	7	13%
CRC 1989	39	71%
Total	**55**	**100%**

3 The most applied treaties in cases of the expulsion of aliens

3.1 The implementation of the American Convention on Human Rights

The American Convention on Human Rights 1969 (ratified on 10 August 1990, was enacted in Chile by Supreme Decree No. 873, published in the Official Journal on 5 January 1991), applicable under Article 5, paragraph 2 Chilean Constitution, has been explicitly invoked by the Chilean courts in actions under the period covered by the sample in cases of the expulsion of aliens, significantly Articles 7 (right to personal liberty), 8 (due process), 17 (protection of the family) and 22 (freedom of movement and residence), as shown in Table 7. (Notice that, between 2008 and 2012, there were no cases with direct application of the ACHR.)

Table 7. Direct application of the ACHR in accepted constitutional Amparo

	Art. 7	Art. 8	Art. 17	Art. 22
2013	X		X	X
2014		X		
2015				X
2016				
2017				X
2018				X
Total	**1**	**1**	**1**	**4**

Following, we refer to the jurisprudence criteria ordered according to their frequency of use, applicating these ACHR provisions.

3.1.1 Article 22 on freedom of movement and residence (legality and motivation of the expulsion order)

Article 22, paragraph 6 ACHR on freedom of movement and residence notes that foreigners can be expelled from the territory whenever the decision follows the legal grounds. Before analysing how Chilean courts have given application to this provision, we provide a brief review of the applicable legal clauses in Chile on expulsion and the problems observed for a better understanding of the judicial practice.

We group the grounds for expulsion provided for in the DL 1094 into three categories: (a) Aliens whose residence permit has been refused or revoked (mandatory expulsion), (b) Aliens sanctioned for an immigration offence (mandatory or discretionary expulsion, depending on the case) and, (c) Aliens who incurred during their residence in some acts (discretionary expulsion). Tables 8, 9 and 10 show the different grounds on detail.

Table 8. Aliens whose residence permit has been refused or revoked (mandatory expulsion30)

a) Permission granted abroad, in contravention of article 15 (rejection or revocation of permission mandatory)[31]	(No 1) those performing acts contrary to the interests of Chile or constitute a danger to the State. (No 2) engaged in illicit drug trafficking, arms smuggling, smuggling of migrants and trafficking in persons and, in general, those who carry out acts contrary to morality or good customs. (No 3) have been convicted or currently are prosecuted for criminal offences that Chilean law defines crimes and fugitives from justice for non-political crimes. (No 4) do not have or cannot exercise a profession or occupation, or who lack the resources to enable them to live in Chile without becoming a social burden. (No 5) suffer from diseases for which the Chilean health authorities determine that constitute grounds for an impediment to entering the national territory. (No 6) they have been expelled or forced to leave the country by Presidential Decree without previously has been repealed respective decree. (No 7) do not meet the entry requirements established in the regulations in force migration and (No 8) being outside the national territory, have prescribed criminal proceedings corresponding to any of the following crimes: (a) entry or attempted exit, using counterfeit, adulterated, or issued in the name documents another person or to use them during their residence; (b) ingress or attempt egress illegal ; (c) entry having impediment or prohibition.

[30] Art 67 DL 1094: "... revoked or denied it any of the authorizations referred to in this Decree-Law, the Ministry of the Interior shall fix affected a reasonable period of not less than 72 hours to voluntarily leave the country to foreigners. ... If the alien does not meet ordered by the authority, the corresponding founded expulsion decree *will be dictated"* (emphasis added).

[31] Art 65 No 1 DL 1094: "… the following permits and authorizations *must revoke* 1.- granted abroad to people who are included in any of the prohibitions referred to in Art 15" (emphasis added).

b) Permission granted in Chile, in contravention of article 63 (rejection or revocation of permit mandatory)[32]	Article 63 refers to the hypotheses of Article 15 and also, adds the entry with falsified or adulterated documents or has made false documentation regarding immigration (Article 63 No 3) (rejection or revocation of permit mandatory).
c) Aliens, tourists, or holders of a residence permit, who perform determinate acts (rejection or revocation of permit mandatory or discretionary)[33]	c.1) Article 15 No 1 or 2 (rejection or revocation of permit mandatory). c.2) Article 63 No 3 (rejection or revocation of permit mandatory). c.3) Article 64 (rejection or revocation of the permit discretionary): (No 1) convicted in Chile for a crime or offence. (No 2) make false management when making any statements to the authorities. (No 3) the acts that could mean trouble to any country with which Chile has diplomatic relations or their rules. (No 4) being encompassed in Article 15 Nos 4 or 5, after he entered into Chile. (No 5) violate the prohibitions or do not fulfil their obligations. (No 6) do not observe the rules on time limits established in this Decree-Law and its regulations, to implore the respective benefit. (No 7) being residents subject to a contract that for their fault generate the termination of the respective employment contract and (No 8) do not comply with their tax obligations. (No 9) reasons of convenience or national utility.

Table 9. Aliens sanctioned for an immigration offence

a) Mandatory expulsion	a.1) aliens who enter the country or attempt egress from it, using counterfeit, adulterated, or issued on behalf of another person or to use them during their residence (Article 68). a.2) aliens who enter the country or attempt egress from it clandestinely, with or without concurrent grounds for impediment or prohibition of the entry (Article 69). a.3) aliens that to apply for visa subject to contract work, have simulated it (Article 75).
b) Discretionary expulsion	b.1) aliens who continue to reside in the country after their legal residence has expired (Article 71). b.2) aliens that during their stay in the country do not timely comply with the obligation to register, to obtain an identity card, to notify the authority, as appropriate, compliance change of address or activities, seriously or repeatedly (Article 72). b.3) aliens who do not pay fines imposed on an immigration offence within 15 working days (Article 80). b.4) aliens that circumvents control measures and transfer imposed by the police authority (Article 82).

Table 10. Aliens who incurred during their residence in any of these acts (discretionary expulsion34

Article 15 No 1: those who carry out acts contrary to the interests of Chile or constitute a danger to the State;
Article 15 No 2: those whose engaged in illicit drug trafficking, arms smuggling, smuggling of migrants and trafficking in persons and, in general, those who carry out acts contrary to morality or good customs;
Article 15 No 4: those who do not have or cannot exercise a profession or occupation, or who lack the resources to enable them to live in Chile without becoming a social burden.

Then, authority can expel aliens following the legal grounds. However, it is also necessary to weigh the factual circumstances of the particular case to verify the justification and rationality of the latter; it is not exhausted with the indication of the legal cause that enables the official to proceed to decree the measure.[35] Therefo-

[32] Art 65 No 2 DL 1094: "… *must revoke* permits and authorizations the following: 2. The granted in Chile in violation of the provisions of Art 63" (emphasis added).

Art 63 DL 1094: "… *must reject* requests submitted by the following petitioners..." (emphasis added).

[33] Art 65 No 3 DL 1094: "The following permits and authorizations *must revoke*: 3. The aliens who, after their ingress to Chile as tourists or to the granting of the permit they hold, do acts that they are included in the numbers 1 or 2 of Art 15 or No 3 Art 63" (emphasis added). Art 66 DL 1094: "*Can revoke* the permits of aliens who, due to actions taken or circumstances arising after he entered into Chile as tourists or to the granting of the permit or authorization they hold, be included in any of the cases referred to in the Art 64" (emphasis added).

[34] Art 17 DL 1094: "Aliens who have entered the country being included in any of the prohibitions outlined in Art 15 or during their residency engage in any of the acts or omissions mentioned in Nos 1, 2 and 4 the Art indicated, *may be expelled* from the national territory" (emphasis added).

[35] DIAZ TOLOSA, Regina Ingrid. Ingreso y permanencia de las personas migrantes en Chile: Compatibilidad de la normativa chilena con los estándares internacionales. *Estudios Constitucionales*, Talca, v. 12, n. 1, p. 196-201, ene./jun. 2016, especially Art 13 ICCPR 1966,

re, regarding the use and application of these grounds, the following questions arise:

1. What is the applicable standard if time has elapsed between income from abroad and the rejection of a residence permit, having changed factual circumstances? For example, at admission, the individual was in the case of the article 15 No 4 DL 1094, but was no longer there at the time of the revocation, because the individual had found a job and was no longer a social burden on the State. Is the State also going to expel? Can it be stated that the expulsion measure follows the law in this case?
2. How is the concurrence of the circumstances that form the legal grounds for expulsion checked? Can the administrative authority make qualifications regarding the circumstances that usually correspond to those determined by the Court, such as the truth or falsity of statements, committing crimes? Article 78 DL 1094 states that investigations regard in acts constituting immigration offences may only be initiated by the complaint or lawsuit by the Interior Ministry or the Regional Governor. However, if these authorities desist from the complaint at any time, such withdrawal shall terminate the criminal proceedings, and the criminal judge gives immediate cessation of the precautionary measures that it has decreed. Then, we wonder whether the expulsion can be one of these measures.
3. How are open or indeterminate legal concepts -like morality, good customs, convenience, or utility- interpreted to prevent the configuration of administrative arbitrariness? Recall that, in addition to Article 15 No 2 DL 1094, which refers to "*carry out acts contrary to morality or good customs*", Article 13 DL 1094 refers to "*the utility or the convenient*" to grant visas or their extensions.

Although the law attempts to define a situation, these indeterminate normative concepts use vague or broad expressions, which imply either a value judgment. For their understanding, blank precepts require a specific assessment of the circumstances of the case. They also pose a problem if they are used to expressing requirements that must guide the actions of the authority to be legitimate. Therefore, in the process of law enforcement, the administrative body must assess the facts surrounding the situation to determine whether the subsumption of it to the norm is possible. In this area, always exists the threat of being used as a legitimising source of arbitrariness. That is why this justifies the review of administrative acts by the courts.[36]

We next look at how the courts have responded to these questions through the direct application of Article 22 ACHR. Our courts have examined the "*usefulness and convenience*" of the residence of a foreigner, not only from the perspective of formal legality but also in distinguishing whether this constitutes a reasonable and proportionate measure, specifically, if the expulsion is the appropriate means to the purpose, seeking safeguard, respecting humanitarian considerations and family order. For example, the Court of Appeals of Santiago (CAS) accepted a constitutional *Amparo* where the ground for expulsion was the convenience and usefulness (Article 13 DL 1094). In the case, the visa subject to a contract for a Colombian citizen, expecting mother having a relationship with Chilean, was rejected because the woman had been falsified a public document and

999 UNTS 171; Art 22.6 ACHR 1969, B-32 OAS; Art 22 ICRMW 1990, 2220 UNTS 3; UNITED NATIONS. General Comment No 15, the position of aliens under the Covenant. Human Rights Committee, 1986. In: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1, paras 9-10, 1994; UNITED NATIONS. General Comment No 27, freedom of movement (art 12). Human Rights Committee, 1999. In: UN Doc CCPR/C/21/Rev.1/Add.9 paras 13-14; Inter-American Court of Human Rights: *Case of Expelled Dominicans and Haitians* (Preliminary objections, merits, reparations, and costs) Series C 282, 28 August 2014; *Case of the Pacheco Tineo Family* (Preliminary objections, merits, reparations, and costs) Series C 272, 25 November 2013; *Case of* Vélez *Loor* (Preliminary Objections, Merits, Reparations, and costs) Series C 218, 23 November 2010; Case of *Nadege Dorzema et al* (Merits, reparations, and costs) Series C 251, 24 October 2012; *Juridical Condition and Rights of Undocumented Migrants,* Advisory Opinion OC-18/03, Series A 18, 17 September 2003; UNITED NATIONS. General Comment No 2 on the rights of migrant workers in an irregular situation and members of their families. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2013. In: UN Doc CMW/C/GC/2 paras. 49-59.

[36] PONCE DE LEÓN, Sandra. ¿Existe clara distinción entre los conceptos jurídicos indeterminados y la discrecionalidad administrativa? In: SOTO KLOSS, Eduardo (ed.). *El Derecho Administrativo y la Protección de las Personas*. Santiago: Ediciones UC, 2018. p. 63-9.

convicted for it. However, there were no pending legal causes since the offence prescribed. Therefore, the refusal to grant residence was unjustified, and the expulsion order appears unnecessary and disproportionate.[37]

Likewise, the decision of the administrative authority cannot be without foundation: It must "demonstrate that the [expulsion] measure adopted is legal and reasonable, i.e., that the conduct attributed to the foreign configure any of the causes that authorise the expulsion of whom ... had permanent residence in the country".[38] In this case, the foreigner had permanent residence since 2009, and the expulsion order was issued against him in 2015, in consideration of a 2011 sentence on charges of armed robbery (Article 17 DL 1094 concerning Article 15 No 2, which carry out acts contrary to morality or good customs). The Court considers that the mere fact of the conviction, in front of his subsequent conduct free of reproach and his family roots, makes the expulsion measure unjustified.[39]

Within this line of argument on the proper grounds for expulsion measures and their weighting of necessity and proportionality, CAS considered the social roots of aliens in 2017. In this case, the alien had entered the country illegally (Article 68 DL 1094), then in seeking to regularise his immigration status had voluntarily attended the International Police Department dependencies to carry out the self-denunciation process. For its part, the Government Office of Metropolitan Region had reported the fact to the Public Prosecutor, subsequently withdrawing criminal prosecution. The Court upheld the deducted appeal because it considered the expulsion decree as an excessive, unjustified, and disproportionate act. Although the alien admitted his illegal crossing, the authority desisted from the action. This withdrawal quashed the possibility to convict him as well as the expulsion decree issued because "did not consider the situation of the rootedness of protected, their time spent in the country and remunerated activity executed".[40]

The same approach followed in an accepted CAS case in 2018. Here, the alien had been convicted by drug trafficking to the penalty of 61 days imprisonment, which fulfilled in the form of conditional remission. However, he had a son of Chilean nationality (also recurring in the cause), had a temporary visa and employment contract, and could apply for the residence time of a final permit; therefore, given its social and family roots, in consideration of Article 22 ACHR, the measure became disproportionate and arbitrary.[41]

3.1.2 Article 7 on the right to personal liberty (right not to be deprived of liberty unlawfully or arbitrarily shaped before expulsion)

Regarding the detention of migrants, the ruling on the arrest of 17 aliens in the headquarters of the Chilean Investigations Police stands as a landmark case (known as "Cuartel Borgoño"). In 2013, to assess the legality of the deprivation of liberty, the CAS recognised that it must consider international instruments that protect fundamental rights and, in particular, Article 7 ACHR.[42] Then, CAS solved with the immediate release of the alien detainees since the measure was not only illegal, it also exceeded the maximum detention period of 24 hours required by law; it was also arbitrary because it was not necessary or proportionate. It additionally asserts that the conditions of the detention facilities were inadequate and unworthy: "*Detainees are virtually crammed, sleep on the floor remain locked up pretty much all day, leaving their cells occasionally to wash or go to the bathroom, the place is dark and poorly ventilated*".[43]

It was an extreme measure because if the detention intended solely to facilitate compliance with the expulsion measure, it would have been strictly functional or instrumental. Any detention must be exceptional because it affects fundamental rights, is increased in the case in which the judicial authority did not revise the arrest order. Neither it was proportional; "*all of them were serving the checks referred to in Articles 164 and 165 of the Aliens Act*". The materialisation of expulsion may be delayed for two to three weeks for the "*coordination needs, purchase tickets or allocation of police equipment, but with the people in freedom, never imprisoned throughout that period*".[44]

[37] CHILE. CAS, Díaz v Aliens and Migration Department of the Ministry of Interior and Public Security (rol No 19-2013, 21 January 2013) [4-11].

[38] CHILE. CAS, Fernandez v Ministry of Interior and Public Security (rol No 1209-2015, 27 July 2015) [3].

[39] CHILE. CAS, Fernandez v Ministry of Interior and Public Security (rol No 1209-2015, 27 July 2015) [7].

[40] CHILE. CAS, *Fernandez v Ministry of Interior and Public Security* (rol No 1209-2015, 27 July 2015) [4-5].

[41] CHILE. CAS, *Utria, and Utria v Ministry of Interior and Public Security* (rol No. 262-2018, 1st March 2018) [4-5].

[42] CHILE. CAS, *Marin and others v Ministry of Interior and Public Security and others* (rol No 351-2013, 9 March 2013) [3-4].

[43] CHILE. CAS, Marin, and others v Ministry of Interior and Public Security and others (rol No 351-2013, 9 March 2013) [10].

[44] CHILE. CAS, Marin, and others v Ministry of Interior and Pub-

3.1.3 Article 8 on judicial guarantees (right to be notified of the reasons for the expulsion and review of unfavourable judgment)

Under Article 8 ACHR, one of the international norms on the expulsion of aliens is the possibility of appealing against an unfavourable decision in the case of the right to personal liberty, movement, and residence. In 2014, a dissenting vote in a rejected sentence of the SC that applied conventional norms of international law recognised this issue. However, the reference is not entirely correct; while mention Article 7 ACHR which is applicable in cases of detention in the context of expulsion -a fact that did not happen in the case-, the correct thing here would have been to refer to Article 22 ACHR since there was not the minimum required guarantees in deportation proceedings. Alien had not duly informed of this, the reasoning of the dissenting vote qualified the expulsion measure as illegal and arbitrary for having deprived the alien to the defendant against the expulsion decree.[45]

3.1.4 Article 17 on the protection of the family (right to family reunification)

In the 2013 case,[46] the wife and two daughters of an Ecuadorian citizen, a surgeon, were expelled; he fulfilled a penalty of two years of imprisonment in its medium degree, for violation of the Drugs Act to prescribe narcotics. In its examination, the CAS considered that the crime committed nine years ago and that his family, consisting of his wife and two daughters, all Chilean, would be harmed by the separation of their economic holder. Therefore, the Court founded the decision on Article 17.1 ACHR on the protection of the family that states: "*[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State*".

3.2 The implementation of the Convention on the Rights of the Child

The Convention on the Rights of the Child (ratified on 13 August 1990, was enacted in Chile by Supreme Decree No. 839, published in the Official Journal on 27 September 1990), applicable under Article 5, paragraph 2 Chilean Constitution, has been explicitly invoked by the courts, especially in the case of Articles 3 (best interests of the child), 7 (the right to acquire a nationality and be cared for by their parents), 8 (the right to preserve their identity, including nationality and family relations) and 9 (no separation of their parents). Between 2008 and 2012, there were no cases of direct application of the CRC in the accepted constitutional *Amparo* against expulsion orders. We distribute them annually, as shown in Table 11. The sample has 39 cases, and mostly SC develops the jurisprudential criteria (71,8 per cent).

Table 11. Direct application of the CRC in accepted constitutional Amparo

Year / Frequency	Court of Appeal	Supreme Court	TOTAL
2013	1	7	8
2014	0	2	2
2015	3	5	8
2016	0	4	4
2017	3	6	9
2018	4	4	8
Total	**11**	**28**	**39**

We subsequently refer to the jurisprudential criteria that apply these provisions of the CRC, presenting the analysis by grounds for expulsion that underlies the measure and in chronological order, from oldest, to determine whether there has been some evolution in the interpretation made by our highest courts.

3.2.1 Discretionary expulsion of Article 17 regarding Article 15 No 2 Decree 1094

These cases have the highest occurrence in the analysed period, constitute 74 per cent of the sample (see Table 12). In nine cases of the accepted constitutional *Amparo*, the courts of appeals develop the reasoning, and SC just confirmed the decision without adding new considerations. The remaining 20 cases are jurisprudential criteria developed by the SC, revoking previous rejections of the appeals courts. Regarding the implementation of the CRC, we observe two modes of incorporation by the courts. Mostly, it used as an addi-

lic Security and others (rol No 351-2013, 9 March 2013) [9, 11].

45 CHILE. SC, Castro v Regional Government Office of Arica and Parinacota and other (rol No 3999-2014, 19 February 2014) [4-5].

46 CHILE. CAS, Barahona, and others v Chilean Investigations Police and Aliens and Migration Department of the Ministry of Interior (rol No 550-2013, 22 April 2013) [8-11].

tional argument to accept the *Amparo* (*obiter dictum*) (69 per cent of the cases). In contrast, 31 per cent, CRC was within the *ratio decidendi*, being the main reason for accepting the protection, being considered as a parameter for measuring the reasonableness, proportionality, and rationale of a non-arbitrary decision and thus discussing the application of discretionary grounds for expulsion, such as that of Article 17 regarding Article 15 No 2 DL 1094 (see Table 13).

Table 12. Distribution of cases by grounds for expulsion

Discretionary expulsion of Article17 regarding Article 15 No 2 DL 1094 (Table 10)	Mandatory expulsion for migration offences (Articles 68-69 DL 1094) (Table 9)	Mandatory expulsion for discretionary residence permit revocation (Article 67 DL 1094) (Table 8)
29	5	5

Table 13. Accepted constitutional Amparo in expulsions of aliens based on discretionary expulsion of Article 17 DL 1094, concurring application of CRC

	Ratio decidendi (9 cases)		*Obiter dictum* (20 cases)	
Year / Court	Court of Appeal	Supreme Court	Court of Appeal	Supreme Court
2013	-	2	1	3
2014	-	-	-	-
2015	1	2	1	1
2016	1	1	-	2
2017	1	-	1	5
2018	-	1	3	3
Total	**3**	**6**	**6**	**14**

In cases where the use of the CRC was part of the complementary or additional considerations (69 per cent of cases) alluding to the best interests of the child as *a sine qua non* via in all matters and decisions that must intervene with authorities and public bodies, including the courts, certainly never have to decide without considering it. Then, this interest was determinate with Article 9 CRC, which "*forces any effort to keep the child not separated from their parents"*. While expulsion is exclusively subject abroad, which does not mean that its consummation involves the disintegration of his marriage and fatherhood are elements to be considered in deciding on maintaining a sanction, other main reasons would be inappropriate. If the children of the foreigner subject to the expulsion measure also have Chilean nationality, it would not only imply separation from their parents subject to the expulsion measure but would also affect the children's family and their national identity.[47]

Then, the main reasons for accepting the constitutional *Amparo* were: a) the disproportionality of the measure (for lack of habitual crime[48], or lack of seriousness or this to not have the entity described in Article 15 No 2 DL 1094[49]), b) lack of due process in administrative proceedings claim[50] or c) lack of opportunity of it, considering the date of the crime.[51]

[47] CHILE. SC: Loyola v Aliens and Migration Department of the Ministry of Interior and Public Security et al (rol No 66-2013, 6 January 6 2013) [6]; Huancas v Ministry of Interior and others (rol, No 3057-2013, 16 May 2013) [6]; Castromonte Diaz v Ministry of Interior and Public Security (rol No 3694-2015, 23 March 2015) [6-8]; Navarrete v Ministry of Interior and Public Security (rol, No 5277-2015, 23 April 2015) prevention vote of Judge Dolmestch; Alvarez v Ministry of Interior (rol, No 190-2016, 1st January 2016); Zurita v Minister of Interior (rol, No 33257-2016, 31 May 2016) [4]; Favilla and others v Ministry of Interior (rol No 50031-2016, 18 August 2016) [3]; Tantalea v Ministry of Interior and Public Security (rol, No 19208-2017, 24 May 2017); Ostos v Secretary of the Interior (rol, No 37229-2017, 22 August 2017) [5]. CHILE. CAS: Bedoya v Aliens and Migration Department of the Ministry of Interior (rol No 803-2017, 17 April 2017) [7], Court refers to the "principle of parental responsibility, which translates into the State's obligation to guarantee the right of adolescents to stay and be cared for by both parents until coming of age".

[48] CHILE. Court of Appeals of Iquique (CAI), Zenteno v Ministry of Interior and Public Security (rol No 70-2015, 19 June 2015) [7-9]; CHILE. CAS. Badaracco and Family v Aliens and Migration Department (rol No 1244-201, 23 July 2013) [para 5-6]; CHILE. SC: Toledo and others v Ministry of Interior and Public Security (rol No 13038-2013, 21 November 2013 [para 4-6]; Gonzalez v Regional Government Office of Maule (rol No 8397-2017, 21 March 2017) [4-6].

[49] CHILE. SC: Loyola v Aliens and Migration Department of the Ministry of Interior and Public Security et al (rol No 66-2013, 6 January 2013) [3-5] (crime of theft); Huancas v Ministry of Interior and other (rol No 3057-2013, 16 May 2013) [3-5] (violation of the Copyright Act).

[50] CHILE. CAI. Zenteno v Ministry of Interior and Public Security (rol No 70-2015, 19 June 2015) [5-6 and prevention vote Judge Marta Contreras Cordano] included the lack of due administrative process as an additional argument, indeed, asserts that the principle of due process is not satisfied if the alien has not received legal, timely assistance from the first stage of the expulsion procedure. Suitable, technical, accessible, and adversarial proceedings outside administrative or judicial nature.

[51] CHILE. SC: Jaramillo v Ministry of Interior and Public Security (rol No 12208-2017, 18 April 2017) [4] crime data 2009; Campos v Home Office Immigration Department (rol No 16754-2017, 8 May 2017) [3] crime data 2013; CHILE. CAS: Rivera v Ministry of Interior and Public Security (rol No 31-2016, 17 January 2018) [5] crime data 2007; Sosa v Aliens and Migration Department of the

Moreover, SC determinate for the ground of Article 15 No 2 DL 1094, that "*acts contrary to morality or good customs*" do not concur if the criminal act "*is the only reproach attributed to an alien whose fully accomplished criminal penalty"*.[52] Besides, in this case, "*illegal befell more than a decade and non-enforcement of the expulsion order, dating May 2009 ago, implies acceptance by the administrative authority of the permanence of the appellant in the country*".[53]

Otherwise, in 31 per cent of the cases, the CRC was no longer cited as an additional argument; instead, into the *ratio decidendi* as a parameter for measuring the reasonableness and proportionality of an administrative decision, not arbitrary in the context of the implementation of a discretionary expulsion as it is Article 17 regarding Article 15 No. 2 DL 1094. Therefore, the SC states that the indifference of mandatory expulsions, such as Article 63 DL 1094, in discretionary removals, the administrative authority to decide whether to exercise the faculty has to weigh other miscellaneous items, which the provision itself lists; the protection of the family of an alien subject to the measure of expulsion is among those items. The legality of the expulsion decision requires a substantial background analysis on the concurrence of mere formal legality. The adoption of the measure cannot be the result of the arbitrariness of a State agent; therefore, he must check without neglecting the personal and family circumstances covered yu justify the expulsion with reasonableness, proportionality, and motivation.[54]

3.2.2 Mandatory expulsion for immigration offences (Articles 68 or 69 DL 1094)

Regarding the analysed cases of mandatory expulsions for immigration offences (13 per cent of the cases) (see Table 12), one dealt with forged income documents (Article 68 DL 1094) and four dealt with illegal entry (Article 69 DL 1094). Both situations are dealt with as immigration offences that constitute a crime punishable by minor imprisonment in its maximum degree (from three years and one day to five years), and also with the expulsion of the alien after he fulfils the penalty. Therefore, they are figures in which, after the application of a criminal sanction, it executed an administrative sanction of expulsion.[55]

Only the Ministry of the Interior or the respective Regional Intendant may initiate a complaint about these immigration offences (they are private action crimes according to article 158 of the Immigration Regulation, Supreme Decree No. 597, 1984), then, if they withdraw the complaint, criminal action extinguished. In this case, the Guarantee Judge or The Criminal Oral Trial Court will order the immediate cessation of the decreed precautionary measures (Article 78 DL 1094). Then, it seems that this includes the expulsion orders, because when it extinguished the criminal action, the legal basis for the expulsion falls, becoming illegal, and disproportionate. Moreover, regarding the reference to the CRC, in four cases is in the *obiter dictum*, being the main reason for hosting the *Amparo*, the arbitrariness of the measure because was unfounded; criminal liability extinguished.[56] While, in one case, CRC is in *ratio decidendi,* as a parameter to decide on the proportionality of the ex-

Ministry of Interior and Public Security and Chilean Investigations Police (rol, No 3317-2017, 5 January 2018) [6]; Carrión v Ministry of Interior and Public Security (rol No 28-2018, 12 January 2018) [5].

52 CHILE. SC: Ayovi v Ministry of Interior and Public Security (rol No 2268-2018, 7 February 2018) [2]; Ragoub v Ministry of Interior and Public Security (rol No 2269-2018, 7 February 2018) [2]; Hernández v Aliens and Migration Department of the Ministry of Interior and Public Security (rol No 2540-2018, 13 February 2018) [2].

53 CHILE. SC, Hernández v Aliens and Migration Department of the Ministry of Interior and Public Security (rol No 2540-2018, 13 February 2018) [4].

54 CHILE. Court of Appeals of Temuco (CAT), *Daltrozz, and others v Ministry of Interior and Public Security* (rol No 1171-2015, 12 November 2015) [3-9]; CHILE. CAI, *Silver, and others v Ministry of Interior and Public Security* (rol No 139-2016, 5 January 2017) [4]; CHILE. Court of Appeal of Arica, *Perez v Regional Government Office of Arica and Parinacota* (rol No 196-2017, 4 July 2017) [5-10]; CHILE. SC: *Solis v Regional Government Office of Tarapaca and other* (rol No 6366-2013, 3 September 2013) [3-4]; *Bazan v Ministry of Interior and Public Security* (rol No 6649-2013, 9 September 2013) [4-5]; *Huerta v Ministry of Interior* (rol No 2309-2015, 19 February 2015) [6-8]; *Jauregui v Ministry of Interior and Public Security* (rol No 5276-2015, 23 April 2015 [3-5]; *Montoya* v *Ministry of Interior and Public Security* (rol No 50010-2016, 16 August 2016) [7]; *Yugar v Ministry of Interior and Public Security* (rol No 1152-2018, 23 January 2018) [3].

55 These cases are the hypothesis of mandatory expulsion being aliens sanctioned for a migratory offence. See Table 8: Article 68: aliens who enter the country or attempt egress from it, using counterfeit, adulterated or issued on behalf of another person or to use them during their residence; Article 69: aliens who enter the country or attempt egress from it clandestinely, with or without concurrent grounds for impediment or prohibition of entry.

56 CHILE. SC, *Aguilar v Governor of Metropolitan Region* (rol No 6693-2013, 11 September 2013) [2-4]. In this case, the alien had committed the immigration offence with falsified documents (mandatory expulsion of Article 68 DL 1094), but the criminal case was with final dismissal, at the time of issuing the expulsion decree. The other three cases correspond to grounds of Article 69 DL 1094: CHILE. SC: *Baltazar v Ministry of Interior and Public Security* (rol No 7804-2014, 22 April 2014) [2-5]; *Adames v Regional Government Office of Tarapaca* (rol No 9081-2014, 29 April 2014) [4-6]. CHILE. CAS, *Renaud v Regional Government Office of Arica and Parinacota and Chilean Investigations Police* (rol No 284-2018, 6 March 2018) [3-6].

pulsion. If authority withdraws the criminal action and consequently extinguished criminal liability, the official must act to review the personal and familiar circumstances of the alien, including the CRC as a parameter for assessing the appropriateness of the measure.[57]

3.2.3 Mandatory expulsion for rejection or revocation of discretionary residence permit (Article 67 regarding Article 64 DL 1094)

Regarding the cases analysed from the period 2013–18, five cases pertained to mandatory expulsions for discretionary revocation of the residence permit, representing 13 per cent of the sample (see Table 12).[58] In these cases, the problematic issue is the discretionary power of the public official on duty. What are the parameters that the official will take into consideration when deciding whether to reject or revoke the permit? It is unquestionable that the State can legitimately refuse to admit foreigners or accept their admission subject to certain conditions fulfilled, but cannot expel them so quickly; must provide convincing and decisive reasons for the adoption of the measure.[59] Therefore, even if the expulsion is applied using a provision of article 64 DL 1094, could be unjustified. In this case, the general principle of public law prohibition against arbitrariness is fully applicable, which excludes the action of the authority according to their mere will, without reasonableness or being disproportionate with the purpose achieved.[60] Indeed, International Law Commission recommends that "*[t]he ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise*".[61]

Currently, there are no criteria established by the Chilean immigration system to decide for rejection or revocation of discretionary residence permit[62]. Therefore, the parameters given in international standards can be applied to guarantee objective and reasonable administrative acts. Thus, we can observe it in the cases analysed. Indeed, one case used the CRC, in the *ratio decidendi*, as a parameter for assessing the reasonableness and motivation of discretionary revocation of the residence permit. That case concerned an order to leave the country after the discretionary revocation of the residence permit under Article 67 regarding Article 64 No 1 DL 1094 by the commission, in 2013, of burglary in things inhabited, with the crime punishable by 541 days, fulfilled with conditional remission and monthly signature, by helping with research and the damages.[63]

The remaining four cases refer to the CRC as *obiter dictum*. The main reason for accepting the constitutional *Amparo* consisted, in one case, of the disproportionality and lack of justification for the decision to reject the permit. In this case, the alien has an old date criminal record in his country of origin, consisting of a crime of qualified theft -committed nine years ago- punishable by 24 months in prison and, was applicating for a residence permit subject to contract work. The Court considered the CRC as *obiter dictum* since the alien had his spouse and daughters in Chile (all were Colombian nationals) and his woman had a permanent visa subject to contract work and enrolling the girls in the school system. Therefore, the Court considered that the discretionary visa refusal was unjustified, since, "*[t]he applicant has entered the country legally and is not subject to any criminal prosecution [...] The authority has invoked 'reasons of convenience and national*

[57] CHILE. SC, *Torres v Regional Government Office of Antofagasta* (rol No. 12356-2015, 12 September 2015) [3-4]. This case corresponds to the ground of expulsion of Art 69 DL 1094.

[58] These cases are the hypothesis of mandatory expulsion of aliens whose residence permit has been refused or revoked, because: (No 1) were convicted in Chile for a crime or offence; (No 2) make false management when making any statements to the authorities; (No 3) the acts that could mean trouble to any country with which Chile has diplomatic relations or their rulers; (No 4) being encompassed in Article 15 Nos 4 or 5 of DL 1094 after he entered into Chile; (No 5) violate the prohibitions or do not fulfil their obligations; (No 6) do not observe the rules on time limits established in this Decree-Law and its regulations, to implore the respective benefit; (No 7) being residents subject to a contract that for their fault generate the termination of the respective employment contract; (No 8) do not comply with their tax obligations; and, (No 9) reasons of convenience or national utility.

[59] SHAW, Malcolm N. The treatment of aliens. In: INTERNATIONAL Law. 6. ed. New York: Cambridge University Press, 2008. p. 826.

[60] UNITED NATIONS. Expulsion of aliens. In: Report of the International Law Commission, Sixty-sixth session (5 May–6 June and 7 July–8 August 2014). New York: General Assembly, Official Records, Sixty-ninth session Supplement No. 10 (A/69/10) p. 23, commentary to article 3.

[61] UNITED NATIONS. Chapter IV. Expulsion of aliens. In: Report of the International Law Commission, Sixty-sixth session (5 May–6 June and 7 July–8 August 2014). New York: General Assembly, Official Records, Sixty-ninth session Supplement No. 10 (A/69/10) p. 26, article 5.3.

[62] CHILE. Decree No. 597 of the Ministry of Interior, Immigration Regulation (1984)., articles 136 to 144.

[63] CHILE. CAT, *Díaz v Ministry of Interior and Public Security* (rol No 497-2015, 15 May 2015) [3-7].

interest' general clause, which requires looking at the characteristics of the specific case. He had a sentence in his country of origin for a common crime, not those of Article 15 No 2 DL 1094, which happened nine years ago, and any judicial authority in his country does not require him. Then nothing is pending on the matter".[64]

In other cases, migrants have a long-standing permanent residence permit[65] or refugee status[66] not revoked before the promulgation of the decree of expulsion. Therefore, the main reason for accepting the constitutional A*mparo* is that their permits are in force. It is not possible to expel a person who is authorised by the State to stay in Chile without a limitation in time. Then, we understand that in these cases, the Court requires the application of article 65 No. 3 DL 1094 (Table 8, case c.1), not only the art 17 No. 2 (Table 10).

4 Conclusions

Chile is a democratic State. Member of the UN, and the OAS systems. It has ratified and internal enacted the major international treaties protecting human rights, thus their courts, as a State organ, must incorporate international standards for the protection of migrants, directly or, at least, their parameters in an extensive interpretation to favour the realisation of human rights. However, we could observe that there is no significant trend in the application of international human rights law in the expulsion of aliens.

Another point reviewed in the article relates to the actions claim of the expulsion measure. The constitutional Amparo action (*habeas corpus*) had been the most used via of claim (78,4 per cent of the sample). While, the extraordinary action claim provided by the DL 1094 is not significant via, and also it is against relevant principles, recognised in International Law of Human Rights; it is not available for all expulsion orders -only those ordered by the Minister of Interior-, the deadline for filing it is extremely short -only 24 hours- and, is not possible to be appealed. While, the Amparo action has not a period of filing because it can exercise as long as the expulsion order is in force, disturbing the freedom of movement of the alien; it also proceeds against all types of expulsion, regardless of the authority that orders it, either by supreme decree or administrative resolution; and, it is appealable.

In the jurisprudential analysis, the courts expressly referred to international human rights law in only 55 of 530 cases, which is equivalent to ten per cent of the constitutional Amparo action sample and 18 per cent of the accepted judgments. In contrast, there are 231 rejected cases in which, applying international regulatory plexus, perhaps would have provided a consistent interpretation of DL 1094 with the international human rights law and it could have protected the rights of migrants to a greater extent. In cases with the incorporation of international treaties, the most used are the CRC (71 per cent of the cases) followed by the ACHR (13 per cent of the cases). Between 2008 and 2012, there are no cases in which the courts directly apply international standards in their reasoning; the treaties were just beginning application in 2013.

Regarding the implementation of the ACHR, a treaty ratified and internally enacted, applicable under the Chilean Constitution, has been invoked on the right to personal liberty, due process, family protection, and freedom of movement and residence. The most criteria used is the legality and motivation of the expulsion order (57 percent). That means it is not sufficient to decree the expulsion (and previous administrative detention to expulsion, if any) just concerning a specific legal ground. Also, it must be justified, reasonable, necessary, proportionate and, supported by a factual reality that justifies the measure as well as its opportunity and rationality. Another relevant reasoning corresponds to de judicial guarantees, the affected must be notified of the grounds for expulsion so that they can exercise their right of appeal and review of the decision in a proceeding with due process. Finally, if the alien affected by expulsion has family in Chile, the State's obligation to protect the family could be violated. With the alien departure from the national territory to the family is harmed by the removal of one of its members, especially if in the specific case, it is the economic holder thereof; family reunification must be a parameter to consider by the Court to evaluate the no arbitrariness of the measure.

Regarding the implementation of the CRC, has been invoked, especially on the best interest of the child.

[64] CHILE. SC, *Clay v Ministry of Interior and Public Security* (rol No 3436-2013, 27 May 2013) [2-3].

[65] CHILE. SC: *Navarrete v Ministry of Interior and Public Security* (rol No 5277-2015, 23 April 2015) [3]; *Favilla and others v Ministry of Interior* (rol No 50031-2016, 18 August 2016) [1-2].

[66] CHILE. SC, *Morales v Ministry of Interior and Public Security* (rol No 30361-2017, 22 June 2017) [7].

Also, the right no being separated from their parents and, to preserve their identity, including nationality and family relations. The cases are related to mandatory and discretionary measures of expulsion. The most belong to discretionary expulsion cases of Article 17 regarding Article 15 No 2 DL 1094 (74,4 per cent); the others to mandatory expulsion measures in cases of immigration offences of Articles 68 and 69 DL 1094 (12,8 per cent) or residence permit revocation of Article 67 DL 1094 (12,8 per cent). In each group of cases, CRC has been applied like the principal *ratio decidendi* (28,3 per cent) or like additional reasoning (71,8 per cent).

In the first group, discretionary expulsion cases of Article 17 regarding Article 15 No 2 DL 1094, the CRC have been applied most as complementary or additional to principal reasoning based on the disproportionality of the measure (either by lack of regularity of the conduct alleged, or the severity of it to be subsumed in the open figure of the legal grounds invoked by the Administration or being a single reproach, with the sanction already fulfilled), the lack of due process in administrative proceedings, or lack of opportunity (in consideration of the date of the commission of the wrongful act). While, in the other cases (31 per cent), family protection and the best interest of the child considered as a canon of weighting the reasonableness of the expulsion measure. Then, It understood that the best interest of the child is affected by expulsion if the separation were to occur with one of their parents and therefore, their family identity. Now, if children have a Chilean nationality, it will also violate their national identity if they had to accompany their father, who is subject to expulsion, outside the national territory.

In cases of mandatory expulsion for immigration offences (Articles 68 or 69 DL 1094), the decision becomes arbitrary for lack of legal basis if the offence finally was acquitted or extinguished responsibility for having existed withdrawal of prosecution. Also, the family protection and the interest of the child can be additional arguments, being the main reason for accepting the action, the arbitrariness of the measure. Otherwise, the CRC is used as a parameter to decide on the proportionality of the expulsion measure.

Finally, in cases of mandatory expulsion for discretionary residence permit revocation (Article 67 regarding Article 64 DL 1094), family protection or the best interest of the child are also complementary arguments, being the principal the revocation permit was not justified or was disproportional, or used directly as a parameter for assessing if the decision of refusal or revocation of the permit, was justified and proportional. Furthermore, it requires the revocation permit before the expulsion decision; if it is not, the aliens remain authorised to stay in the country without a time limit.

Overall, we want to emphasise that the low application of international standards by national courts in matters of the expulsion of aliens worries, since being a State party to the international systems for the protection of human rights, their organs should act accordingly. In this sense, a possible alternative will always be the incorporation of the international standard for the protection of migrants by national judges, with the final aim of achieving adequate and maximum protection of human dignity.

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Acknowledgements

This article is part of a research funded by Agencia Nacional de Investigación y Desarrollo (ANID), Fondecyt Regular Project No. 1181194 entitled "Contribution of the courts of justice to the adequate protection of the rights of migrants".

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