**_REPORT No. 176/10_**
CASES Nos. 12.576, 12.611 and 12.612
ANICETO NORIN CATRIMAN, JUAN PATRICIO MARILEO SARAVIA,
VICTOR ANCALAF LLAUPE *ET AL.*
MERITS
CHILE*
November 5, 2010

## *I. SUMMARY*

1. On August 15, 2003, April 13, 2005 and May 20, 2005, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission" or "the IACHR") received three petitions against the State of Chile (hereinafter the "State", "Chile", or the "Chilean State") concerning the convictions of a number of traditional authorities, leaders and activists of the Mapuche indigenous people for crimes classified as terrorism under Law No. 18,314, which determines what acts constitute terrorist offenses and the sentences they carry (hereinafter "Law No. 18,314" or the "Anti-Terrorism Act"). The first petition was filed by the Mapuche *Lonkos* Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, represented by attorneys Rodrigo Lillo Vera and Jaime Madariaga de la Barra; the second petition was lodged by Mr. Florencio Jaime Marileo Saravia, Mr. José Huenchunao Mariñán, Mr. Juan Patricio Marileo Saravia, Mr. Juan Ciriaco Millacheo Lican and Ms. Patricia Roxana Troncoso Robles; the third petition was filed by Mr. Víctor Manuel Ancalaf Llaupe, one of the Mapuche traditional authorities, together with 69 traditional authorities, leaders and members of the Mapuche indigenous people of Chile,[1] and attorneys Ariel León Bacian, Sergio Fuenzalida Bascuñán and José Alywin Oyarzún, all representing the alleged victim. The three petitions allege violation of numerous rights recognized in the American Convention on Human Rights (hereinafter the "American Convention" or the "Convention").

2. On October 21, 2006, April 23, 2007, and May 2, 2007, the Commission approved admissibility reports No. 89/06[2], No. 32/07[3] and No. 33/07[4], respectively, in which it concluded that it was competent to take cognizance of the complaints filed by the petitioners. Based on the

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* In keeping with Article 17(2)(a) of the Rules of Procedure of the Inter-American Commission on Human Rights, Commissioner Felipe González, a Chilean national, did not participate in the decision on this petition.

[1] 1. Galvarino Reiman, 2. Eugenia Calquin, 3. Pablo Mariman, 4. María Teresa Panchillón, 5. Edmundo Antipani, 6. Jorge Hueque, 7. Audiel Millapi, 8. Alfredo Seguel, 9. Ronny Leiva, 10. Rayen Huyeb, 11. José Millalén, 12. Sergio Caiquere, 13. Gabriela Calfucoy, 14. Mirta Ñancuan Curihuinca, 15. Carmen Curihuentro Llancaleo, 16. Juan Carlos Palma Palma, 17. Aurelio Millahual Chueuque, 18. David Huenupil Huenchuman, 19. Miguel Liguempi, 20. René Huenchuñir Hueraman, 21. Juan Yaupe Ancalao, 22. Paulina Huechán, 23. Viviana Nahuelpan, 24. Javier Lienlat, 25. José Teca, 26. Luis Humbarto Marhuen, 27. Claudia Hueche, 28. Tomas Pablo Antil, 29. Carlos Nahuelpani, 30. J.E. Huechan, 31. Antonio Marilaf, 32. Juan Segundo Huemfil, 33. Myriam Sepúlveda, 34. Luis Quiritro, 35. Iván Muñoz Antileo, 36. Isaac Colicheo Quirilao, 37. Alberto Antipil, 38. Edgardo Chiguay, 39. Luis Painequir Antillanca, 40. Tito Lienlaf Marilef, 41. Ernesto Caninllén, 42. José Manuel Guerrero, 43. Jorge Diaz, 44. Bladimir Iván Catrileo, 45. Osvaldo Fuentes, 46. Rodrigo Flores, 47. Rodrigo Videla, 48. Guillermo Garcia, 49. Juan Carilao, 50. Juan Cona, 51. Gladis Merino, 52. José Llancapán, 53. Luis Llancapan, 54. Fredy Avilch, 55. Héctor Llanquén, 56. Gloria Levil, 57. Soledad Martínez Quicao, 58. Francisco Caquilpan, 59. Emilio Francisco Painemal, 60. Juan Painemal Huaiquinao, 61. Carolina Manque, 62. Juan Silva Painequeo, 63. Legario Lepumán Leumán, 64. Agustín Polma Rain, 65. Domingo René Cayupan, 66. Arsenio Licayupan, 67. Alfonso Reimán Huilcmán, 68. Jorge Pichuñol Rainecura and 69. René Jefi Ojeda, all members of the Mapuche indigenous people.

[2] IACHR, Report No. 89/06 (Admissibility), Petition 619-03, Aniceto Norín Catrimán and Pascual Pichún Paillalao , Chile, October 21, 2006.

[3] IACHR, Report No. 32/07 (Admissibility), Petition 429-05, Juan Patricio Marileo Saravia *et al.*, Chile, April 23, 2007.

[4] IACHR, Report No. 33/07 (Admissibility), Petition 581-05, Víctor Manuel Ancalaf Llaupe, Chile, May 2, 2007.

arguments of fact and of law and without prejudging the merits of the case, it decided to declare the petitions admissible with respect to the alleged violations of articles 8, 9, 13, 23 and 24 of the American Convention, in relation to the general obligations set forth in articles 1(1) and 2 thereof.

3. In the petitions and in the observations on the merits, the petitioners assert that by prosecuting and convicting them of crimes classified as terrorist offences, the State violated their right to equality, the principle of legality, various procedural guarantees, freedom of expression, the right to personal liberty, and the right to participate in government, in relation to the State's duty to respect and protect the human rights recognized in the Convention and to adapt its domestic laws to be in compliance with its international human rights obligations.

4. The State did not submit observations on the merits of any of the three cases in question.

5. Having made the respective analysis as to facts and law, the Commission concluded that Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles, and Víctor Manuel Ancalaf Llaupe were tried and convicted under legal provisions that suffer from ambiguity and imprecision incompatible with the principle of legality. Precisely as a result of the application of open-ended criminal classifications, the offenses with which they were charged were classed as terrorist crimes on account of the ethnic origin of the victims and their status as *Lonkos*, leaders of, or activists for the Mapuche indigenous people. The Chilean judicial authorities that convicted the victims for terrorist crimes based their decision on a representation of a situation known as the "Mapuche conflict," without making distinctions between the broader context of that indigenous people's legitimate claims characterized by various forms of social protest, and the acts of violence committed by certain minority groups in that context. Accordingly, the invocation of the victims' membership and/or link to the Mapuche indigenous people constituted an act of racial discrimination by which the social protests of members of the Mapuche indigenous people were, at least in part, criminalized. One of the most striking aspects of the case *sub examine* is that it concerns the criminal prosecution and conviction of the highest traditional authorities and leaders of three Mapuche indigenous communities, under Chile's anti-terrorism law and under circumstances antithetical to human rights. Pascual Pichún and Aniceto Norín are *Lonkos*, in other words, the highest-ranking leaders or heads of their respective communities; Víctor Ancalaf is a *Werkén*, i.e., his community's messenger or envoy. Together, the *Werken* and the *Lonkos* comprise the local Mapuche indigenous leadership and as such are critical nodes in this indigenous people's socio cultural structure. Proper performance of their roles within Mapuche culture and social organization is a factor that helps to preserve the socio cultural integrity of the Mapuche people and ensures the transmission of its social and cultural values and norms from one generation to the next; therefore, to in any way obstruct or prevent these authorities from discharging their functions adversely affects Mapuche social structure and cultural integrity.

6. In consequence, the Commission concludes that the Chilean State violated the rights recognized in articles 8(1), 8(2), 8(2)(f), 8(2)(h), 9, 13, 23 and 24 of the American Convention, in relation to the obligations set forth in articles 1(1) and 2 thereof, to the detriment of the persons named in the present report, and a resulting impact on the socio cultural integrity of the Mapuche people as a whole.

## *II. PROCESSING WITH THE COMMISSION*

7. On October 21, 2006, April 23, 2007 and May 2, 2007, respectively, the Inter-American Commission approved Admissibility Reports No. 89/06, concerning Petition No. 619-03 (Aniceto Norín Catrimán and Pascual Pichún Paillalao); No. 32/07, concerning Petition No. 429/05

(Juan Patricio Marileo Saravia *et al.*), and No. 33/07, concerning Petition No. 581-05 (Victor Manuel Ancalaf Llaupe). These admissibility reports were forwarded to the State and to the petitioners on November 15, 2006, May 9, 2007 and May 10, 2007, respectively. The Commission also placed itself at the parties' disposal with a view to arriving at a friendly settlement. It gave the petitioners two months in which to submit their additional observations on the merits, a period that would begin as of the date on which the respective admissibility reports were transmitted.

8. In the case of Aniceto Norín Catrimán and Pascual Pichún Paillalao (Report No. 89/06):

> On March 1, 2007, the IACHR sent the State the petitioners' observations on the merits and set a deadline of two months for the State to submit its observations thereon. As of the date on which the present report was adopted, the State had not yet submitted its observations on the merits.
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> The Commission also received information from the petitioners on November 13, 2007, which was duly forwarded to the State. The Commission received information from the State on the following dates: April 11, July 25, and November 14, 2008. Those communications were duly forwarded to the petitioners.
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> In a communication dated July 13, 2007, the State said it would be interested in reaching a friendly settlement of the matter, a suggestion to which the petitioners agreed in a communication dated October 24, 2007. On March 11 and October 24, 2008, working meetings were held during the Commission's 131st and 133rd sessions, in Washington, D.C., to pursue the friendly settlement process that the parties had embarked upon. On February 4, 2009, the petitioners advised the Commission that they had decided not to pursue the friendly settlement process and asked that the Commission continue to process the case.

9. In the case of Juan Patricio Marileo Saravia *et al.* (Report No. 32/07):

> The Commission forwarded the petitioners' observations on the merits to the State on August 15, 2007, and gave it two months in which to submit its observations. As of the date of this report, the State has not yet submitted its observations on the merits.
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> The IACHR received information from the petitioners on the following dates: February 11 and 25, July 28, August 19, and December 1, 2008. Those communications were duly forwarded to the State. The Commission received communications from the State on the following dates: July 12, September 18, November 6 and 14, and December 8, 2008. The State's communications were then forwarded to the petitioners.
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> In a communication dated February 14, 2008, the State expressed its interest in arriving at a friendly settlement of the matter, an offer the petitioners accepted in a communication dated February 23, 2008. On March 11 and October 24, 2008, working meetings were held during the Commission's 131st and 133rd sessions, to pursue the friendly settlement process between the parties. On December 23, 2008, the petitioners informed the Commission that they had decided not to pursue the friendly settlement process and requested that the processing of the case continue.
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> On November 15, 2007, the petitioners asked the Commission to adopt precautionary measures to avoid irreparable harm to the life and health of Patricia Roxana Troncoso Robles, and Mr. José Huenchunao Marillan, Mr. Jaime Marileo Saravia, and two other persons deprived of liberty and of Mapuche origin: Mr. Héctor Llaitul Catrillanca and Mr. Juan Millalén Mila, who had been on a hunger strike since October 10, 2007, at the Angol Penitentiary (Region IX). The purpose of the hunger strike was to demand that a number of measures be taken immediately to improve the situation of the Mapuche persons deprived of liberty,

including an effort to find legal ways to obtain their release.[5] On December 20, 2007, the applicants seeking the precautionary measures informed the Commission that the only person still on a hunger strike was Mrs. Patricia Troncoso. By a communication dated January 3, 2008, the Commission requested information from the State and from the petitioners. Each party's reply was forwarded to the other party. Finally, on January 30, 2008, the Commission was informed that Mrs. Patricia Troncoso had ended her hunger strike.

10. In the case of Victor Manuel Ancalaf Llaupe (Report No. 33/07):

On August 27, 2007, the IACHR sent the State the petitioners' observations on the merits and gave it two months in which to submit its own observations. As of the date of the adoption of this report, the State has not submitted observations on the merits.

The IACHR received communications from the petitioners on February 19 and September 5, 2008, and duly forwarded them to the State. The Commission received communications from the State on February 14 and 27 and July 7, 2008, which it then forwarded to the petitioners.

11. At the State's express request, the Commission decided that in this report, it would deliver a combined decision on the merits of all three petitions.

## *III. THE PARTIES' POSITIONS*

### *A. On the classification and interpretation of terrorist offenses under Chilean law*

#### *The petitioners*

12. Petitioners Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán contend that as formulated, Law 18,314 violates the principle of legality and the presumption of innocence. In the first case, the petitioners explain that "the crimes that it [the law] establishes as the predicate offenses of terrorism are broader than those commonly found internationally. Specifically, in Chile, the crime of intentionally setting fire to a forest or wooded area – a fire that may do no harm or pose any threat to a community - is classified as a terrorist offense."[6] They also contend that, as set forth in Law 18,314, the legal presumption of a terrorist intent for cases in which incendiary means are used is a violation of the principle of legality by virtue of the fact that "the crime constituting terrorism is not described,"[7] and a violation of the principle of presumption of innocence by virtue of the "presumption of criminal culpability."[8]

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[5] The applicants seeking the precautionary measure asked that the following measures be adopted: "1) that an order be given that the *comuneros* are to be visited on a daily basis by a medical professional, who will check on their health and keep their families informed of their health status; 2) that a means of dialogue be established with the Mapuche *comuneros* who are on hunger strike, safeguarded by a guarantor; 3) that any time that *the comuneros* have spent in incarceration be counted toward their final sentences; 4) that any Mapuche *comuneros* who meet the established requirements be given access to prison privileges; 5) that a technical team be established, composed of State and independent professionals whom the beneficiaries trust, to undertake... a study of some legal alternative that makes possible .. a solution to their unjust incarceration ..."

[6] Observations of Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán on the merits of the matter before the IACHR, received on August 9, 2007, p. 8.

[7] Observations of Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán on the merits of the matter before the IACHR, received on August 9, 2007, p. 7.

[8] Observations of Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán on the merits of the matter before the IACHR, received on August 9, 2007, p. 7.

13. Other petitioners add that it is not only the law as written that violates the principle of legality, but the manner in which it is applied. Specifically, they argue that the principle of legality was violated to their detriment because the classification of their conduct as terrorism was contrary to the facts, inasmuch as their conduct did not qualify as such; hence, the application and penalties of Law 18,314 were not justified.

14. The petitioners in the case of Víctor Ancalaf also allege violation of the principle of legality, because Ancalaf was convicted of a crime whose distinctive characteristics are not clearly established, thus giving the judge an excessive margin of appreciation in applying criminal law. Petitioners Pascual Pichún and Aniceto Norín argue that their conviction on September 27, 2003, violated the principle of legality because they were convicted of being the perpetrators of "terrorist threats." [9]

***The State***

15. The State argues that Law 18,314 was the applicable law in the criminal prosecution of the *Lonkos* Aniceto Norín and Pascual Pichún, given the general context of political and social protests in Region IX and the commission of acts of violence in that context.[10]

16. As for the asserting that a violation of Article 9 of the Convention was committed because "terrorist threat" was not criminalized in Chilean law, the State asserts that the the petitioners have wrongly interpreted the scope of the principle of legality and the principle of non-retroactivity of criminal law, which have nothing to do with the name attached to the crime prosecuted, but the substantive aspects of the crime: "The purpose of these principles is to ensure that a person is not convicted of something that, at the time of its commission, was not part of the description of any crime, nor described in clear and precise language in the classification of the offense. In the instant case, the deeds attributed to the persons convicted were crimes under Chilean criminal law. The precise name attached to the crime of which they were convicted and on which the sentence is based has nothing to do with legality."

***B. Application of the anti-terrorism legislation in light of the principle of individual criminal responsibility and the prohibition of racial discrimination.***

***The petitioners***

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[9] In their view, there is no such crime under the Chilean legal system, since Article 7, subparagraph 2 of Law 18,314 provides that "the penalty for a serious and credible threat to commit any of these crimes shall be same as the penalty for an attempt to commit these crimes;" and subparagraph 1 provides that "an attempt to commit any of the terrorist crimes contemplated in this law shall constitute a punishable offense..."; thus they point out that "terrorist threat" is not criminalized under Law 18,314; what that law criminalizes is a serious and credible threat of terrorist arson or terrorist homicide. They also point out that neither Aniceto Norín nor Pascual Pichún was charged with the crime of "terrorist threats;" the crime with which Norín was charged in the indictment was a "threat of terrorist attack."

[10] In the opinion of the State this was because the facts that gave rise to the investigation and subsequent prosecution are part of a broader framework of criminal activity in Region Nine, perpetrated by a group of people that uses ideological discourse to assert claims of ancestral rights and that collectively planned, organized and committed crimes. The purpose of these criminal acts is to instill a well-founded fear among the population or a portion thereof, that one will fall victim to these kinds of crimes, both because of the nature of the means employed, and because of the evidence that shows that this is part of a premeditated plan to attack a certain category or group of people, particularly owners of agricultural and forestry lands in the areas that the perpetrators have declared to be in dispute. The purpose is to pressure landowners to abandon their land and authorities to turn the land over to these groups. These are the very circumstances that Article 1 of that law hypothesizes. Response from the Chilean State to Petition P-619-03, received by the IACHR on November 30, 2004, pp. 6-8.

17. All the petitioners contend that their conviction on September 27, 2003, was a violation of Article 1(1) of the American Convention, which prohibits racial discrimination.[11] They also argue that Article 24 of the Convention has been violated because the prosecutor sought to have the anti-terrorism law enforced against them, which they contend has never been similarly applied against any other social group. In this sense, they regard themselves as victims of discriminatory treatment under criminal law, based on their ethnic or racial origin. Petitioners Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán contend that the Chilean State's conduct amounts to criminal persecution of persons belonging to the Mapuche indigenous people under the Anti-Terrorism Act, repressing the Mapuche people's activism and social protest to reclaim their territorial rights; this pattern of conduct is, in their view, discrimination based on ethnic origin. Accordingly, "our contention is that the enforcement of Law 18,314 has to do with our racial identity and not with the act of which we have been accused and convicted. The consequence is an act of discrimination against us on the basis of race. The different treatment we are receiving by being regarded as terrorists has no objective or reasonable justification."[12]

18. The petitioners in the Víctor Ancalaf case[13] cite various reasons why the right to equal treatment and the prohibition of discrimination, established in articles 1 and 24 of the American Convention, have been violated: First, they contend that his right to equality and non-discrimination has been violated because the legal description of terrorist crimes is disproportionate, as it includes acts that affect property but pose no threat to the lives and physical integrity of persons; this is also a violation of the basic principles of criminal law: proportionality and injury. The petitioners explain that the actions of which Víctor Ancalaf was accused, without any evidence to support the accusation, are part of a context of social protest at a project being developed on indigenous territory, "in which the behaviors are motivated by ends in no way related to subversion; their disvalue or illegality is on an entirely different plane from that of terrorist activity." The petitioners are referring to the construction of the Ralco hydroelectric plant on Mapuche–Pehuenche territory. The petitioners also make the point that enforcement of the Anti-Terrorism Act to persons who are members of the Mapuche people is part of a recurring, discriminatory pattern of criminal persecution.[14] They explain that between 2001 and 2005 there was a pattern of unwarranted enforcement of the anti-terrorism legislation against Mapuche persons, which resulted in disproportionate sentences and proceedings in which due process guarantees were violated. Second, the petitioners in the Victor Ancalaf case explain that the

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[11] They also cite the International Convention on the Elimination of All Forms of Racial Discrimination (Articles 1(1) and 5), the International Covenant on Civil and Political Rights, and Article 19-2 of the Constitution of Chile.

[12] Observations from Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán on the merits of the matter before the IACHR, received on August 9, 2007, p. 8.

[13] The petition in the case of Víctor Ancalaf Llaupe was filed with the Commission by Mr. Ancalaf himself, accompanied by 69 authorities, leaders of the Mapuche people and three lawyers. While it was made clear that the alleged victim of the human rights violations claimed was Mr. Ancalaf, the 69 leaders – who appear as co-petitioners - told the Commission that they are threatened by the discriminatory enforcement of the anti-terrorism law against members of the Mapuche people: "The other Mapuches join with don Victor Ancalaf Llaupe, the person directly affected by the indictment, prosecution and conviction for the supposed terrorist act, in signing the complaint because the anti-terrorism act has been repeatedly enforced against Mapuche persons, which poses a threat to every one of us." Original petition that Víctor Ancalaf Llaupe, 69 authorities, leaders and members of the Mapuche people and three attorneys filed with the IACHR, received on May 20, 2005, p. 2.

[14] In their words: "(...) The Executive Branch's use of the Anti-Terrorism Act and its indiscriminate enforcement by the courts is not an isolated incident when it comes to Mapuche individuals and leaders. The Chilean State has frequently resorted to this to repress the Mapuches, which clearly constitutes discriminatory treatment of the Mapuches merely for being members of that ethnic group. This discriminatory treatment is apparent when compared with other conflicts or disputes that the country has had, as in the case of the protests by port workers and students, where heavy property damage was involved but where no one ever even suggested the possibility of applying such a disproportionate piece of legislation as the one described here to punish terrorist conduct.". Original petition that Víctor Ancalaf Llaupe, 69 authorities, leaders and members of the Mapuche people and three lawyers filed with the IACHR, received on May 20, 2005, pp. 8-9.

courts have applied the anti-terrorism law without properly weighing and assessing the facts charged, which constitutes a violation of the right to equal treatment.[15]

***The State***

19. The State did not submit observations on the merits on this point. It simply asserted and maintained that the trials were conducted by law, that the law under which the cases were prosecuted was the applicable law inasmuch as the facts of the cases fit into the broader context of social manifestations and acts of violence; that the cases were conducted in accordance with the State's international obligations; or it simply denied the allegation made claiming that the petitioners were convicted because they are *lonkos* in their respective communities.

***C. The right of defense and the use of anonymous witnesses***

***The petitioners***

20. Petitioners Pascual Pichún and Aniceto Norín contend that the use of anonymous witnesses at trial constituted a violation of the American Convention. In effect, the Trial Court allowed the identity of two of the witnesses to be kept secret; during the first part of the proceeding right through to the initial verdict of acquittal; During the second phase of the case, from the time the original acquittal was vacated until they were finally convicted, the identity of the witnesses was revealed to the attorneys, who were expressly instructed not to reveal the witnesses' identity to either defendant. Given these facts, petitioners Aniceto Norín and Pascual Pichún allege that the right to due process was violated, "as our right to cross examine the prosecution's witnesses was clearly abridged."[16]

21. As for the second phase of the criminal case, the petitioners allege that Article 8(5) of the American Convention was violated by virtue of the fact that the verdict relied upon the testimony of anonymous witnesses and by the fact that their defense attorneys' motion to not to keep their identity confidential was denied.[17] The petitioners contend that "these witnesses were crucial to the conviction, so much so that if one reads the verdict in its entirety, one would readily conclude that without these two witnesses Mr. Pichún would not have been convicted."[18] They argue further that the failure to reveal the identity of the faceless witnesses to the defendants at the trial that took place when the Supreme Court vacated the original acquittal was a violation of the right to an effective defense, also protected under the Convention.

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[15] "The principle of proportionality and consequently the right to equal protection and non-discrimination enshrined in Articles 1 and 24 of the American Convention was violated because the courts handed down a conviction for the alleged terrorism offense without proper appreciation and discernment regarding the legal nature and actual seriousness of the alleged act, by indiscriminately applying antiterrorist legislation." Original petition that Victor Ancalaf, 69 authorities, leaders and members of the Mapuche people and three attorneys filed with the IACHR, received on May 20, 2005.

[16] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, pp. 7-8

[17] Petitioner Aniceto Norín argues that "during the hearing, the Court itself pointed out that under Article 19(3) of the Constitution, due process had to be observed, and that the identity of the witness had to be revealed to the defense. However, the Court's statement of principles stopped there; it was an empty guarantee on two counts: because the defense attorneys were not permitted to reveal the identity of the witness to the defendants, which made the court's decision on this point meaningless and did not allow proper exercise of the right of defense: if a defense attorney is unable to tell his client what the evidence against him is so as to get the details needed to stage a proper defense, then this due process is due process in name only, but not in fact or in practice; and because in *consideranda* 13 (p. 42) the court disallowed identification of protected witness No. 1, which meant that no legal action could be initiated against that witness. A court cannot shelter a criminal who commits the crime of perjury behind a decision that prevents the victim of the crime from exercising one of his essential rights, which is to denounce the crime." Communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, pp. 10-11.

[18] Observations of Aniceto Norín and Pascual Pichún on the merits of the matter before the IACHR, received on March 1, 2007, p. 20.

22. Petitioners Pascual Pichún and Aniceto Norín also argue that the manner in which their motions regarding the testimony of the faceless witnesses were processed was a violation of Article 8(2)(f) of the American Convention. They explain that at the trial, the Public Prosecutor's Office asked to enter new evidence – the statement of witness José Pichincura Caniuqueo, a request the court granted without explaining why. Following the testimony of Protected Witness No. 1, and given the nature of his testimony, *"the defense offered to enter new evidence that would disprove the witness' testimony, prove that the witness was not impartial and was of dubious moral character, and fundamentally undermine the truth of his testimony, as the code of criminal procedure in force provides. After some debate, the court did not allow this new evidence, asserting only that the court had the authority to disallow evidence; it gave no other grounds for its decision."*[19] The petitioners contend that this was an arbitrary decision, contrary to the principle of equality of arms, especially inasmuch as it was evidence offered to counter the anonymous witness' testimony. They also allege that in *Consideranda* 23, the court refuses to lift the shroud of secrecy surrounding the witness so that legal action can be brought against him for perjuring himself.[20]

23. The petitioners in the case of Victor Ancalaf also consider that the fact that the proceeding was not conducted in public and the identity of the witnesses upon whose testimony the conviction rested was kept secret constituted a violation of the accused' right of defense.[21]

***The State***

24. The State responds that witness protection rules set forth in the provisions of Law 18,314 and the Code of Criminal Procedure are intended to protect those witnesses' right to life and to their physical integrity. It asserts that witnesses have the same rights protected by the American Convention – i.e., the right to life, the right to humane treatment, and the right to equal protection under law-, and that "the premise of the petitioners' assertion is that the guarantees of the accused in this case are more important than the rights of the witnesses and of the victims of

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[19] Communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received on June 21, 2004, p. 12; Communication from Aniceto Norín Catrimán supplementing the original petition he filed with the IACHR, received on July 12, 2004.

[20] For the petitioners, "[e]verything recounted here is a violation of the right of the defendant in a criminal proceeding to obtain witness testimony from persons who are able to shed light on the facts; it was also a violation of the principle of equality before the law, because the various parties were treated differently: the private accuser and the Public Prosecutor's Office were allowed to enter new evidence, without any explanation, while my defense counsel was not allowed to offer new evidence that would have proved that the statements made by one of the witnesses were false, the very witness whose testimony the court used to make its case that the crime of threats had been committed and that I was involved." Communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, and received on June 21, 2004, p. 13. Communication from Aniceto Norín Catrimán supplementing the original petition sent to the IACHR, received July 12, 2004. Observations of Aniceto Norín and Pascual Pichún on the merits of the matter before the IACHR, received on March 1, 2007, p. 19

[21] "At the time of the commission of the acts for which Víctor Ancalaf was convicted, the new code of criminal procedure was still not in force in the Bío Bío region, so that the procedure followed in the case against the petitioner was the old system, which was inquisitorial in nature (...) The trial against Víctor Ancalaf, which was confidential and secret, was a "secret summary" proceeding for the defense attorneys during much of the investigation, seriously impairing their right to contest the background information that implicated him. (...) The inquisitorial proceeding against Víctor Ancalaf made it impossible to interrogate the witnesses against him when they testified, thus leaving the defense at an obvious procedural disadvantage. This problem was compounded by the use of anonymous witnesses. As observed in the complaint, the supposed participation of Víctor Ancalaf in the unlawful act of which he was accused was based entirely on testimony given in confidential files by witnesses whose faces could not be seen, resulting in testimony that had little truth to it; the defense knew nothing of the testimony for months. (...) The trial against Ancalaf was not public. Much of the summary proceeding was completely confidential, including for the defense attorneys. While the other court proceedings, once the secret summary proceedings were over, were public, they were open only to the parties." The petitioners' additional observations in the case of Víctor Ancalaf on the merits of the case, August 9, 2007, received at the Commission on August 24, 2007.

these crimes, or of any human being for that matter. This in itself is a violation of Article 29 of the Convention."[22] The State further contends that the accused's right of defense was respected, despite the fact that the identity of some witnesses was kept confidential: "The right protected under Article 8(2)(f) of the Convention is the right of the defense to examine the witnesses present in the courtroom, a guarantee that the defense fully exercised when its defense attorneys cross-examined the witnesses in question. The State asserts that the protected witnesses did not give testimony with their faces covered. The two protected witnesses testified behind a screen facing the judges, who were able to observe their gestures and expressions, and thus gauge the veracity of their testimony, and ask the witnesses for any clarifications they might have required."[23] The State further contends that it is untrue that their testimony was a key factor in the court's decision to convict, as that decision was based on a body of various pieces of evidence of different kinds: testimony, experts, documents and material evidence.[24]

### *D. Double jeopardy in the cases against Mapuche indigenous people*

#### *The petitioners*

25. Petitioner Aniceto Norín alleges that the decision of the Chilean Supreme Court to vacate the original verdict of acquittal is a violation of Article 8(4) of the American Convention on Human Rights, which upholds the double jeopardy rule or principle of *non bis in idem* "because after being unanimously acquitted in a non-appealable judgment by the Angol Oral Criminal Trial Court, the State seeks to retry him for the same cause."[25] He explains that Article 8(4) of the Convention means that the State cannot disregard the effects of a final verdict of acquittal and that in his view, the verdict of the Angol Oral Criminal Trial Court was final and not subject to review, although it was challenged by the prosecutor and private accusers in a motion seeking to have the decision vacated on the pretext that a domestic court cannot declare a verdict final, because violations of international treaties might be at stake.

26. Petitioner Norín reasons that the double jeopardy rule upheld in Article 8(4) of the American Convention and in Article 14(7) of the International Covenant on Civil and Political Rights was violated because, in his opinion, the principle of *non bis in idem* recognized therein must be interpreted in two ways: "on the one hand, the State cannot seek to try a person for the same criminal offenses by means of a challenge brought by the accuser to vacate a judgment of acquittal; on the other hand, the principle has to be interpreted in the formal sense of the effects of a final verdict of acquittal." Petitioner Pascual Pichún submitted to the Commission arguments similar to those made by petitioner Aniceto Norín to the effect that the decision of the Supreme Court to vacate his verdict of acquittal and order a new trial, was a violation of his rights to be presumed innocent and of the double jeopardy rule recognized in articles 8(2) and 8(4) of the

[22] Response from the Chilean State to Petition P-619-03, received by the IACHR on November 30, 2004, pp. 12-14.

[23] Response from the Chilean State to Petition P-619-03, received by the IACHR on November 30, 2004, pp. 12-14.

[24] The State contends that "the contribution that the protected witnesses made to the decision in the case was quite marginal. An analysis of the decision would suggest that the testimony of the two protected witnesses did not prove the fact that they were called to testify about: i.e., the accused' participation in the burning of the Nancahue property. Thus, the court did not give substantial weight to their testimony, as the petitioner would have one believe. This is also apparent from *consideranda* 14 of the decision, i.e., that the statements made by the witnesses were not proof of the terrorist threats, the crime of which the petitioners were ultimately convicted." Response from the Chilean State to Petition P-619-03, received by the IACHR on November 30, 2004, pp. 12-14.

[25] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003.

American Convention.[26] Petitioner Pascual Pichún also contends that the principle of *non bis in idem* recognized in Article 8 of the American Convention was violated; he used the same reasoning that petitioner Aniceto Norín used, which was that his verdict of acquittal was challenged by the accusing party.[27]

***The State***

27. Regarding the violation of the principle of *non bis in idem* alleged by Pascual Pichún and Aniceto Norín by virtue of the fact that the original verdict of acquittal and the trial that preceded it were vacated, the State contends that no such violation occurred because the verdict of acquittal was not final under the applicable domestic law, since the State still had the right to challenge the decision by a motion seeking to have the decision vacated. For the State, "…the alleged violation of the principle of *non bis in idem* did not happen. The double jeopardy rule previously cited expressly provides that the rule prohibiting retrial for the same facts applies in the case of a final verdict of conviction or acquittal of someone whom the State now seeks to retry for the same facts; a sentence is final "under the law and criminal procedure of each country.' // Under Chilean procedural law, and as prescribed in Article 174 of the Code of Civil Procedure (a provision that also applies in criminal matters), a decision shall be considered final or executed once the parties have been so notified, provided no remedy can be filed to challenge it; therefore, if there is some remedy that the parties can use to challenge a court ruling, said court ruling cannot be considered final, provided the deadline for filing the challenge has not passed. In the instant case, the verdict of acquittal handed down by the Angol Oral Criminal Trial Court could be challenged by a motion to have the verdict vacated. That motion (…) is regulated under articles 372 *et seq* of the Chilean Procedural Code; a party has ten days in which to file such a challenge, counted from the date of notification of the respective ruling. Thus, one cannot claim that the principle in question has been violated if Chilean law already had on the books a remedy intended to challenge a court ruling; in this case, the ruling was filed within the statutory period and therefore the sentence was neither final nor executed."[28]

***E. The right to be heard by a competent, impartial and independent judge or tribunal.***

***The petitioners***

*Arguments pertaining to the violation of the right to a competent judge*

28. Petitioner Aniceto Norín has challenged the Supreme Court's jurisdiction to nullify his verdict of acquittal on the grounds that in nullifying the verdict, the Supreme Court did not speak to the grounds upon which it has competence to vacate a verdict; instead, it cited grounds that are the jurisdiction of the appellate courts. The petitioner explains that (i) under Chilean law, the general rule is that motions seeking to have a verdict vacated are to be heard by the respective appellate courts and only in exceptional circumstances by the Supreme Court,[29] based on Article

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[26] Here he writes that "*the Chilean justice system (…) is now forcing me to be retried for the very same facts since, in the opinion of the highest court, my innocence was not duly established. In other words, based a violation of the principle of presumption of innocence, the court ordered a violation of my right to the principle of non bis in idem. (…) Summarizing, in my case, the court ordered that a criminal case against me be retried on the grounds that my innocence had not been duly established, thus concurrently violating my right to presumption of innocence and my right not to be retried for the same cause. My petition seeks a stop to the criminal persecution of me."* Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 5.

[27] Observations of Aniceto Norín and Pascual Pichún on the merits of the matter before the IACHR, received on March 1, 2007, p. 31.

[28] Response from the Chilean State to Petition P-619-03, received by the IACHR on November 30, 2004, p. 6.

[29] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 10.

376 of the Code of Criminal Procedure;[30] (ii) both the Public Prosecutor's Office and the private plaintiffs filed their motions seeking to have the verdict vacated on the basis of Article 373-a), which gave the Supreme Court the authority to hear them, and also "on the grounds that the verdict had not been properly reasoned and substantiated to arrive at a verdict of acquittal (which is the very grounds for review by an appellate court)"[31]; and (iii) in this case, the Supreme Court declared the motion admissible and "then, when ruling on it, incredibly made no reference to the grounds cited in Article 373 a), which concerns a substantial violation of rights or guarantees protected by the Constitution or international treaties and which are precisely the grounds upon which the Supreme Court has jurisdiction to hear a motion; in its ruling, the Supreme Court made reference only to the second grounds alleged by the petitioners, which is the grounds where the appellate court has jurisdiction (the one contemplated in Article 373 b)), i.e. a motion that argues that the law upon which the ruling relies heaviest has been misinterpreted."[32] Petitioner Pascual Pichún also took issue with the Supreme Court's jurisdiction to adopt the decision that vacated his acquittal; he explains that in order to take jurisdiction, the Supreme Court invoked the grounds cited in Article 373 a) of the Code of Criminal Procedure, and the lack of reasoning to support the verdict of acquittal, and that "the Court declared the motion admissible; then, when delivering its ruling on the motion, addressed only the second grounds alleged by the complainants (which is the grounds for which the appellate court has jurisdiction), and deemed it unnecessary to address the other grounds because it had already vacated the verdict on the grounds that the acquittal was not a reasoned verdict."[33]

29. Petitioners Pascual Pichún and Aniceto Norín argue that they were convicted by a court that did not have jurisdiction and had not been established by law prior to the date of the events. They contend that Article 8(1) of the Convention was thus violated. The petitioners explain that by 2001, the date on which the events occurred, the reform of the criminal procedural code was already in force in region IX of Chile, but the special law giving the court such powers – Law 19,806, which amended Law 18,314, especially its Article 10- was not yet in force. For the petitioners, "the error is that the Angol oral criminal trial court only has competence by virtue of the amendment that Law 19,806 introduced into Law 18,314, an amendment that came subsequent to the events; the law dates from May 31, 2002 whereas the events occurred in 2001."[34] Thus, the competent court in 2001 must rely on the provisions of Article 10 of Law 18,314 prior to its amendment by Law 19,806. The text of that article before it was amended reads as follows:

> Proceedings instituted for the offenses criminalized under this law shall be undertaken by the courts *ex officio* or when a complaint is filed in accordance with the general rules. // The foregoing notwithstanding, such proceedings may also be instituted at the request or upon a complaint from the Ministry of the Interior, from the Regional Intendants, from the Governors of the provinces and from the garrison commanders, in which case the provisions of Title VI – Jurisdiction and Procedure- of Law 12,927 shall be followed, except in the case of Article 27(ñ). //
> The authorities to which the above subparagraph refers may also prepare complaints even

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[30] Article 376, paragraphs 1 and 2 of the Code of Criminal Procedure, cited on page 10 of Aniceto Norín's original petition filed with the IACHR, reads as follows: "*The Supreme Court shall hear motions based on the grounds stipulated in Article 373, subparagraph a). The respective appellate court shall hear motions based on the grounds cited in Article 373, paragraph b) and in Article 374.*"

[31] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 10.

[32] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 12.

[33] Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 5.

[34] Communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, p. 11.

when the case is already in progress, in which case the provisions on jurisdiction and procedure in that subparagraph shall also apply.[35]

30. The petitioners also assert that "what happened in the present case is the situation provided for in subparagraph 3, cited above, inasmuch as the Provincial Governor of Malleco filed a complaint in this matter. Therefore, under this subparagraph we are required to apply the rules on Jurisdiction and Procedure set forth in the State Security Act. Under Article 26 of that Act, any minister on the respective court of appeals has jurisdiction. // The consequence is obvious: a Trial Court does not have jurisdiction. However, no minister on the appeals court has jurisdiction either because Article 50 No. 1 of the Judiciary Statute was repealed by Law 19,665. // My client is not to blame for the fact that no tribunal has competence to take cognizance of a terrorist crime that occurred after Law 19,665 (which struck down Article 50 No. 1 of the Judiciary Statute) took effect but before Law 19,806 (*Ley Adecuatoria) entered into force,* which is when the Provincial Government brought its complaint."[36] This argument is discussed at greater length in the petitioners' submissions on the matter before the IACHR.[37]

*Arguments on the violation of the right to an impartial judge*

31. Petitioners Pascual Pichún and Aniceto Norín allege that Article 8(1) of the American Convention, which recognizes the right to an independent and impartial judge, was violated by the fact that the Trial Court regarded the existence and operations of violent unlawful organizations in Region IX to be an obvious and notorious fact.[38]

32. Petitioners Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán,

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[35] Cited in the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, p. 11.

[36] Communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, p. 11.

[37] They explain that the jurisdiction to hear the facts in this case was assigned to the oral criminal trial court purely on the basis of the amendment that Law 19,806 of May 31, 2002 (*Ley Adecuatoria)* introduced in the Anti-Terrorism Act; "based on the foregoing, the tribunal or court that had jurisdiction at the time the acts were committed, and as Article 10 of the Anti-Terrorism Act prescribes, was a minister of the court, i.e., a visiting minister to serve as a special presiding judge by virtue of the subject matter and the nature of the intervening parties; the court with jurisdiction was not the oral criminal trial court that in the end decided the case. Nevertheless, at the time of the events, Article 11 of Law 19,665 had repealed Article 50(1) of the Judiciary Statute, which provided that a visiting minister should preside. This meant that in the instant case, no court had jurisdiction if a case was the result of a complaint filed by the Ministry of the Interior, the Governor or the Intendant." Observations of Aniceto Norín and Pascual Pichún on the merits of the matter before the IACHR, received on March 1, 2007, pp. 2-3. Later, in response to the Government's argument to the effect that this allegation was the result of a misreading of domestic law, the petitioners observed that "[i]t has never been our contention that at the time the crimes were committed, no court had jurisdiction and therefore competence to take up the case; instead, our position was that no court was competent if, and only if, the government became a party through the Ministry of the Interior, a provincial governor or regional intendant, which is precisely what happened (now, since the legal adjustments, a court does have jurisdiction.). // It has never been our contention that the facts ought to be tried by the old system of criminal procedure; instead, we are simply arguing that the Government of Chile cannot make itself a complainant in the case because, were that the case, no court would be competent." Observations of Aniceto Norín to the State's response to the original transmission of Petition P-619-03, received on September 7, 2005, p. 2.

[38] "The ruling that convicted the *lonkos* is an obvious manifestation of the violation of Article 8(1) of the Convention, which recognizes the fundamental right to independent and impartial judges. Particularly disturbing was the part of the judgment that states the following: "It is a public and notorious fact ...'(...) An independent and impartial tribunal cannot declare it to be a public and notorious fact that organizations exist in Chile, especially in the region of the Araucania, that assert their territorial claims by committing acts of violence and inciting such acts. This statement by the court is nothing more than a demonstration of its bias and of the influence of the press. It is not a public and notorious fact; it is a fact that must be proved. However, that was not done. And as we shall see, it has already been proven in court that such was not the case." Observations of Aniceto Norín and Pascual Pichún on the merits of the matter before the IACHR, received on March 1, 2007, p. 8.

argued that their right under Article 8(1) of the Convention to a hearing by an impartial court, had been violated by the fact that an excerpt from the verdict of conviction that the oral criminal trial court delivered in their case is textually identical to a judgment delivered by the same Tribunal in another criminal case against other Mapuche *comuneros* –specifically the reasoning as to why the facts constituted terrorism.[39] They assert that *consideranda* 19 of the conviction is a *verbatim* copy of *consideranda* 10 in the verdict delivered by the oral criminal trial court on April 14, 2003, in the trial prosecuted against Pascual Pichún and Aniceto Norín. On this particular point, the petitioners' contention is that an impartial court or tribunal has no bias or preconceived opinion regarding the case it is called upon to take up. "The bias and preconceived opinion of the tribunal that convicted us were so strong that the court simply copied a ruling it had delivered more than a year earlier, where it pointed out why, in its opinion, the matter under investigation (setting fire to a home) was a terrorist act."[40] In the petitioners' opinion, the Tribunal should have been forthcoming about its involvement in the earlier case and should have disqualified itself, as required under the applicable legal code;[41] by failing to do so, it violated the defendants' right to a trial by an impartial tribunal.[42]. The petitioners report that on this basis, they filed a criminal complaint against the judges on the tribunal alleging the crime of prevarication, Register No. 257-2005 of the Angol Court of Guarantees.[43]

*Arguments on the violation of the right to an independent judge*

33. The petitioners assert that their right to be heard by an independent and impartial tribunal was violated by the fact that the Government became a complainant in the criminal case, in the form of the Malleco Governor's Office and the Office of the Intendant of Region IX; they also point out that it is the Government that decides which judges will be promoted to the appellate courts.[44]

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[39] "This right was violated because the court copied into its decision a prior judgment handed down against other Mapuche residents of the same territorial zone, in the context of the so-called "Mapuche conflict." The part of the decision handed down against us that refers to terrorist arson as the crime being prosecuted is an exact copy, to the letter, of the ruling that the same court delivered in the case against don Pascual Pichún Paillalao, Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles." Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005, p. 9.

[40] Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005, p. 9.

[41] The petitioners cite Article 195-8 of the Judiciary Statute: "The grounds for recusal are (...) 8. The judge expresses his/her opinion on the matter before the court with the background information necessary to pass judgment." They also cite Article 200: "Recusal of judges can and should be declared *ex officio* or at the request of a party." Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR on August 13, 2005, p. 9.

[42] "The tribunal that convicted us did not observe domestic or international law, and presided over a trial even though it was completely biased. // It is obvious that the tribunal had no doubt in its mind that the act for which we were standing trial qualified as terrorism, to the point that it failed to provide any reasoning for its verdict and instead copied from a ruling that it had delivered in another case in which Mapuche *comuneros* were also on trial." Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR on April 13, 2005, p. 10. Observations of Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán on the merits of the matter before the IACHR, received on August 9, 2007.

[43] Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR dated April 13, 2005, p. 10.

[44] They explain that "from the beginning the government expressed an unmistakable interest in prosecuting and establishing the criminal culpability of the perpetrators by applying the Anti-Terrorism Act, a special piece of legislation that, at the request of the Public Prosecutor's Office and the private accusers, the government argued for. (...) It is the Government of Chile that appoints the ministers on the higher courts; hence, the State cannot guarantee the independence of the court if is also authorizing a regional government to become a complainant in the case. (...) The independence and

***The State***

34. To counter the petitioners' assertion to the effect that the Tribunal that handed down the conviction on September 27, 2003 was not impartial but rather came to the case with its own biases and assumed *a priori* that the accused were guilty, particularly in *consideranda* 15, subparagraph 1 of the judgment, the State explains that "the paragraph cited by the petitioner is simply an account of the facts established at trial based on the evidence offered and assessed directly by the judges and weighed on the basis of logic and the lessons learned from experience. (...) But the State also asserts that these facts are public and notorious facts in the regional and national community, as the members of these groups have broadcast their territorial claims and their methods and at the same time have announced these acts and claimed authorship. // There is no basis, therefore, to claim that the tribunal (...) is prejudging when it analyzes the evidence offered and puts the facts into context based on the evidence. (...) In the preamble of its judgment, the court naturally had to describe the context in which these crimes were committed, which is nothing more than the uncontestable conclusion drawn from the evidence offered at trial."[45]

35. As for the argument made by petitioners Pascual Pichún and Aniceto Norín concerning the oral criminal trial court's lack of jurisdiction under the rules in force at the time the acts in the case were committed, the State maintains that the such an assertion is the product of a biased and skewed interpretation of the rules governing the Chilean courts' jurisdiction. The State contends that that interpretation has been fabricated to arrive at one conclusion, which is that at the time of the commission of the crimes, the law did not specify which tribunal had jurisdiction to prosecute the crimes.[46] The State elaborates by saying that this criminal case was

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impartiality of the courts can hardly be guaranteed if the complainant has the legal authority to decide whether the judges of the oral criminal trial court will be promoted to the rank of minister on a higher court. And if these same ministers must then decide a case under social pressure and influence, the bias and lack of independence that they would bring to a case is obvious (...) As this principle informs all government affairs, and as the government has made itself a party to the trials, any appearance of the court's impartiality vanished and the principle of presumption of innocence, equality and nondiscrimination were violated, thereby undoing any pretense of an equality of arms before and during the criminal proceedings. The government's participation in the trials, especially in the appeal to have the ruling vacated, has raised serious doubts about the objectivity and impartiality of the Chilean courts." Observations of Aniceto Norín and Pascual Pichún on the merits of the matter before the IACHR, received on March 1, 2007, pp. 8-10.

[45] Response from the Chilean State to Petition P-619-03, received by the IACHR on November 30, 2004, pp. 8-9.

[46] The State explains that the petitioners base their arguments on Article 10 of Law 18,314, before it was amended by Law 19,806. It goes on to assert that in this case, complaints were brought by the Office of the Regional Intendant and by the Provincial Government of Malleco; from that one can infer that the competent organ would be a minister on the Temuco Appellate Court. However, "by that reading, the petitioners are disregarding and attribute no application or efficacy to the entire body of organic and procedural law that entered into force in Region IX as of December 16, 2000, a body of law that includes the constitutional amendment introduced with Law No. 19,519, Law No. 19,640 Constitutional Organic Statute of the Public Prosecutor's Office, and Laws No. 19,665 and 19,708 which, while supplementing the existing legal texts, introduced the corresponding amendments in the Judiciary Statute. // Particular mention should be made of the amendments that Article 11 of Law No. 19,665 introduced in Article 50 of the Judiciary Statute. Under that amendment, no single minister of the appellate court, functioning as a single-person court, has competence in criminal matters. // Under the terms of transitory constitutional provision number 36, the constitutional amendment introduced by Law No. 19,519 begins to take effect when the Organic Constitutional Law of the Public Prosecutor's Office enters into force, paragraph two of which expressly states that the body of legal texts that, taken together, form the so-called criminal procedural reform, shall apply exclusively to events that transpire subsequent to the date on which it enters into force. // Lastly, in keeping with that constitutional provision, transitory Article 4 of the Organic Constitutional Act of the Public Prosecutor's Office set December 16, 2000, as the date on which the provisions of Law No. 19,519 and of Law No. 19,640 would take effect for region IX. That provision is reiterated in transitory Article 7 of Law No. 19,665 and in Article 484 of the Code of Criminal Procedure. // Then, effective December 16, 2000, the procedural rules that predated the entry into force of the laws governing the new criminal procedure system can no longer be said to be in effect in Region IX, as the competence and authorities in the investigation and prosecution of crimes of the jurisdictional bodies under the old system shall be tacitly and organically repealed with the entry into force of the new legal texts mentioned previously. // One provision of Law No. 19,665 specifically concerned ministers of the appellate court functioning

not instituted at the behest of or as a result of a complaint brought by the Regional Intendant or Provincial Governor; it was brought on the basis of a complaint that the victims themselves filed with the Public Prosecutor's Office, and which they joined as private accusers.

### *F. The right to appeal a judgment to a higher court or judge*

#### *The petitioners*

36. Petitioners Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán, contend that their right to appeal a judgment to a higher court or judge, a right recognized in Article 8(2)(h) of the American Convention, was violated by the fact that the Temuco Court of Appeals did only a partial review of the verdict, and dismissed the grounds upon which they based their motion to vacate; they also argued that the appeals court did not examine all the grounds invoked by the petitioners: "the superior court (...) stopped short of considering a number of our allegations, and did only a partial review of the judgment; the court's contention was that in order to consider the other allegations it would have to explore questions of fact, for which the higher court does not have jurisdiction. In other words, the higher court did not do an authentic review of the conviction, thereby violating the right of appeal. Furthermore, the higher court failed to review the argument made in the complaint, thereby transforming into an empty procedural measure."[47]

37. The petitioners are claiming that the appellate court did only a partial review of the lower court ruling because the appellate court addressed only two of the petitioners' arguments in their motion to vacate the lower court ruling: the fact that the lower court had not considered all the evidence, and the fact that the crime charged was classified as a terrorist offense, a violation of Article 8(2)(f) of the Convention reflected in *consideranda* 5 and 20 of the appellate court ruling. In those paragraphs of its ruling, the appellate court "narrows its jurisdiction so that it abstains from ruling on any essential questions raised by our defense, specifically the failure to consider numerous pieces of exculpatory evidence and the question of whether or not the crime being prosecuted was a terrorist offense. We were thus denied an authentic review of the guilty verdict."[48]

38. As for the appellate court's failure to address some of the arguments presented in the motions filed to have their convictions vacated, the petitioners contend that in the appellate

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as a single-judge courts. That law amended Article 50 of the Judiciary Statute so that those single-judge courts no longer had jurisdiction with respect to the investigation and prosecution of crimes committed as of the date on which the law took effect. // In Region IX, the new criminal procedure system, and thus the entire body of law we have herein described, entered into force on December 16, 2000, whereas the facts under investigation and prosecuted by virtue of the judgment being objected to occurred on December 16 and 17, 2001, in other words, one year after the new system of criminal prosecution took effect. Hence, one cannot claim that the investigation and prosecution of those events should have been done according to the old system of criminal procedure. // This follows from the fact that the legal texts in question are of a higher legal order, in particular Constitutional Amendment Act No. 19,519 and Law No. 19,640 the Constitutional Organic Statute of the Public Prosecutor's Office. It also follows from a systematic and balanced interpretation of the body of law governing criminal procedure.// These considerations notwithstanding, in May 2002 Law No. 19, 806 was passed amending the text of Article 10 of Law No. 18,314, to adapt it to fit the new system of criminal prosecution. Clearly, lawmakers have not hesitated to introduce amendments in the law to make the necessary adjustments once it enters into force; yet even before these amendments take effect, legal practitioners wield the tools of interpretation that the legal system affords them to correctly discern and apply the provisions of the law so as to keep them in balance." Response the Chilean State to Petition P-619-03 received by the IACHR on November 30, 2004, pp. 16-17.

[47] Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005, p. 16.

[48] Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005, p. 17.

court proceedings the defense attorneys for Patricia Troncoso, José Benicio Huenchunao and Juan Ciriaco Millacheo had asserted a violation of the principle of equal protection as grounds for vacating the verdict, as an arbitrary distinction had been made in the application of the principle of immediacy when the lower court weighed the evidence and exculpatory evidence. However, the higher court failed to address this argument.

***The State***

39. The State did not submit any substantive observations on this particular point.

### *G. Other arguments of the petitioners*

40. In the three cases under consideration, the petitioners have made a number of additional claims alleging violation of their guarantees under articles 8 and 9 of the Convention. These allegations allude to the following: (i) the aforementioned violation of the presumption of innocence, the admission and weighing of evidence of guilt and exculpatory evidence, and their application to criminal proceedings conducted against Mapuche indigenous persons; (ii) a failure to respect their rights to have the time and means to prepare their defense and question and summon witnesses, recognized in articles 8(2)(c) and 8(2)(f) of the American Convention, during the criminal trial and in the guilty verdict that the Angol Oral Criminal Trial Court delivered against Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán, given that the testimony that the Public Prosecutor's Office presented against them during the trial phase was not the same as the evidence presented in the investigative phase; the latter had been provided to their attorneys and was the basis upon which their defense was built; (iii) a failure to observe the principle of the non-retroactivity of criminal law, recognized in Article 9 of the Convention, to the detriment of petitioners Pascual Pichún and Aniceto Norín, by virtue of the fact that the anonymous witnesses used in the trial phase meant that a more restrictive criminal procedure law was being applied retroactively; (iv) failure to observe the right to equality of arms and to be able to summon witnesses, to the detriment of petitioners Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán, by virtue of the fact that the State allegedly paid witnesses to testify against the petitioners on the grounds that it was protection money, with the result that the petitioners did not receive the same procedural treatment that other persons who are not Mapuche indigenous people would receive when prosecuted for a crime; or (v) a failure to observe the right to equality in the case of the petitioners Juan Patricio Marileo *et al.* because the Trial Court did not follow apply the same criteria in admitting and weighing the evidence of guilt and exculpatory evidence, which was particularly detrimental to Patricia Troncoso, José Benicio Huenchunao and Juan Ciriaco Millacheo.

## *IV. PROVEN FACTS*

### *A. Context*

#### *1. The Mapuche indigenous people, their territorial situation and socioeconomic conditions*

41. The Mapuche indigenous people, composed of some six hundred thousand persons, is the largest indigenous group in Chile.[49] The different communities that compose the Mapuche

[49] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph 3.

people are grouped into five different identities: Huenteche, Nagche, Lafkenche, Pehuenche and Huilliche, located in regions VIII, IX and X, and on the island of Chiloé. A large proportion of the Mapuche people also lives in urban areas.[50] The social organization of the Mapuche indigenous people is structured around groups of families or extended families that form communities (*lof),* each with its respective territorial identity. The Mapuche people revere the *Lonkos* as their highest traditional authorities; *Lonkos* exercise leadership over their respective communities;[51] the combination of the *Lonkos* and the *Werkén* or messengers forms the indigenous leadership of a given community.[52]

42. The social and economic conditions of the Mapuche indigenous people are such that they live in poverty and are, in general, worse off than the non-indigenous population of Chile, as various international human rights organization have reported.[53] A number of organizations and experts have drawn an association between the Mapuches' socioeconomic condition and their gradual loss of territory and the deterioration of the environment, both factors causing this people's gradual impoverishment.[54]

43. At the time of the events that gave rise to the petitions that are the subject of this merits report (2000-2004), Chile had not yet ratified ILO Convention 169 and the territorial rights of its indigenous peoples were not recognized in the Constitution. Nevertheless, a legal statute for indigenous lands and natural resources was already in force: Law 19,253. This law recognizes as indigenous lands all those given by the State as land grants since the XIX century. The law also provides certain tools to protect these lands. Nonetheless, the Mapuche people believe that their ancestral territory is much larger, and includes what the Mapuche refer to as the "ancient lands," most of which are now privately owned or the property of the State.

### *2. The social and political mobilizations of the Mapuche indigenous people, the social representation of those mobilizations, and the State's response*

44. The areas where the Mapuche people have traditionally lived include Regions VIII and IX of Chile, where in recent years a number of social mobilizations and protests have been staged by Mapuche authorities, leaders, activists and members, motivated by the declared

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[50] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph. 3. See also: International Federation for Human Rights: "*Chile – La otra transición chilena: derechos del pueblo Mapuche, política penal y protesta social en un estado democrático*" *[Chile – The other Chilean transition: the rights of the Mapuche people, policy on crime and social policy in a democratic state"],* FIDH, April 2006 – Report provided by petitioners Pascual Pichún and Aniceto Norín on June 14, 2006, added to the case file and forwarded to the State, p. 5.

[51] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003.

[52] Original petition that Víctor Ancalaf Llaupe, 69 authorities, leaders and members of the Mapuche people and three attorneys filed with the IACHR, received May 20, 2005.

[53] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph. 3. UN – Economic and Social Council – Committee on Economic, Social and Cultural Rights: Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant. Concluding observations of the Committee on Economic, Social and Cultural Rights. Chile. Doc. UN E/C.12/1/Add.105, December 1, 2004, paragraph 13.

[54] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph 19.

objective of recovering the ancestral lands and on the grounds of the conditions of poverty in which the Mapuche indigenous people live.[55]

45. In the course of the Mapuche people's social mobilizations and protests, sporadic acts of a violent nature have taken place, among them the takeover of land, burning of forests and buildings, and setting fire to machinery and vehicles. This does not imply that these movements or protests are, as a general rule, violent in nature, nor that all those participating in these movements or protests have engaged in violent conduct, nor that the substantial objectives they seek to achieve are violent.

46. The media and State officials have described the Mapuche people's social and political movements with the label "Mapuche conflict," an expression that has become common parlance among non-indigenous sectors of society to refer to said the process of socioeconomic and territorial protests and claims.[56]

47. This situation of social protests and mobilizations has triggered widespread debate among various State agencies. The House of Deputies, for example, held a special session in June 2002, while the Senate Commission on the Constitution, Legislation, Justice and Regulations prepared a special report on the subject. In the course of that special session, reference was made to the so-called "Mapuche conflict." The language used illustrates how that sociopolitical situation is depicted within Chilean government circles and by non-indigenous society in general:

> For some time now, Regions VIII and IX have been the scene of multiple acts of violence, basically in rural sectors. They take the form of illegal takeovers and seizures of property, intentional burning of crops and plantations, destruction of machinery, warehouses and homes, attacks on the life and the physical integrity of the farmers, farm workers, transportation workers, etc., all committed by organized groups that usually wear hoods, and perpetrate these acts under the pretext of asserting land claims for the Mapuche communities and for the creation of a separate State or autonomous nation, with its own territory and right to self-determination (...).[57]

48. This social representation, which the communications media have helped to create,[58] has exacerbated the climate of tension surrounding the sociopolitic processes of the Mapuche

[55] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraphs 28-29. UN – International Covenant on Civil and Political Rights – Human Rights Committee –Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee. Chile, April 17, 2007, Doc. UN, CCPR/C/CHL/CO/5, paragraph 19.

[56] The original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, offers the following explanation: *"In recent years, the media have reported extensively on what has been labeled the "Mapuche conflict," which is an expression that an important section of the news media uses to refer to what they believe are the tensions caused by indigenous peoples who oppose the country's economic development and undermine public order and security."* (p. 2). See also: International Federation for Human Rights: "*Chile – La otra transición chilena: derechos del pueblo Mapuche, política penal y protesta social en un estado democrático*" *[Chile – The other Chilean transition: the rights of the Mapuche people, policy on crime and social policy in a democratic state"],* FIDH, April 2006 – Report provided by petitioners Pascual Pichún and Aniceto Norín on June 14, 2006, added to the case file and forwarded to the State – p. 18.

[57] Report of the Commission on the Constitution, Legislation, Justice and Regulations, prepared by order of the Senate in connection with the Mapuche Conflict as it pertains to public order and citizen security in certain regions. Bulletin No. S 680-12 (2003). See also: UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph 39.

[58] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in

indigenous people. Thus, in some quarters of the State and in Chilean public opinion, the Mapuche people's acts of violent social protest and political mobilization are viewed as acts of terrorism. The terrorism label attached to their activities has triggered the application of anti-terrorist legal instruments against them.

### *3. The Chilean State's response and the selective application of the Anti-Terrorism Law to members of the Mapuche indigenous people*

49. The State has reacted to the situation of social protests and mobilizations of the Mapuche indigenous people in various ways, which include judicially prosecuting Mapuche individuals for alleged violations of criminal law.[59] The leaders and members of the Mapuche indigenous people view this reaction by the State as persecution aimed at repressing their processes of mobilization and protests by way of the courts.[60] Although most of the criminal cases have been prosecuted under ordinary criminal law, a significant number of cases have been prosecuted under Law 18,314 of 1984,[61] also known as the "Anti-Terrorism Act". This was especially true in the period between 2000 and 2005.[62]

50. In this context, a number of international human rights organizations have expressed concern over the existence of a pattern of selective enforcement of Chile's anti-terrorism laws to Mapuche indigenous persons, in the framework of their political and social movement and protest. This pattern is said to have been facilitated by the broad scope of the definition of terrorist crimes under Law 18,314. These observations will be examined at greater length in the analysis of the law, at paragraph 149 below.

51. At this point, as an example of this concern, the Commission refers to the statement made by the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, R. Stavenhagen, who wrote the following in his November 2003 report on his Mission to Chile:

> In the opinion of some experts, this combination of a new criminal procedure, the counter-terrorist law and military jurisdiction creates a situation in which the right to due process is weakened, and this affects, in a selective way, a clearly identified group of Mapuche leaders. This is a matter of concern, regardless of the seriousness of the acts in which they may have been involved, with regard to respect for their right to due process."[63]

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accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph 55.

[59] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph 31.

[60] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph 38.

[61] Law No. 18,314 which establishes what offenses constitute terrorist conduct and the penalties they carry, published in the Official Gazette of May 17, 1984.

[62] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph 35.

[63] UN – Economic and Social Council – Commission on Human Rights - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56. Addendum – Mission to Chile – Doc. UN E/CN.4/2004/80/Add.3, November 17, 2003, paragraph 37.

> He therefore recommended to the State that "[u]nder no circumstances should legitimate protest activities or social demands by indigenous organizations and communities be outlawed or penalized"[64] and that "[c]harges for offences in other contexts ("terrorist threat", "criminal association") should not be applied to acts related to the social struggle for land and legitimate indigenous complaints."[65]

52. The current U.N. Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people, James Anaya, included the following comment in his follow-up to the recommendations of the previous Rapporteur for Chile, October 2009:

> 61. The Special Rapporteur is mindful of the commitment that the Government made in years past and reported to human rights bodies, which was that it would not use the Counter-Terrorism Law to prosecute individuals in cases related to the Mapuches' social movements and therefore calls upon the competent authorities to honor that commitment. In this regard, it underscores the importance of amending Law No. 18314 and of adopting a more precise definition of terrorist crimes, as the Human Rights Committee and the Committee for the Elimination of Racial Discrimination recommended.[66]

53. Thereafter, in his February 2005 report on analysis of country situations and other activities of the Special Rapporteur, the latter commented that "the Special Rapporteur continues to express his concern over the unjustified application of Antiterrorist Law No. 18.314 to activities related to social issues and land rights."[67]

### *4. Relevant provisions of the Constitution and Law 18.314 (Anti-Terrorism Act)*

54. Article 9 of the Constitution of Chile provides:

> Terrorism, in any form, is fundamentally contrary to human rights.
>
> A qualified majority law shall determine acts of terrorism and their penalties. Anyone found guilty of these crimes shall be disqualified for 15 years from discharging public duties or holding public office, regardless of whether or not the appointment is by popular election; from being the rector or director of an educational establishment or performing teaching activities therein; from operating a social communications media outlet or being a director or manager thereof, or performing therein functions connected with the broadcast or dissemination of opinions or information; and from being the leader of a political organization, an organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time. The foregoing is understood to be without prejudice to other disqualifications provided by law, including those of longer duration.
>
> The offenses referred to in the paragraph above shall always be considered common, not political, crimes for all legal effects and shall not qualify for an individual pardon, except to commute a sentence of death to one of life imprisonment.

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[64] Ibid, paragraph 69.

[65] Ibid, paragraph 70.

[66] UN - Human Rights Council - Twelfth session - Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development - Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya: Addendum: the situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur. A/HRC/12/34/Add. 6, October 5, 2009. [Translation ours]

[67] UN - ECONOMIC AND SOCIAL COUNCIL – COMMISSION ON HUMAN RIGHTS – Indigenous Issues

Human Rights and Indigenous Issues - Report of the Special Rapporteur on the Situation of Human Rights and

Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen. Addendum. Analysis of Country Situations and Other Activities of the Special Rapporteur. Doc. E/CN.4/2005/88/Add.1 – February 16, 2005.

55. Law 18,314 prescribes more severe penalties than those prescribed for common crimes; it states that those who engage in the behaviors punishable under that law shall have their political rights restricted; it further provides that preventive detention of the detained shall only be permissible by a unanimous vote of the judges on the appellate tribunals; it permits longer periods of preventive detention and allows the inquiries to be conducted in secret for up to six months; it also allows tapping of telephone conversations and provides for restricted visiting privileges, among other measures.

56. The following are the relevant provisions of the Anti-Terrorism Act. Articles 1 and 2 of Law 18,314, as amended by 1991 Law No. 19,027, read as follows:

> Article 1. The offenses listed in Article 2 constitute terrorist offenses when any of the following circumstances apply:
>
> 1a The offense is committed with the intention of instilling in the population or in a portion thereof a well-founded fear of becoming victim to similar crimes, either due to the nature and effect of the methods used or evidence suggesting that it is part of a premeditated plan to attack a specific category or group of people.
>
> The intent of instilling fear among the general population shall be presumed, unless there is indication to the contrary, when the offense was committed by means of explosive or incendiary devices, weapons with great destructive power, toxic, corrosive or infectious agents, or other agents that could cause great havoc, or by mailing letters, packages or the like with explosive or toxic effects.
>
> 2a The offense is committed for the purpose of pressuring authorities to make certain decisions or imposing demands.
>
> Article 2: The following crimes shall constitute terrorist offenses when any of the conditions indicated in the previous article is present:
>
> 1. The crimes of homicide, punishable under articles 390 and 391; crimes of felonious assault, punishable under articles 395, 396, 397 and 399; kidnapping crimes, either by locking up or detaining a person or holding a person hostage, and abduction of minors, punishable under articles 141 and 142; the crimes of mailing explosive devices, punishable under Article 403 bis; the crimes of arson and vandalism, punishable under articles 474, 475, 476 and 480; violations of public health covered in articles 313(d), 315 and 316; the crime of derailing, punishable under Articles 323, 324, 325 and 326, all articles in the Criminal Code. I
>
> 2. Seizing or attacking a boat, aircraft, railway, bus or other means of public transportation in service, or engaging in acts that threaten the life, physical safety or health of its passengers or crew.
>
> 3. An attempt on the life or physical integrity of the Head of State or other political, judicial, military, police or religious authority or internationally protected persons, by virtue of their office.
>
> 4. Placing, tossing, or shooting bombs or explosive or incendiary devices of any type that affect or could affect personal safety or cause harm.
>
> 5. Unlawful association for the purpose of committing crimes that qualify as terrorism under the preceding subparagraphs and Article 1.
>
> When committed by an unlawful terrorist organization, the crimes of kidnapping, either by locking up or detaining a person or holding a person hostage, and abduction of minors, set forth in articles 141 and 142 of the Criminal Code, shall always be regarded as terrorist offenses."

57. For its part, Article 7 of Law 18,314 provides the following with regard to attempts or threats to commit the offenses classified as terrorism under that law:

> Article 7. An attempt to commit an act of terrorism described in this law shall be punished with the minimum sentence established by law for the consummated crime. If there is only one degree of punishment, the provisions of Article 67 of the Criminal Code shall be applied and the minimum shall be tentatively imposed.
>
> A serious or credible threat to commit any of the aforementioned crimes shall be punished as an attempt of same.
>
> Conspiracy with regard to the same crimes shall carry the same penalty as the consummated crime, reduced by one or two degrees.

***B. The criminal case brought against Mapuche Lonkos Pascual Pichún Paillalao and Aniceto Norín Catrimán and their conviction***

***1. The fires that led to the criminal case against the Lonkos***

58. On December 13, 2001, a fire occurred in the house of the manager of the Nancahue Tree Farm located in the district *[comuna]* of Traiguén, in Chile's Region IX. This property belongs to Mr. Juan Agustín Figueroa, who was once Minister of Agriculture; at the time of the fire, he was a member of Chile's Constitutional Tribunal.[68] No one was hurt in the fire; however for the courts the owner estimated the property damage at $45,000,000 (forty-five million Chilean pesos).[69]

59. On December 16, 2001, there was a fire at the San Gregorio tree farm, which initially affected 10 hectares of pine trees; later on, the fire broke again and destroyed approximately 80 hectares. The San Gregorio tree farm belongs to the brothers Juan Rafael and Julio Sagredo Marín.[70] No one was hurt in the fire, and there is no estimate in the case file of the value of the property damage that the fire caused.

60. Aniceto Norín Catrimán is the *Lonko* in the community of Lorenzo Norín (Didaico sector), while Pascual Pichún Paillalao is the *Lonko* in the community of Antonio Ñirripil (Temulemu sector). Both communities are in the district *[comuna]* of Traiguén.[71] The community of Antonio Ñirripil is adjacent to the Nancahue Tree Farm.[72]

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[68] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 6. Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 2. Not contested by the State.

[69] The owners' estimate was not introduced with supporting evidence in court, which is why the Angol oral criminal trial court dismissed the claim of civil damages in its verdict of conviction of September 27, 2003.

[70] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 6. Verdict of the Angol oral criminal trial court – chamber with jurisdiction, September 27, 2003. Addendum to the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, and to the communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received June 21, 2004.

[71] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 2. Original Petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 2.

[72] Original petition that Pascual Pichún Paillalao filed with IACHR, received on August 15, 2003, p. 2. Verdict of the Angol oral criminal trial court – chamber with jurisdiction, September 27, 2003. Addendum to the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, and to the communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received June 21, 2004.

61. Pascual Pichún was accused of the fire that destroyed the house of the manager of the Nancahue Tree Farm; with that, criminal proceedings were instituted against him in which he was charged with the crimes of terrorist arson, and of threatening the owner and the manager of the Nancahue Tree Farm with terrorist arson.[73]

62. Aniceto Norín was accused of the fire that burned the San Gregorio property; with that, criminal proceedings were instituted against him in which he was charged with the crimes of terrorist arson and of threatening the owners and managers of the property with terrorist arson.[74]

63. The authorities also charged Patricia Roxana Troncoso Robles as one of the arsonists. She is an activist who has supported the Mapuche indigenous people's social movement and territorial claims.[75]

64. The criminal cases against Pascual Pichún, Aniceto Norín and Patricia Troncoso were conducted as a single trial, in which the party bringing the charge was the Public Prosecutor's Office; the Office of the Intendant of Region IX and the Office of the Governor of Malleco Province became parties to the case, and Juan Agustín Figueroa was the private accuser.[76]

### *2. Preventive detention and criminal investigation prior to indictment*

65. Under the provisions of Law 18,314, the investigation was conducted in secret for six months.[77] In September 2002, the investigation was closed and the suspects were formally charged; March 31, 2003 was set as the date for oral arguments.[78]

66. The Public Prosecutor's Office requested that Lonko Pascual Pichún be taken into custody on the very day of the fire at the Nancahue tree farm; Traiguén's judge charged with protecting the constitutional rights and guarantees of persons under investigation acceded to the request and issued the warrant to have him taken into custody, which happened on December 21

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[73] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 6. Verdict of the Angol oral criminal trial court – chamber with jurisdiction, September 27, 2003. Addendum to the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, and to the communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received June 21, 2004.

[74] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 6. Verdict of the Angol oral criminal trial court – chamber with jurisdiction, September 27, 2003. Addendum to the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, and to the communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received June 21, 2004.

[75] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 6. Verdict of the Angol oral criminal trial court – chamber with jurisdiction, September 27, 2003. Addendum to the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, and to the communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received June 21, 2004.

[76] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003. Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003. Verdict of the Angol oral criminal trial court, April 14, 2003, *Consideranda* 1. Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received August 15, 2003.

[77] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 7. Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 3. Not contested by the State.

[78] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 7. Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 3. Not contested by the State.

of that year; Pascual Pichún was held in preventive detention for three days.[79] Then, on March 3, 2002, Pascual Pichún was again taken into custody by order of the court; this time he was in preventive detention for one year and three months. Similarly, Lonko Aniceto Norín was taken into preventive custody on March 3, 2002, and was held in custody until the original verdict of acquittal was handed down.[80]

67. The preventive detention of Aniceto Norín and Pascual Pichún was reviewed by the courts on several occasions, but was always upheld both by the Traiguén judge charged with protecting the rights and guarantees of persons under investigation and by the Temuco Appeals Court.[81]

### *3. The Public Prosecutor's indictment*

68. The Public Prosecutor's Office and the complainants brought charges against Aniceto Norín and Pascual Pichún for their aforementioned joint criminal responsibility –together with Patricia Troncoso- as authors of the crimes of terrorist arson at the home of Juan Agustín Figueroa Elgueta and of threatening the owners and managers of the Nancahue Tree Farm; they also charged Aniceto Norín –together with Patricia Troncoso- with the crimes of terrorist arson at the San Gregorio property, and threatening the owners and managers of that property with terrorist arson.

69. The accusers' position was that these were terrorist crimes under Law 18,314, "as the fires and threats were committed with the intention of instilling in the population or in a portion thereof a well-founded fear of becoming victim to similar crimes, either due to the nature and effect of the methods used or evidence suggesting that it was part of a premeditated plan to attack a specific category or group of people; the intent of instilling fear among the general population shall be presumed, unless there is indication to the contrary, when the offense was committed by means of explosive or incendiary devices."[82] They therefore requested that Article 2(1) of Law 18,314 be applied, in relation to the types of fires indicated in Article 476 of the Criminal Code; they requested enforcement of Article 7 of Law 18,314 in the case of the threats. In the bill of indictment, the Public Prosecutor sought penalties of 5 years and one day for the crime of threatening a terrorist assault, and 10 years and one day for the crime of terrorist arson, together with the accessory penalties and fines required under the law.[83]

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[79] In the original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, the following is explained: "On the morning of the very day of the fire at the home of the manager of the Nancahue Tree Farm, even before the tests were done to determine the cause of the fire, the investigating prosecutor with the Public Prosecutor's Office asked that I be taken into custody (...). The Traiguén judge charged with protecting the rights and guarantees of persons under investigation (...) agreed to his request and issued a warrant for my arrest. // On December 21, 2001, I was taken into custody. A decision of the Traiguén Judge of Constitutional Guarantees ordered that I be held in custody for another three days, so that the Prosecutor might compile background information to formally institute the investigation (...) At the end of those three days, the hearing was held where the public prosecutor formally advised me that I was under investigation, but he also said that he did not have the information he needed to bring formal charges; he asked the court to extend my detention by another seven days in application of Law 18, 314, which criminalizes terrorist offenses and establishes the penalties they carry. The Judge of Constitutional Guarantees denied the prosecutor's request on the grounds that the conditions to classify the action as a terrorist offense had not been established, and there ordered my unconditional release." ( p. 3)

[80] Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 3. Not contested by the State.

[81] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 7. Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 3. Not contested by the State.

[82] Verdict of the Angol oral criminal trial court dated April 14, 2003, *consideranda* 3. Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[83] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 7. Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 3. Verdict of the Angol oral

### *4. The trial and first verdict –acquittal- delivered by the Angol oral criminal trial court*

70. Oral arguments in the case against Pascual Pichún, Aniceto Norín and Patricia Troncoso were conducted on March 31 and April 2 to 9, 2003.[84] The Angol oral criminal trial court delivered its verdict of acquittal on April 14, 2003.[85]

71. The evidence introduced during the trial included two anonymous witnesses. When they testified in court at the public hearing, they were behind a screen, invisible to everyone in the courtroom except the judges. The defense attorneys representing the defendants were told the identity of these witnesses and were allowed to cross examine them during the proceedings; nevertheless, the Court gave instructions that the attorneys were not to reveal the identity of the two anonymous witnesses to the defendants.[86]

72. Based on the evidence introduced, the Court ruled that the following facts had been established: (a) that "terrorist fires" had happened at the Nancahue and San Gregorio properties, set by third parties; and (b) that threats had been made against the owners and managers of the two properties. The Court's analysis of these events as terrorist acts was as follows:

> ...background information that, taken together and after being duly examined, leads these judges to conclude, beyond a reasonable doubt, that the events recounted in the indictment and described, respectively, as a house fire at the Nancahue tree farm, a forest fire at the San Gregorio tree farm, and the threats made against the owners and managers of those properties, do qualify as terrorist offenses, inasmuch as the actions that underlie these crimes demonstrate that the form, methods and strategies employed had a malicious intent, which was to instill a generalized fear in the area, a situation that is a public and notorious fact that these judges cannot ignore; this is a serious conflict between a portion of the Mapuche ethnic group and the rest of the population, a fact neither argued by the parties nor unknown to them.
>
> In effect, the crimes herein specified must be viewed against the backdrop of a process of recovering Mapuche lands, in which the perpetrators took direct action, without respecting the legal and institutional order and by recourse to the use of force through measures that were planned, agreed and prepared in advance by radicalized groups that seek to create a climate of insecurity, instability and fear in various sectors of Regions VIII and IX. These measures can be summarized as follows: excessive demands that violent groups make of owners and landholders, warning them of the various consequences they will face if they do not give in to the demands. Many of these threats have materialized in the form of felonious assaults, robberies, theft, arson, vandalism and usurpation, which have affected both the persons and property of various farmers and tree farmers in this part of the country; in the oral proceedings the court heard numerous pieces of testimony and learned some of the background to this situation, even though that information is public knowledge.
>
> The obvious inference is that the objective is to instill in the population a well-founded fear of falling victim to similar crimes, and thereby force the owners to cease any further exploitation

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criminal trial court dated April 14, 2003, *consideranda* 3. Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[84] Verdict of the Angol oral criminal trial court, April 14, 2003, *Consideranda 1.* Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[85] Verdict of the Angol oral criminal trial court, April 14, 2003, *Consideranda 1.* Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[86] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, pp. 7-8. Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, pp. 4-5. Not contested by the State.

> of their properties and ultimately to force them to abandon their properties, as the sense of insecurity and uneasiness that these attacks cause have consequences, such as driving off the workforce or increasing the cost of labor, increasing the costs of renting farming equipment and the cost of insuring the properties, the buildings and the crops. It is becoming more and more common to see workers, machinery, vehicles and work set up on the various properties under police protection, to ensure that the work can get done. All this affects constitutionally protected rights.[87]

73. The Court then held that the authorship of these acts had not been demonstrated, and therefore held that Aniceto Norín and Pascual Pichún could not be held criminally responsible.

74. The Court's analysis meant that Aniceto Norín and Pascual Pichún –and Patricia Troncoso as well- were cleared of any criminal responsibility by the oral criminal trial court, which also ordered the Public Prosecutors Office and the private accusers to pay costs, dismissed the civil suit and ordered costs there as well.[88] Having been acquitted, the two *Lonkos* were released after spending one year and three months in preventive detention.[89]

### *5. The motion filed with the Supreme Court to have the lower court ruling vacated and the verdict of acquittal overturned.*

75. The Public Prosecutor's Office, the Government and the private accuser filed a motion with the Supreme Court on April 24, 2003[90] seeking to have the lower court's ruling vacated and the verdict overturned. It cited the grounds set forth in Articles 373-a)[91] and 374-e)[92] of the Code of Criminal Procedure. The three motions argued that the ruling did not contain an adequate discernment of the evidence entered by the accusers during oral arguments.[93] The Supreme Court decided that it would first rule on the motion to vacate,[94] and concluded that the

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[87] Verdict of the Angol oral criminal trial court, April 14, 2003, *Consideranda 10.* Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[88] Verdict of the Angol oral criminal trial court, April 14, 2003, operative part. Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[89] Original petition that Aniceto Norín Catrimán filed with the IACHR, received on August 15, 2003, p. 9. Original petition that Pascual Pichún Paillalao filed with the IACHR, received on August 15, 2003, p. 5. Not contested by the State.

[90] Chilean Supreme Court Decision, July 2, 2003. Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[91] This article reads as follows: Article 373. A trial or judgment may be declared null and void: (a) when the rights recognized in the Constitution or international treaties in force in Chile have been substantively violated at any stage of the proceedings or in the judgment (...)".

[92] This article provides the following: Article 374. Grounds for vacating trials and overturning verdicts. Trials shall be vacated and verdicts overturned whenever: (...) (e) the judgment has omitted one of the requirements established in Article 342, subparagraphs c), d) or e)." For its part, Article 342 reads as follows: "Article 342. Content of the verdict. The final verdict shall contain: (...) (c) A clear and cogent explanation of each of the facts and circumstances that the court takes as established, whether favorable or unfavorable to the defendant, and an analysis of the means of evidence that support those conclusions, in accordance with Article 297; d) the legal and doctrinal reasons for the court's classification of each of the facts and circumstances and as the basis for the judgment; e) the decision to either convict or acquit each of the defendants of each of the crimes of which they were accused in the indictment; the ruling on any civil liability the defendants may have and the amount of any damages owed; (...)".

[93] The Supreme Court explained that: "The motions have one fact in common, which is that in arriving at the conclusion expressed in *considerada eleven,* which was that the involvement of the defendants in the punishable offenses attributed to them (which, moreover, the judges deemed to have been established) had not been proven, the court did not properly assess and weigh the evidence that the accusers presented in the oral arguments, as will be examined below. The accusers end by requesting that the oral proceedings be vacated, that the verdict be overturned and that a new trial by a court having jurisdiction be ordered." Ruling of the Chilean Supreme Court, July 2, 2003; *consideranda* one. Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[94] The Court explained that although the motion seeking to have the rulings vacated were based on two different grounds –those established in Article 373 a) and in Article 374 e) of the Code of Criminal Procedure- "for reasons that will

analysis of the verdict being challenged was inadequate as the court's interpretation had failed to analyze all the evidence in the case file, particularly the evidence supplied by the accusers to prove that the defendants were guilty.[95]

76. The Supreme Court thus upheld the motion asserting the absolute nullity of a ruling, set forth in Article 374 (e) of the Code of Criminal Procedure, in relation to Article 342 (c). Accordingly, it refrained from deciding the other grounds invoked by the complainants.[96] Its decision, which was a majority decision, was to vacate the criminal trial, overturn the verdict of acquittal and order the competent trial court to retry the case. One of the justices on the Court cast a dissenting vote.

#### *6. The second verdict –conviction- delivered by the Angol oral criminal trial court*

77. Subsequent to the Supreme Court's nullification of the verdict of acquittal, a new criminal trial got underway on September 9, 2003. When the trial came to an end, the Angol oral criminal trial court, with different judges presiding, delivered its verdict to convict on September 27, 2003. Two of the defendants, *Lonkos* Norín and Pichún, were convicted of the crime of "terrorist threats" and sentenced to five years and a day of imprisonment.[97] Defendant Patricia Troncoso was cleared of any responsibility in the crimes of which the Public Prosecutor's Office had charged her.

78. The Court explained the reasons why it concluded that the crimes charged were terrorist offenses:

> According to the *Diccionario de la Lengua Española* the term "terrorism" means domination by terror, a succession of violent acts committed to instill "terror." It defines terror as fear, fright, dread of some threat or danger that one fears. Our laws do not define terrorist offences; they simply enumerate them. Terrorist offences are acts of violence committed by armed persons against the lives, health and liberty of persons, or harm or damages inflicted systematically and planned in advance. The objective is to create insecurity, a collective fear, all for the sake of undoing constitutional order or any other activity carried out within the legal order in order to instill terror. Among the elements that must be present are violence and the goal of wreaking havoc in the political-social order by annihilating security and constitutional order as protected legal rights, which in turn affects other rights such as life, physical integrity or individual freedom.
>
> According to the literature, threat is the use of moral or physical force exerted against free will. This presupposes either the introduction of wrongdoing of another type or threatening -either tacitly or expressly- some wrongdoing that constitutes a crime and that affects the honor, property or family of persons in a real and serious way.
>
> (...) This Tribunal is persuaded that the presence of the criminal elements required under Article 7 of Law 18,314 which describes terrorist offences and the penalties they carry, has been established. The statements examined above come from persons who were directly

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be explained later in this ruling, the Court has opted to single out and analyze the second of the two grounds, i.e., the one that argues the absolute nullity of a ruling based on the fact that the ruling failed to meet any of the requirements set forth in Article 342, subparagraphs c), d) or e)." Ruling of the Chilean Supreme Court, July 2, 2003; *consideranda* one. Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[95] Ruling of the Chilean Supreme Court, July 2, 2003; *consideranda* 8. Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[96] Ruling of the Chilean Supreme Court, July 2, 2003; *consideranda 9*. Attached to the original petitions that Aniceto Norín and Pascual Pichún filed with the IACHR, received on August 15, 2003.

[97] Communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, p. 3.

associated with the facts in this case or who came to learn of them for a variety of reasons. Their testimony is consistent with the expert reports and documentary evidence introduced during the hearing. This background information, taken together and after being duly examined, leads these judges to conclude, beyond a reasonable doubt, that the events recounted in the indictment of the prosecution and the private accusations, no matter what actions caused these crimes, demonstrate that the form, methods and strategies employed had a malicious intent, which was to cause widespread fear within the area.

The crimes herein specified must be viewed against the backdrop of a process of recovering Mapuche lands, in which the perpetrators took direct action, without respecting the legal and institutional order and by recourse to the use of force through measures that were planned, agreed and prepared in advance by radicalized groups that seek to create a climate of insecurity, instability and fear in Regions VIII and IX. These measures can be summarized as follows: excessive demands that violent groups make of owners and landholders, warning them of the various consequences they will face if they do not give in to the demands. Many of these threats have materialized in the form of felonious assaults, robberies, theft, arson, vandalism and usurpation, which have affected both the persons and property of various farmers and tree farmers in this part of the country.

The objective is to instill in the population a well-founded fear of falling victim to similar crimes, and thereby force the owners to cease any further exploitation of their properties and ultimately to force them to abandon their properties. The sense of insecurity and uneasiness that these attacks cause have consequences, such as driving off the workforce or increasing the cost of labor, increasing costs or the mortgage, increasing the costs of leasing farming equipment and the cost of insuring the properties, the buildings and the crops. It is becoming more and more common to see workers, machinery, vehicles and work set up on the various properties under police protection, to ensure that the work can get done. All this affects constitutionally protected rights.

The above follows from the testimony given by Juan and Julio Sagredo Marín, Miguel Angel Sagredo Vidal, Mauricio Chaparro Melo, Raúl Arnoldo Forcael Silva, Juan Agustín Figueroa Elgueta, Juan Agustín Figueroa Yávar, Armin Enrique Stappung Schwarzlose, Jorge Pablo Luchsinger Villiger, Osvaldo Moisés Carvajal Rondanelli, Gerardo Jequier Shalhli and Antonio Arnoldo Boisier Cruces. Their testimony was consistent overall, with some slight variations in the particulars. They all testified that they had been direct victims of or had knowledge of threats or felonious assaults on persons or property, perpetrated by persons of Mapuche origin. Albeit in different ways, these witnesses all expressed the fear that those acts instilled in them. This ties in with what the expert José Muñoz Maulen said, which he said was supported by a CD obtained at the website called "sitio htp/fortunecety.es/" (sic), which describes various activities associated with a movement by part of the Mapuche ethnic group to reclaim lands and underway in the country's eighth and ninth regions; the background information contained in the report of the meeting of the Senate Commission on the Constitution, Law, Justice and Regulations, July 1, 2002, which ended in a finding to the effect that the State had failed to provide service; the uncontested reports at pages 10 and 11 of the March 10, 2002 edition of *El Mercurio* concerning the number of conflicts caused by groups of Mapuches in terrorist acts, publications of *La Tercera* on the internet, *La Segunda* on the internet and *El Mercurio Electrónico*, published on March 26, 1999, December 15, 2001, March 15, 2002 and June 15, 2002, respectively, the three graphs taken from the web pages of the National Commission on Foreign Investment in Chile, divided into sectors and by regions, according to the country's administrative political division, which does a dollar comparison of the amounts invested in other regions and in the Ninth Region, illustrating that private investment in the region has dropped.

Underpinning all this is the legal presumption set forth in the second paragraph of subparagraph 1 of Law 18,314, now amended by the new principles for the weighing of evidence set forth in articles 295 *et seq.* of the Code of Criminal Procedure. In effect, at the present time, logic dictates that the public's well-founded fear of falling victim to similar

crimes is borne out by the fact that it is now threatened with falling victim to and being harmed by a crime committed using incendiary devices.[98]

79. At *consideranda* 15, the Court explained the background information that, in its view, had a bearing on its decision to convict the defendants of the crime of threats:

As for the involvement of the two defendants, the following has to be considered:

1. As general background and from the evidence that the Public Prosecutor and the private accusers introduced at trial, it is a public and notorious fact that *de facto* organizations have existed within the area for some time that commit acts of violence or incite violence on the pretext of their territorial claims. Their *modus operandi* includes various acts of force targeted at the lumber businesses, small- and medium-size farmers, all of whom have one thing in common: they are owners of properties that are adjacent to, neighbor or are nearby indigenous communities that are asserting historical claims to those properties. The purpose of the measures is to reclaim lands that they believe are their ancestral lands. The illegal occupation of those lands is the means to accomplish the most ambitious goal. Through these actions, they believe they will gradually recover a portion of their ancestral territory and thereby strengthen the territorial identity of the Mapuche people. This is what the court learned from the testimony given by victims Juan and Julio Sagredo Marín, Juan Agustín Figueroa Elgueta and Juan Agustín Figueroa Yávar, which was supported by the testimony of Armin Stappung Schwarzlose, Gerardo Jequier Salí, Jorge Pablo Luchsinger Villiger, Antonio Arnaldo Boisier Cruces and Osvaldo Moisés Carvajal Rondanelli, examined earlier.

2. It has not been sufficiently established that these acts were caused by persons outside the Mapuche communities, since they are acts clearly intended to create a climate of harassment towards the property owners in the sector, in order to instill fear and get them to accede to their demands. This is the logic of the so-called "Mapuche Problem." The perpetrators knew the territory they were claiming and no Mapuche community or property was affected.

3. It has been established that defendant Pascual Pichún is *lonko* of the community of 'Antonio Ñirripil' and that Segundo Norín is *lonko* of the community of 'Lorenzo Norín.' This means they have authority within their community and have some degree of command and leadership in those communities.

4. Defendants Pichún and Norín stand convicted of other crimes involving occupations of land committed prior to these events and against timberlands located near their respective communities, as the record of Case No. 22,530 and combined cases shows. Pascual Pichún was sentenced to 4 years imprisonment, the maximum short-term prison sentence, while Segundo Norín was sentenced to serve 800 days in prison, which is an average short-term prison sentence. They were both given accessory penalties and ordered to pay legal expenses and costs for the crime of (*sic).* Pichún Paillalao was also sentenced to serve 41 days and to pay a fine of 10 monthly tax units for the crime of driving under the influence (...).

5. The Mapuche communities of Didaico and Temulemu are adjacent to the Nancahue tree farm, and

6. According to the statement that Osvaldo Carvajal, both defendants are members of a violent, *de facto* organization called the *Coordinadora Arauco Malleco C.A.M.*[99]

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[98] Verdict of the Angol oral criminal trial court – chamber with jurisdiction- September 27, 2003; *consideranda* 13. Attached to the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, and to the communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received on June 21, 2004.

[99] Verdict of the Angol oral criminal trial court –chamber with jurisdiction- of September 27, 2003; *Consideranda* 15. Attached to the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received

80. Based on these considerations and evidence that, in the judges' opinion, proved that the defendants had had a hand in setting the fires, the oral criminal trial court concluded that defendants Pascual Pichún and Aniceto Norín were guilty of the authorship of the crimes of "terrorist arson" and sentenced them to imprisonment for five years and one day.

81. Furthermore, ancillary penalties were imposed under Article 9 of the Constitution of Chile in the following terms:

> That, those found guilty shall, furthermore, be disqualified for 15 years from discharging public duties or holding public office, regardless of whether or not the appointment is by popular election; from being the rector or director of an educational establishment or performing teaching activities therein; from operating a social communications media outlet or being a director or manager thereof, or performing therein functions connected with the broadcast or dissemination of opinions or information; and from being the leader of a political organization, an organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time.[100]

82. Finally, the Court denied Pascual Pichún's request to have the identity of protected witness No. 1 revealed so that legal action could be instituted against the witness for perjury. The court dismissed the request in view of the nature and seriousness of the crimes established in this ruling.[101]

83. Therefore, in the operative part of the oral criminal trial court's judgment, the petitioners were acquitted of the charge of terrorist arson involving the home of the manager of the Nancahue tree farm and terrorist arson on the San Gregorio property; Aniceto Norín was also acquitted of the crime of terrorist threat against the owners and manager of the Nancahue tree farm as the court was of the view that his individual culpability had not been proven; the two defendants were convicted of the crime of "terrorist threats."

### *7. The motion filed to vacate the conviction and the Chilean Supreme Court's decision*

84. The petitioners filed a motion with the Chilean Supreme Court seeking to have the September 27, 2003 verdict of the Angol oral criminal trial court overturned and argued that the lower court had committed several violations that were legal grounds for nullification, namely: (a) violation of constitutional guarantees and international treaties (Article 373-a of the Code of Criminal Procedure); (b) formal defects in the explanation of the facts, the weighing of the means of evidence, and the explanation of the grounds for the ruling (Article 374-e) of the Code of Criminal Procedure); (c) lack of proper evidence to prove that the convicted parties were authors of the crimes of which they were convicted; (d) a failure to prove that the fires were acts of terrorism; (e) a mistaken interpretation of the law (Article 373-b) of the Code of Criminal Procedure) inasmuch as the law does not make "terrorist threat" a crime; and (f) the court did not have jurisdiction to prosecute them.

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on December 23, 2003, and to the communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received on June 21, 2004.

[100] Verdict of the Angol oral criminal trial court – chamber with jurisdiction, September 27, 2003; *Consideranda* 15. Addendum to the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, and to the communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received June 21, 2004.

[101] Verdict of the Angol oral criminal trial court –court with jurisdiction- of September 27, 2003; *Consideranda* 23. Attached to the communication that attorney Rodrigo Lillo Vera sent to the IACHR on behalf of Aniceto Norín, received on December 23, 2003, and to the communication from Pascual Pichún Paillalao supplementing the original petition he filed with the IACHR, received on June 21, 2004.

85. The Supreme Court dismissed each and every one of the grounds cited for nullification and, in a ruling dated December 15, 2003, upheld the conviction: (a) as to the assertion that rights protected under the Constitution and international treaties had been violated, the Supreme Court held that under Law 18,314 a witness' identity could be kept secret owing to the danger that terrorist crimes pose; it also held that nothing in the verdict suggested that the burden of proving their innocence had been shifted to the two defendants ultimately convicted, innocence that the Court deemed to have been disproven by the evidence offered by the accusers; (b) as for the grounds referenced in Article 374-e of the Code of Criminal Procedure, the Supreme Court held that the ruling did in fact contain a clear, cogent and thorough explanation of the proven facts and of the reasons why the lower court had deemed those facts to be criminal offenses under the law, beyond any reasonable doubt; (c) as for the ground claiming a failure to prove that the defendants were the authors of the crimes, the Supreme Court reasoned that, contrary to what the motion for nullification alleges, *consideranda* 15, 16, 17 and 18 of the judgment set forth the reasons why the lower court had found the defendants guilty; (d) as for the ground based on a misinterpretation of the law which asserted that the law did not make "terrorist threat" a crime, the Supreme Court held that the allegation was itself based on a mistaken interpretation of Law 18,314, Article 7 of which classifies the threat of committing such crimes as terrorist arson as crimes, and it was clear from the proceedings that the evidence had to do with the crime of arson, and that the threats of arson that were made are punishable offenses under the law; and (e) as for the argument that the court did not have jurisdiction, the Supreme Court asserted that the indictment for terrorist crimes was formalized on January 3, 2002, by which time the law that assigned jurisdiction to ministers on the courts of appeals was no longer in force, and that the party filing the motion failed to take into account the amendment to criminal procedure in Chile, where jurisdiction to prosecute crimes was given to the new oral criminal trial courts therein established.

86. Once this ruling was adopted, the conviction handed down by the oral criminal trial court on September 27, 2003, became final, whereupon the order to arrest *Lonkos* Pascual Pichún and Aniceto Norín was issued. They were incarcerated in January of 2004, and began to serve the sentence imposed.

### C. The criminal case and conviction of Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán.

#### 1. The fire for which the petitioners were criminally prosecuted

87. On December 19, 2001, a fire broke out on the Poluco-Pidenco tree farm, owned by the Mininco Lumber Company, S.A., in the district *[comuna]* of Ercilla, province of Malleco, Region IX of Chile.[102] The fire burned for some two days and scorched almost 108 hectares of land planted with pine and eucalyptus.[103] No one was hurt in the fire; the property damage was

[102] Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005. Verdict of the Angol oral criminal trial court, August 22, 2004. Attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

[103] Verdict of the Angol oral criminal trial court, August 22, 2004, *Consideranda* one. Attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

assessed by the Public Prosecutor's Office and the company affected at close to six hundred thousand dollars, which at that time was the equivalent of four hundred million Chilean pesos.[104]

88. Messrs. Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán are members of the Mapuche indigenous group. Mrs. Patricia Roxana Troncoso Robles is a Chilean citizen who has been supportive of the Mapuche indigenous people's causes and has worked as a defender of their human rights.[105]

89. The five petitioners: Juan Patricio Marileo, Florencio Jaime Marileo, José Benicio Huenchunao, Juan Ciriaco Millacheo and Patricia Roxana Troncoso, were charged with intentionally setting the fire at the Poluco-Pidenco tree farm and were tried as the authors of the crime of terrorist arson.[106]

### *2. Accusation brought by the Public Prosecutor's Office and the private accusers*

90. In the criminal case prosecuted against the petitioners, the accusing party was the Public Prosecutor's Office, the Office of the Provincial Prosecutor of Malleco as a complainant, and the Mininco Lumber Company S.A. as a private accuser.[107]

91. In its indictment, the Public Prosecutor's Office argued that the facts constituted the crime of arson criminalized under Article 476-3 of the Criminal Code, but committed as a terrorist act, according to the description contained in articles 1(1) and 2(1) of Chilean Law 18,314. The Public Prosecutor's Office argued that the accused had been the material authors of the fire and therefore sought a sentence of 10 years and one day imprisonment for each, which was the middle range of the maximum sentence allowed.

### *3. The trial and conviction of the petitioners*

92. The criminal trial was conducted by the Angol oral criminal trial court from July 29 to August 17, 2004.[108] The petitioners were convicted and sentenced to ten years and one day imprisonment, the middle range of the maximum sentence. As authors of the crime of terrorist arson under Law 18,314, they were disqualified from office or public service for life, stripped of their right to run for and be elected to office, and disqualified to work as licensed professionals for the duration of their sentence. They were also ordered to pay, jointly and severally, compensatory damages to the company for a total of 424,964,798 Chilean pesos.[109]

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[104] Verdict of the Angol oral criminal trial court, August 22, 2004, *Consideranda* two. Attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

[105] Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

[106] Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005. Verdict of the Angol oral criminal trial court, August 22, 2004, *consideranda 1*. Attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

[107] Verdict of the Angol oral criminal trial court, August 22, 2004, *Consideranda One*. Attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

[108] Verdict of the Angol oral criminal trial court, August 22, 2004, *Consideranda* One. Attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

[109] Original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005. Verdict of

93. In its reasoning, the Court examined the arguments made by the attorneys representing the defendants concerning the alleged terrorist nature of the crimes with which their clients were charged. The Court held that that the offenses were crimes under Law 18,314, and wrote the following:

> As for the defense's argument that these facts do not constitute terrorist crimes, the statements alluded to in the previous comments, which come from persons who were directly associated with the facts of this case or who came to learn of them for a variety of reasons, are testimony that is consistent with the expert reports and documentary evidence that the accusers introduced during the hearing and that constitute background information that, taken together and after being duly examined, leads these judges to conclude, beyond a reasonable doubt, that the fire that burned the Poluco-Pidenco tree farm on December 19, 2001, was a terrorist act, inasmuch as the actions committed on that occasion reveal that the form, methods and strategies employed had a malicious intent, which was to cause widespread fear within the area, a situation that is a public and notorious fact that these judges cannot ignore; this is a serious conflict between a portion of the Mapuche ethnic group and the rest of the population, a fact neither argued by the parties nor unknown to them.
>
> In effect, the crime established in *Consideranda* 16 must be viewed against the backdrop of a process of recovering Mapuche lands, in which the perpetrators took direct action, without respecting the existing legal and institutional order and by recourse to the use of force through measures that were planned, agreed and prepared in advance by radicalized groups that seek to create a climate of insecurity, instability and fear in the Province of Malleco, as most of the events and the most violent have happened in districts *[comunas]* in that province. These measures can be summarized as follows: excessive demands that violent groups make of owners and landholders, under pressure and warning them of the various consequences they will face if they do not give in to the demands. Many of these threats have materialized in the form of felonious assaults, robberies, theft, arson, vandalism and usurpation, which have affected both the persons and property of various farmers and tree farmers in this part of the country; in the oral proceedings the court heard numerous pieces of testimony and learned some of the background to this situation, even though that information is public knowledge.
>
> The obvious inference is that the objective is to instill in the population a well-founded fear of falling victim to similar crimes, and thereby force the owners to cease any further exploitation of their properties and ultimately to force them to abandon their properties. The sense of insecurity and uneasiness that these attacks cause have consequences, such as driving off the workforce or increasing the cost of labor, increasing the costs of both leasing farm equipment and the cost of insuring the properties, the buildings and the crops. It is becoming more and more common to see workers, machinery, vehicles and work set up on the various properties under police protection, to ensure that the work can get done. All this affects constitutionally protected rights.
>
> The Court's conclusion follows from the testimony given by César Gutiérrez Chávez, Ricardo Martín Ruff, Víctor Luengo San Martín, Gerardo Cerda Agurto, Juan Zapata Acuña, Mario Garbarini Barra, Gerardo Jequier Schalchi, Manuel Riesco Jaramillo, René Araneda Amigo, Juan Correa Búlnes, Jorge Vives Dibarrat and Julio Piwonka de Amesti, all of whom told the court that they were immediate victims or had knowledge of threats and assaults on persons or property, perpetrated by persons of Mapuche origin. Albeit in different ways, these witnesses all expressed the sense of fear that those acts instilled in them. This background information is in the report of the session of the Senate Commission on the Constitution,

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the Angol oral criminal trial court, August 22, 2004, *Consideranda* One. Attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

Legislation, Justice and Regulations. Paragraphs from that report were read during the hearing.[110]

94. Based on these considerations, the Oral Criminal Trial Court convicted the accused of the crime of terrorist arson and sentenced them to ten years and one day imprisonment and payment of compensatory damages for the damage done to the property in question.

95. In addition, the following ancillary penalties were imposed on them under Article 9 of the Constitution of Chile:

> (...) Each and every one of them, as perpetrators of the crime of terrorist arson, is sentenced to (...) the ancillary penalties of complete disqualification for life from public office, public employment, and political rights as well as complete disqualification from titled professions for the duration of the conviction.[111]

### *4. The motions filed to have the convictions vacated and the decision by the Temuco Appeals Court*

96. The five petitioners filed motions to have their convictions overturned. The five motions cited the oral criminal trial court's failure to weigh the relevant evidence, which in their view fit the grounds for nullification established in Article 374-e of the Code of Criminal Procedure. Juan Ciríaco Millacheo's motion cited a misreading of the testimonial evidence.[112] The motions also asserted violations of the right to equality by virtue of the fact that the criteria used to admit and weigh the defense's evidence were different from those used to weigh the accusers' evidence.

97. When deciding the merits of the motions seeking to have the convictions overturned, the Temuco Appeals Court began by narrowing the kind of evidence that the judges could consider; the Temuco Appeals Court asserted that its analysis had to be confined to determining whether the conviction being challenged complied with the legal standard; it could not address the facts that led to the petitioners' prosecution and conviction[113].

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[110] Verdict of the Angol oral criminal trial court, August 22, 2004, *Consideranda* 19. Attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

[111] Verdict of the Angol oral criminal trial court – chamber with jurisdiction, September 27, 2003; *Consideranda* 19. Attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005.

[112] Decision of the Temuco Appeals Court, dated October 13, 2004, attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005. *Consideranda* One of that decision summarizes the grounds for nullification that the complainants invoked: "That the grounds cited in the various motions filed by JOSE HUENCHUNAO MARIÑAN, PATRICIA ROXANA TRONCOSO ROBLES, JUAN PATRICIO MARILEO SARAVIA, JOSE FLORENCIO JAIME MARILEO SARAVIA and JUAN CIRIACO MILLACHEO LICAN seeking to have their convictions overturned, include the one contemplated in Article 374-e) in relation to Article 342-c, all provisions of the Code of Criminal Procedure, by virtue of the fact that the lower court failed to weigh relevant evidence, thereby violating that article of the Code of Criminal Procedure, both with respect to the evidence introduced by the public prosecutor and the evidence introduced by the defense in each particular case. The motion filed by JUAN CIRIACO MILLACHEO LICAN also claimed that the way in which a portion of the testimony was assessed was a violation of the principles of logic and experience, since he claimed there was contradiction in the assessment of the testimony given by JUAN IGNACIO QUEIPUL LEVINAO who in *Consideranda* 17 incriminates JUAN CIRIACO MILLACHEO LICAN when, according to the complainant, it was clear that he did not know the accused, since he was unable to recognize him at the hearing and identified him as the one wearing a green jacket, when he was actually wearing a blue jacket."

[113] Decision of the Temuco Appeals Court, dated October 13, 2004, attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005. *Consideranda* One of that decision summarizes the grounds for nullification that the complainants invoked: "That the grounds cited in the various motions filed by JOSE HUENCHUNAO MARIÑAN, PATRICIA ROXANA TRONCOSO ROBLES, JUAN PATRICIO MARILEO SARAVIA, JOSE

98. Applying that standard, the Appeals Court concluded that the oral criminal trial court had adequately assessed and weighed the evidence that supported its findings. It explained that while judges are required to examine the complete body of evidence, they are not bound to examine each and every exhibit in the case file[114].

99. Finally, concerning the argument claiming an erroneous application of the law when classifying the crimes as terrorist offenses and the claim that the petitioners were blamed for the acts of third parties, the Appeals Court concluded that "in its August 22, 2004 ruling, the Angol Trial Court did not violate the provisions that the complainants are claiming, inasmuch as it fully applied the provisions of Law 18,314 and the presumptions established therein, which were the accusations brought by the Public Prosecutor's Office and the Mininco Lumber Company, S.A."[115]

### *D. The criminal prosecution and conviction of Werkén Víctor Ancalaf Llaupe*

#### *1. The events that led to Víctor Ancalaf's criminal prosecution*

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FLORENCIO JAIME MARILEO SARAVIA and JUAN CIRIACO MILLACHEO LICAN seeking to have their convictions overturned, include the one contemplated in Article 374-e) in relation to Article 342-c, all provisions of the Code of Criminal Procedure, by virtue of the fact that the lower court failed to weigh relevant evidence, thereby violating that article of the Code of Criminal Procedure, both with respect to the evidence introduced by the public prosecutor and the evidence introduced by the defense in each particular case. The motion filed by JUAN CIRIACO MILLACHEO LICAN also claimed that the way in which a portion of the testimony was assessed was a violation of the principles of logic and experience, since he claimed there was contradiction in the assessment of the testimony given by JUAN IGNACIO QUEIPUL LEVINAO who in *Consideranda* 17 incriminates JUAN CIRIACO MILLACHEO LICAN when, according to the complainant, it was clear that he did not know the accused, since he was unable to recognize him at the hearing and identified him as the one wearing a green jacket, when he was actually wearing a blue jacket."

[114] Decision of the Temuco Appeals Court, dated October 13, 2004, attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005. *Consideranda* One of that decision summarizes the grounds for nullification that the complainants invoked: "That the grounds cited in the various motions filed by JOSE HUENCHUNAO MARIÑAN, PATRICIA ROXANA TRONCOSO ROBLES, JUAN PATRICIO MARILEO SARAVIA, JOSE FLORENCIO JAIME MARILEO SARAVIA and JUAN CIRIACO MILLACHEO LICAN seeking to have their convictions overturned, include the one contemplated in Article 374-e) in relation to Article 342-c, all provisions of the Code of Criminal Procedure, by virtue of the fact that the lower court failed to weigh relevant evidence, thereby violating that article of the Code of Criminal Procedure, both with respect to the evidence introduced by the public prosecutor and the evidence introduced by the defense in each particular case. The motion filed by JUAN CIRIACO MILLACHEO LICAN also claimed that the way in which a portion of the testimony was assessed was a violation of the principles of logic and experience, since he claimed there was contradiction in the assessment of the testimony given by JUAN IGNACIO QUEIPUL LEVINAO who in *Consideranda* 17 incriminates JUAN CIRIACO MILLACHEO LICAN when, according to the complainant, it was clear that he did not know the accused, since he was unable to recognize him at the hearing and identified him as the one wearing a green jacket, when he was actually wearing a blue jacket."

[115] Decision of the Temuco Appeals Court, dated October 13, 2004, attached to the original petition that Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán filed with the IACHR, April 13, 2005. *Consideranda* One of that decision summarizes the grounds for nullification that the complainants invoked: "That the grounds cited in the various motions filed by JOSE HUENCHUNAO MARIÑAN, PATRICIA ROXANA TRONCOSO ROBLES, JUAN PATRICIO MARILEO SARAVIA, JOSE FLORENCIO JAIME MARILEO SARAVIA and JUAN CIRIACO MILLACHEO LICAN seeking to have their convictions overturned, include the one contemplated in Article 374-e) in relation to Article 342-c, all provisions of the Code of Criminal Procedure, by virtue of the fact that the lower court failed to weigh relevant evidence, thereby violating that article of the Code of Criminal Procedure, both with respect to the evidence introduced by the public prosecutor and the evidence introduced by the defense in each particular case. The motion filed by JUAN CIRIACO MILLACHEO LICAN also claimed that the way in which a portion of the testimony was assessed was a violation of the principles of logic and experience, since he claimed there was contradiction in the assessment of the testimony given by JUAN IGNACIO QUEIPUL LEVINAO who in *Consideranda* 17 incriminates JUAN CIRIACO MILLACHEO LICAN when, according to the complainant, it was clear that he did not know the accused, since he was unable to recognize him at the hearing and identified him as the one wearing a green jacket, when he was actually wearing a blue jacket."

100. On the night of March 17, 2002, a truck belonging to the firm BOTEC, a contractor for the ENDESA Enterprise, was traveling along the "Guayali road" in the Alto Bío Bío sector, carrying material for the construction of the Ralco Dam, when it was stopped by a group of five persons, wearing hoods. One of the five was carrying a firearm. The hooded persons forced the truck driver to get out of the truck, after which they hurled a Molotov cocktail inside the truck, which was destroyed in the blaze.[116]

101. On March 19, 2002, the Governor of the Province of Bío Bío filed a complaint with the Concepción Appeals Court based on Article 10 of Law 18,314, and requested that a judicial inquiry be instituted to investigate and punish the party responsible for the attack on the BROTEC truck, which he described as a terrorist attack. When he filed this complaint, the Governor also made reference to two previous attacks on cargo vehicles, one on September 29, 2001, and the second on March 3, 2002.[117]

102. Víctor Ancalaf Llaupe is a member of the Mapuche indigenous people and a *Werkén*, or messenger, within his community. As the petitioners explained, the *Werkén's* role is to be, among the leaders, the "messenger of the community or *lof,* which is the Mapuche's traditional sociopolitical organization. As the *Werkén,* he is the messenger or spokesperson vis-à-vis other Mapuche communities and non-Mapuche society. The *Werkén* and the '*Lonko*', or head of the community, are the leaders of their group."[118]

103. The investigation of the case ended on April 17, 2003, and the bill of indictment came down on May 23, 2003, prepared by the Court Prosecutor of the First Prosecutor's Office of the Concepción Court of Appeals. The indictment covered the three attacks mentioned in the complaint filed by the Governor's Office. The Bío Bío Governor's Office became a party to the case on June 3, 2003.

104. The trial of Víctor Ancalaf ended with a lower-court ruling dated December 30, 2003, in which he was sentenced to 10 years and one day imprisonment, the average maximum sentence. He was convicted of being the perpetrator of the terrorist offenses criminalized in Article 2(4) of Law 18,314, committed on September 29, 2001, and March 3 and 17, 2002. He was also sentenced to ancillary penalties:

> Ancalaf Llaupe was also sentenced to the ancillary penalties of complete disqualification for life from public office, public employment, and political rights as well as complete disqualification from titled professions for the duration of the conviction, and to the payment of costs.
>
> Furthermore, in accordance with Article 9 of the Constitution, the convict Ancalaf Llaupe is disqualified for 15 years from discharging public duties or holding public office,[119] regardless of whether or not the appointment is by popular election; from being the rector or director of an educational establishment or performing teaching activities therein; from operating a social communications media outlet or being a director or manager thereof, or performing therein functions connected with the broadcast or dissemination of opinions or information; and from

[116] Original petition that Víctor Ancalaf Llaupe, 69 authorities, leaders, and members of the Mapuche indigenous people and three attorneys filed with the IACHR, received May 20, 2005. Not contested by the State

[117] Original petition that Víctor Ancalaf Llaupe, 69 authorities, leaders and members of the Mapuche indigenous people and three attorneys filed with the IACHR, received May 20, 2005, p. 4. Not contested by the State.

[118] Original petition that Víctor Ancalaf Llaupe, 69 authorities, leaders and members of the Mapuche indigenous people and three attorneys filed with the IACHR, received May 20, 2005, p. 3. Not contested by the State

[119] The Commission takes note of the lack of clarity as regards the punishment of disqualification from public office which, in one part of the sentence is imposed for life, while in another it says that the penalty is for 15 years.

> being the leader of a political organization, an organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time.[120]

105. Based on its assessment of the evidence, the Court concluded that the occurrence of the crime had been established: "The information outlined above, having been carefully examined, establishes that on Sunday, March 17 of this year, at around 10:30 p.m., on the stretch of the Guallalí public road at km 45, Las Juntas sector, Alto Bío Bío, in front of the Ralco Lepoy cemetery, a group of hooded individuals, one of whom was carrying a firearm, intercepted a 1996 Mack dump truck owned by Brotec, S.A., an ENDESA contractor, license plate NF-5514, driven by Marco Antonio Jofré Erices. The latter was driving west. The group of hooded individuals forced the driver to run by firing shots in the air, and then proceeded to break the lights and to throw a Molotov cocktail inside the truck's cab, which was consumed in the blaze."[121] It then wrote that this was a terrorist crime: "The facts described in the preceding *consideranda* constitute the terrorist crime proscribed under Article 2(4) of Law No. 18,314, in relation to Article 1 of that legal text. The facts indicate that these actions were taken for the purpose of instilling in a portion of the population a well-founded fear of falling victims to such crimes, given the circumstances and the nature and effects of the means employed; it is obvious that everything was part of a premeditated plan to attack property belonging to third parties who are engaged in work related to the construction of the Ralco Power Plant that will serve Alto Bío Bío, all for the purpose of forcing the authorities to make decisions that will slow or stop the construction work."[122]

106. After summarizing the statements made by Víctor Ancalaf to the effect that he was not at the scene of these events, the Court outlined the evidence that, in its view, proved the defendant's guilt as an author of the attack and concluded that "the evidence described above establishes legal presumptions that, after careful study, constitute full proof against Víctor Ancalaf Llaupe and prove, beyond a reasonable doubt, that he was directly and immediately involved as the author of the crime established in *Consideranda* 17, i.e., the terrorist crime provided for in Article 2(4) of Law No. 18,314, in relation to Article 1 thereof, committed in the Alto Bío Bio sector on March 17, 2002."[123]

### 2. *The appeal filed to challenge the conviction and the decision by the Concepción Appeals Court*

107. On January 3, 2004, Víctor Ancalaf filed an appeal to challenge his conviction. The appeal was decided by a second instance ruling delivered on June 4, 2004, which amended the judgment that the petitioner was appealing and held that his involvement in the events of September 29, 2001 had not been proven, nor had his involvement in the events on March 3,

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[120] Conviction handed down by the Concepción Appeals Court on December 30, 2003. Supplied to the IACHR together with the record of the criminal case that the Chilean State prosecuted against Víctor Ancalaf on February 27, 2008. *Consideranda* 18.

[121] Conviction handed down by the Concepción Appeals Court on December 30, 2003. Supplied to the IACHR together with the record of the criminal case that the Chilean State prosecuted against Víctor Ancalaf on February 27, 2008. *Consideranda* 14.

[122] Conviction handed down by the Concepción Appeals Court on December 30, 2003. Supplied to the IACHR together with the record of the criminal case that the Chilean State prosecuted against Víctor Ancalaf on February 27, 2008. *Consideranda* 15.

[123] Conviction handed down by the Concepción Appeals Court on December 30, 2003. Supplied to the IACHR together with the record of the criminal case that the Chilean State prosecuted against Víctor Ancalaf on February 27, 2008. *Consideranda* 18.

2002; the ruling upheld his conviction as one of the authors of the attack on March 17, 2002, and he was sentenced to five years and one day, as well as accessory penalties.[124]

108. He then filed a motion of cassation seeking nullification of the verdict on the grounds of an error of law, and a complaint requesting that the conviction be invalidated on the grounds of a miscarriage or serious miscarriage of justice in the adoption of the decision. The motion of cassation was declared inadmissible on August 2, 2004. The complaint was heard but denied on November 22, 2004, on the grounds that the judges had not committed a miscarriage or serious miscarriage of justice.[125]

## *IV. THE LAW*

109. Based on the relevant provisions of the American Convention, the Commission will now examine the parties' allegations and the facts taken as proven, in the following order: i) The principle of legality and the terrorist crimes of which the alleged victims were charged and convicted; ii) The verdicts in light of the right to equality before the law and the right to nondiscrimination, iii) The right to maintain cultural integrity; iv) Freedom of expression and political rights; and v) The principle of individual criminal liability and the right to judicial guarantees.

### *A. The principle of legality and the terrorist crimes of which the alleged victims were charged and convicted (Article 9 of the Convention in relation to articles 1(1) and 2 thereof)*

110. Article 9 of the American Convention provides that:

> No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

111. Article 1(1) of the Convention reads as follows:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

112. Article 2 of the Convention provides that:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

113. The Commission will examine whether the Chilean State violated the principle of legality, recognized in Article 9 of the American Convention, as a consequence of the regulation of

[124] Original petition that Víctor Ancalaf Llaupe, 69 authorities, leaders and members of the Mapuche indigenous people and three attorneys filed with the IACHR, received on May 20, 2005. Not contested by the State.

[125] Original petition that Víctor Ancalaf Llaupe, 69 authorities, leaders and members of the Mapuche indigenous people and three attorneys filed with the IACHR, received May 20, 2005. Not contested by the State.

the predicate offenses of terrorism and their use in the present case. Accordingly, the Commission's observations will appear in the following order: i) General comments on the principle of legality; ii) relevant aspects with respect to terrorism under international law, and iii) Analysis of articles 1, 2 and 7 of the Anti-Terrorism Act.

### *1. General comments on the principle of legality*

114. The Inter-American Court has held that under the rule of law, the principles of legality and non-retroactivity govern the actions of all State institutions in their respective fields of competence, particularly when it comes to the exercise of the State's punitive power.[126] It has also emphasized that in a democratic system every precaution must be taken to ensure that penalties for crime are imposed with strict respect for the basic rights of individuals, and after carefully confirming that unlawful conduct effectively existed.[127]

115. The principle of legality recognized in Article 9 of the American Convention embodies the principles of *nullum crimen sine lege* and *nulla poena sine lege,* according to which states shall not prosecute or punish persons for acts or omissions that did not, under the applicable law, constitute criminal offenses at the time they were committed.[128]

116. The Commission understands that the decision as to which acts are classified as crimes and trigger the punitive authority of the State belongs, in principle, to the latter, in the exercise of its criminal policy, based on its particular historic, social, and other circumstances. However, certain elements arise from Article 9 of the American Convention that must be observed by states when they come to exercise their authority to define crimes. Insofar as the instant case is concerned and in keeping with the interpretation of inter-American case law, one corollary of the principle of nullum crimen nulla poena sine lege praevia trae is the rule that criminal laws must be worded in precise and unambiguous language that narrowly defines the punishable offense and exactly determines its elements and the factors that distinguish it from other types of conduct that do not constitute punishable offenses or that are punishable as other crimes.[129]

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[126] *Cf.* I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, paragraph 177; I/A Court H.R., *Case of Baena Ricardo et al. v. Panama.* Judgment of February 2, 2001. Series C No. 72, paragraph 107; I/A Court H.R., *Case of De la Cruz Flores v. Peru*. Judgment of November 18, 2004. Series C No. 115, paragraph 80; .I/A Court H.R., *Case of Fermín Ramírez*. Judgment of June 20, 2005. Series C No. 126, paragraph 90; and I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru.* Judgment of November 25, 2005. Series C No. 137, paragraph 187.

[127] Cf. I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Judgment of February 2, 2001. Series C No. 72, paragraph 106; citing, *inter alia,* Eur. Court H.R., Ezelin, judgment of 26 April 1991, Series A No. 202, paragraph 45; and Eur. Court H.R., Müller and Others, Judgment of 24 May 1988, Series A No. 133, paragraph 29. See also: I/A Court H.R., *Case of De la Cruz Flores v. Peru*. Judgment of November 18, 2004. Series C No. 115, paragraph 81; and I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, paragraph 189.

[128] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 225.

[129] IACHR, Report on the Situation of Human Rights in Peru (2000), OEA/Ser.L./V/II.106, Doc. 59 rev. 2, June 2, 2000, pars. 80, 168; IACHR, Report on Terrorism and Human Rights, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, par. 225; I/A Court H.R, *Castillo Petruzzi et al. Case*, Judgment of May 30, 1999, Series C No. 52, par. 121; I/A Court H.R., *Cantoral Benavides Case v. Peru.* Judgment of August 18, 2000. Series C No. 69, par. 157; I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, par. 174; I/A Court H.R., *Case of De la Cruz Flores v. Peru.* Judgment of November 18, 2004. Series C No. 115, par. 79; I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru.* Judgment of November 25, 2005. Series C No. 137, par. 188; I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2009. Series C No. 207, par. 55.

117. The Commission has written that observance of the principle of legality of criminal law enables persons to effectively determine their conduct in accordance with the law[130] As the Commission held, "the principle of legality has a specific role in the definition of crimes; on the one hand, it guarantees individual liberty and safety by preestablishing the behavior that is penalized clearly and unambiguously and, on the other hand, it protects legal certainty."[131]

118. The Court has similarly written that:

> the description of a crime shall be in precise, accurate, specific language and shall exist *ex ante*, especially inasmuch as criminal law is the most restrictive and severe means to establish culpability for illicit behavior, taking into account that the legal framework must afford the citizen legal certainty.[132]

119. The Court has also underscored the fact that a "criminal court judge, upon applying criminal law, [must] strictly abide by the provisions thereof and be extremely rigorous when likening the accused person's conduct to the criminal definition, so as not to punish someone for acts that are not punishable under the legal system."[133]

120. As for the risks that imprecision in describing offenses can pose, the Inter-American Court has written that "[a]mbiguity in describing offenses creates doubts and the opportunity for abuse of power, which is particularly undesirable when determining the criminal liability of an individual and punishing the latter with penalties that severely affect such fundamental attributes as life or freedom."[134]

121. Applying these principles, the Inter-American Court has decided a number of cases by determining that the violation of the principle of legality was due, for example, to the existence of criminal offenses that "refer to behaviors that are not narrowly defined and hence could be classified indiscriminately as either one crime or the other."[135] The Court placed particular emphasis on the problems that this type of ambiguities cause, as their effect may be to restrict due process guarantees, depending on which category of crime is charged; the effect may also be to change

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[130] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 225, and Executive Summary, paragraph 17.

[131] IACHR, Application filed with the Inter-American Court of Human Rights in the case of De la Cruz Flores v. Peru, cited in I/A Court H.R., *Case of De la Cruz Flores v. Peru*, Judgment of November 18, 2004 (Merits, Reparations and Costs), Series C. No. 115, paragraph 74.

[132] I/A Court H.R., *Case of Usón Ramírez v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, paragraph 55; and I/A Court H.R., *Case of Kimel v. Argentina.* Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, paragraph 63.

[133] I/A Court H.R., *Case of De la Cruz Flores v. Peru.* Judgment of November 18, 2004. Series C No. 115, paragraph 82; I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru.* Judgment of November 25, 2005. Series C No. 137, paragraph 190.

[134] I/A Court H.R., *Case of Castillo Petruzzi et al. v. Peru.* Judgment of May 30, 1999. Series C No. 52, paragraph 121; and I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, paragraph 174.

[135] Referring to articles 1, 2 and 3 of Decree Law No. 25.659 and articles 2 and 3 of Decree Law No. 25,475, which criminalized treason and terrorism, respectively, in Peru, but made it impossible to distinguish when a person was committing one crime as opposed to the other.

See, I/A Court H.R., *Case of Cantoral Benavides v. Peru.* Judgment of August 18, 2000. Series C No. 69, paragraph 153; I/A Court H.R., *Case of Castillo Petruzzi et al. v. Peru.* Judgment of May 30, 1999. Series C No. 52, paragraph119.

the penalty imposed.[136] The Court also wrote that in such situations, the accused has no way of knowing to a certainty what the criminalized behavior in each category is, the elements used in its commission, the objects or assets against which it is directed, and the impact it has on the whole of society.[137]

122. The Inter-American Court has also had occasion to assess the precision with which crimes are described, irrespective of their connection to other crimes. Thus, for example, in the case of the crime of slander in Chile and Venezuela, the Court held that it incorporates a "description that is vague and ambiguous and it does not specify clearly the typical forum for a criminal behavior, which could lead to broad interpretations, allowing the determined behaviors to be penalized incorrectly by using the criminal codification."[138] In the case of Usón Ramírez specifically, the Court made reference to the lack of specificity as to the injury that must be present for the conduct to qualify as slander. In the Court's words, "[S]ince it does not specify the injury required, such law allows that the subjectivity of the offended party determine the existence of crime, even when the active subject did not have the intent to injure, offend, or disparage the passive subject."[139]

123. The Court has also addressed the imprecision in the definitions of certain types of crime, which include broad modalities of participation that de-characterize the respective crime[140]

***2. Important considerations with respect to terrorism under international law and its relationship to the principle of legality***

124. Terrorism in all its forms is a serious crime under international law that involves a profound and extreme violation of human rights and poses a threat to democracy, peace and regional and international security.[141] It is also a serious and meaningful threat to democratic governments and the institutions of democratic government.[142] It is a particularly cruel and abominable form of violence[143] that is in no way justifiable, regardless of its perpetrators or its

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[136] I/A Court H.R., *Case of Castillo Petruzzi et al. v. Peru.* Judgment of May 30, 1999. Series C No. 52, paragraph119; and I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*. Judgment of November 25, 2004. Series C No. 119, paragraph 119.

[137] I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*. Judgment of November 25, 2004. Series C No. 119, paragraph 117.

[138] I/A Court H.R., *Case of Usón Ramírez v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, paragraph 56; and I/A Court H.R., *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, paragraph 92.

[139] I/A Court H.R., *Case of Usón Ramírez v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, paragraph 56.

[140] Referring to Article 2 of Decree Law No. 25.475, which criminalizes treason in Peru. Although the provision contemplated an active perpetrator, it also included broad methods of participation in the commission of the offense, such as "providing support," thereby altering the very definition of the perpetrator, without ever clearly defining what the specific criminalized behaviors were.

See. I/A Court H.R., *Case of Cantoral Benavides v. Peru.* Judgment of August 18, 2000. Series C No. 69, paragraph 155; and I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*. Judgment of November 25, 2004. Series C No. 119, paragraphs 117 and 118.

[141] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 1.

[142] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraphs 2, 3.

[143] IACHR, *Report on Terrorism and Human Rights,* OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 226, and Executive Summary, paragraph 17.

objectives. Such violence warrants the most vigorous condemnation, as it is harmful to individuals and to society as a whole.[144]

125. The States have an international obligation to fight terrorism in all its forms; individuals have the right to be protected from acts of terrorism. The Commission has repeatedly held that the member states of the OAS have an obligation, under international law, to adopt the measures necessary to prevent, suppress, and eradicate terrorism and other forms of violence and ensure the safety of their citizens and other persons on their soil.[145] This includes the obligation to investigate, prosecute and punish acts of violence or terrorism,[146] which is yet another manifestation of the States' international obligation to investigate acts that violate human rights and punish those responsible.[147]

126. In the counter-terrorism struggle, States have an international obligation to fully respect human rights. Ensuring fundamental human rights in these situations does not contradict the obligation of member states to protect their populations from terrorist violence.[148] It is a fundamental principle that the campaign waged against terrorism and the protection of human rights and democracy are mutually reinforcing responsibilities: "the very object and purpose of anti-terrorism initiatives in a democratic society is to protect democratic institutions, human rights and the rule of law, not to undermine them."[149]

127. Thus, the drafting, passage and enforcement of laws that criminalize terrorism are important steps in preventing and punishing such terrorist conduct. As anti-terrorism measures and unqualified observance of human rights are mutually reinforcing and intrinsically related, States have an obligation to respect the guarantees of due process and the principles of legality and non-retroactivity of criminal law.

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[144] I/A Court H.R., *Case of Castillo Petruzzi et al.*, Judgment of May 30, 1999 (Merits, Reparations and Costs), Series C No. 52, paragraph 89.

[145] IACHR, Ten Years of Activities 1971-1981), General Secretariat of the Organization of American States, 1982, p. 339. IACHR, Case 11.182, Report No. 49/00, Molero Coca, Asencios Lindo *et al.* (Peru), paragraph 58. I/A Court H.R., *Case of Neira Alegría*, Judgment of January 19, 1995, Ser. A No. 20. IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 3.

[146] American Convention on Human Rights, Article 1(1); IACHR, Annual Report 1990-1991, Chapter V, Part II, p. 513; I/A Court H.R., *Case of Neira Alegría*, Judgment of January 19, 1995, Ser. A No. 20. IACHR, *Report on Terrorism and Human Rights,* OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 22. See also, Declaration of Lima to Prevent, Combat and Eliminate Terrorism, approved at the second plenary session of Ministers and Heads of Delegation of the member States of the OAS for the Inter-American Specialized Conference on Terrorism, April 26, 1996, paragraph 5 of which states that terrorist acts are serious common crimes or felonies and, as such, should be tried by national courts in accordance with domestic law and the guarantees provided by the rule of law.

[147] I/A Court H.R., *Case of El Amparo*, Reparations and Costs (Article 63(1) American Convention on Human Rights), Judgment of September 14, 1996, Series C No. 28, paragraphs 53-55 and 61. IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 33.

[148] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Preface.

[149] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 2.

A number of international treaties and instruments contain a similar provision, one of which is the Inter-American Convention against Terrorism (General Assembly resolution AG/Res.1840 (XXXII/O-02), June 3, 2002, to which Chile is party.

The Commission has issued various pronouncements that incorporate these principles. See. IACHR, Ten Years of Activities 1971-1981, OAS General Secretariat, 1982, p. 339. IACHR, *Annual Report 1990-1991*, Chapter V, p. 512. IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 3. IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 22.

128. The Inter-American Commission has written that the principle of legality is one of the fundamental guarantees of due process and the right to a fair trial that States must take particular pains to observe in the course of waging their anti-terrorist strategies.[150] In the words of the Commission, the principle of legality is "[o]f particular pertinence in the context of terrorism (...) [a]mbiguities in laws proscribing terrorism (...) undermine the propriety of criminal processes that enforce those laws."[151]

129. The Commission is aware that at the current stage of the development of international law, no international consensus exists on a precise definition of "terrorism".[152] Absent that generally accepted definition, the international community has adopted treaties, which many States have then ratified or acceded to, in which it identifies certain violent acts that are deemed to be specific manifestations of terrorism, such the taking of hostages,[153] the hijacking and destruction of civilian aircraft,[154] attacks on the life, physical integrity or freedom of internationally protected persons[155] and, amid armed conflict, acts or threats of violence whose primary purpose is to strike terror among the civilian population,[156] acts that the corresponding treaties define as crimes for purposes of the respective convention and that make it incumbent upon the States parties to make them punishable offenses under their domestic laws. Under Article 2 of the Inter-American Convention against Terrorism, for example, "offenses" are those established in the ten principal international instruments against terrorist acts.[157].

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[150] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraphs 225-226, and Executive Summary, paragraph 17.

[151] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 261(a).

[152] IACHR, *Report on Terrorism and Human Rights,* OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 15; and Executive Summary, paragraph 6.

[153] International Convention against the Taking of Hostages, UN Res. 34/145 (XXXIV), 34 UN GAOR Supp. (no. 46) a 345, UN Doc. A/Res/34/146 (1979), 1316 UNTS 205.

[154] Convention on Offences and Certain Other Acts committed on Board Aircrafts, opened to signature on September 14, 1963, 704 U.N.T.S. 219; Convention on the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 860 UNTS 105; Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened to signature in Montreal, September 23, 1971, 974 UNTS 177.

[155] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature on December 14, 1973, 1035 UNTS 167; the Convention on the Safety of United Nations and Associated Personnel, UN Doc.A/Res/49/59 (1995) (February 17, 1995).

[156] The Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, which entered into force on October 21, 1950, art. 33; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, which entered into force on December 7, 1978, Art. 13.

[157] For purposes of the Convention, Article 2 of the Inter-American Convention against Terrorism defines "offenses" as those established in the international instruments listed below: a) Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970; b) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971; c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973; d) International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979; e) Convention on the Physical Protection of Nuclear Material, signed at Vienna on March 3, 1980; f) Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24, 1988; g) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988; h) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988; i) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997, and j) International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999.

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130. The absence of a generally accepted definition of "terrorism" does not mean that terrorist violence cannot be described or that international law does not prescribe restrictions on what a State's response to such situations can be.[158] Quite the contrary, there is international consensus on some basic elements of the concept of terrorism that distinguish it from other equally unlawful behaviors and that should serve as the parameters by which States evaluate and determine their actions in light of their international obligations.[159] In other words, although, in principle, it is for states to define what conducts will be classified as terrorist crimes, that authority must be exercised in accordance with the principle of legality and bearing in mind international consensus with respect to certain elements of terrorism that trigger a punitive response on the part of the State.

131. In the Commission's Report on Terrorism and Human Rights, after reviewing the relevant sources, the Commission concluded that the authorities on the subject "suggest that characteristics common to incidents of terrorism may be described in terms of: (a) the nature and identity of the perpetrators of terrorism; (b) the nature and identity of the victims of terrorism; (c) the objectives of terrorism; and (d) the means employed to perpetrate terrorist violence."[160] Observance of the principle of legality under Article 9 of the Convention, in the terms described above, means that when describing terrorist behaviors, these elements must be more clearly defined, thereby avoiding any vague or ambiguous language that lends itself to varied interpretations as to what the criminalized behaviors are or their similarity to other crimes.

132. The organs of the inter-American system have had occasion to evaluate the way in which terrorist behaviors have been defined in various countries. In effect, "[t]he Commission and the Court have previously found certain domestic anti-terrorism laws to violate the principle of legality because, for example, those laws have attempted to prescribe a comprehensive definition of terrorism that is invariably too broad and imprecise, or have legislated variations on the crime of "treason" that denaturalizes the meaning of that offense and creates imprecision and ambiguities in distinguishing between these various offenses."[161]

133. When examining the definitions of terrorist offenses in specific cases, the Commission has concluded that the principle of legality is violated when the domestic law uses definitions of crime that are open-ended, abstract or vague, and thus contrary to the modern principles of criminal law which require specific terminology with little or no room for interpretation, especially when the definitions of terrorist offenses can be confused either with the

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[158] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 17.

[159] In the words of the IACHR, "[t]he absence of an internationally-accepted definition of terrorism does not mean that terrorism is an indescribable form of violence or that states are hot subject to restrictions under international law in developing their responses to such violence. To the contrary, it is possible to identify several characteristics frequently associated with incidents of terrorism that provide sufficient parameters within which states' pertinent international legal obligations in responding to this violence can be identified and evaluated. These characteristics relate to the nature and identity of the perpetrators of terrorism, the nature and identity of the victims of terrorism, the objectives of terrorism, and the means employed to perpetrate terrorist violence. In particular, the Commission has noted that terrorism may be perpetrated, individually or collectively, by a variety of actors, including private persons or groups as well as governments, may employ varying means and levels of violence ranging from mere threats devised to induce public panic to weapons of mass destruction, and may impact detrimentally upon a variety of persons who are afforded particular protections under international law, including women, children and refugees." IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 7.

[160] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 17.

[161] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 226.

descriptions of other terrorist offenses or with other crimes, thus allowing for broad interpretation and obstructing the necessary legal certainty that the State must guarantee in this area.[162]

134. Other international human rights bodies have addressed the issue of broad definitions of terrorist offenses in domestic laws, underscoring the effect that such broad definitions can have on the effective observance of human rights. In the case of a number of States, the United Nations Human Rights Committee has observed that the definition of terrorist crimes in their domestic laws is too broad, and can thus lead to violations of the human rights protected under the International Covenant on Civil and Political Rights. It made comments of this nature in regard to the domestic laws of Egypt,[163] Estonia[164] and New Zealand.[165]

### *3. Analysis of articles 1, 2 and 7 of the Anti-Terrorism Act*

135. As observed in the section on proven facts, Chile's anti-terrorism legislation is Law 18,314, as amended by 1991 Law 19,027 and 2002 Law 19,806.

136. This body of laws resorts to the technique of classifying as terrorist crimes, certain behaviors that are already criminalized in the Criminal Code –such as homicide, felonious assault, kidnapping, abduction of minors, arson- and simply adds certain subjective elements to the description to make it a terrorist offense. These subjective elements are as follows:

> a) the purpose of the crime is to instill fear among the population or a portion thereof, that one will fall victim to these kinds of crimes, either because of the nature and effects of the means employed or because they are part of a premeditated plan to attack a certain category or group of persons, or
>
> b) the purpose is to pressure the authorities into a certain decision or to make demands of them.

137. As for the first subjective element, the Commission observes that a terrorist crime can be established based on "the nature and effects of the means employed or because it is part of a premeditated plan to attack a certain category of group of persons." Article 1 of the Anti-Terrorism Act does not explain what nature or effect of the means employed has the effect of

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[162] IACHR, Application filed with the Inter-American Court of Human Rights in the case of *Castillo Petruzzi et al v. Peru,* referenced in I/A Court H.R., *Case of Castillo Petruzzi et al.*, Judgment of May 30, 1999 (Merits, Reparations and Costs), Series C No. 52, paragraph 114. IACHR, Application filed with the Inter-American Court of Human Rights in the *Case of De la Cruz Flores v. Peru,* referenced in I/A Court H.R., *Case of De la Cruz Flores v. Peru*, Judgment of November 18, 2004 (Merits, Reparations and Costs), Series C. No. 115, paragraph 74.

[163] *Concluding observations of the Human Rights Committee: Egypt*, CCPR/CO/79/Add. 23 (August 9, 1993), paragraph 8 ("The Committee is particularly disturbed by the adoption in 1992 of law No. 97 on terrorism, which contains provisions contrary to articles 6 and 15 of the Covenant. The definition of terrorism contained in that law is so broad that it encompasses a wide range of acts of differing gravity. The Committee is of the opinion that the definition in question should be reviewed by the Egyptian authorities and stated much more precisely especially in view of the fact that it enlarges the number of offences which are punishable with the death penalty".)

[164] C*oncluding observations of the Human Rights Committee: Estonia,* Doc. UN CCPR/CO/77/EST (April 15, 2003), paragraph 8 ("The Committee is concerned that the relatively broad definition of the crime of terrorism and of membership of a terrorist group under the State party's Criminal Code may have adverse consequences for the protection of rights under article 15 of the Covenant, a provision which significantly is non-derogable under article 4, paragraph 2. The State party is requested to ensure that counter-terrorism measures, whether taken in connection with Security Council resolution 1373 (2001) or otherwise, are in full conformity with the Covenant".)

[165] *Concluding observations of the Human Rights Committee: New Zealand*, Doc. UN CCPR/CO/75/NZL (August 7, 2002), paragraph 11 ("The State party is requested to ensure that the definition of terrorism does not lead to abuse and is in conformity with the Covenant").

transforming a common crime into a terrorist crime. Thus, the distinction between a common crime and a terrorist offense is up to the discretion of the judge in each specific case.

138. This broad language is not corrected by the second paragraph of Article 1(1) of the Anti-Terrorism Act, which mentions certain means that imply intent to instill fear. The purpose of that second paragraph is not to establish an exhaustive list of those means that transform a common crime into a terrorist offense, but rather to describe some of the means that lead to a presumption. The Commission considerer that the provision on "the nature of the means and their effects", opens up a vague and imprecise range of behaviors that can be classified as terrorism, without the persons being able to know, to a certainty, when his/her conduct falls under the legal description of the common crime, and when it comes under the description of the crime of terrorism. As will be described in detail below, the vagueness of this provision allowed the introduction of elements, such as the ethnic origin of the accused, their position as leaders and/or their link to the Mapuche indigenous people, as well as a generalized representation of the claims of said indigenous people, without a distinction made between the context of social demands and protest, and the sporadic acts of violence that have arisen in that context.

139. The same conclusion applies with respect to the provision under which the conduct is deemed to be part of a "premeditated plan" to attack "a certain category or group of persons." The Commission observes that nowhere in Article 1(1) of the Anti-Terrorism Law does one find a definition of what constitutes a "premeditated plan." The article does not explain what type of pre-determination or planning is necessary or the groups or categories of persons to which it refers. This ambiguity led, in the case of Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán, and Juan Ciríaco Millacheo Licán, to the consideration of certain facts connected with the fire as indicating a definition of roles, in order to take the view that a degree of premeditation existed, without it being possible to differentiate this conduct from an offense aggravated by premeditation. Furthermore, the imprecision as to the persons who were targeted by the act resulted in those who are on the lands claimed by the Mapuche people being considered a "category" or a "certain group of persons" because they have property titles to the land or because they work there.

140. As for the second subjective element, i.e., the purpose to "pressure the authorities into a certain decision or to make demands of them," the Commission notes first that because of the way in which the law is formulated, this intent can stand on its own as a subjective factor that transforms a common crime into a terrorist offense, irrespective of the means used or their effects. Thus, this subjective element can cover a multiplicity of hypotheticals that are not necessarily associated with terrorist violence *per se.* Similarly, it is difficult to separate the formulation of Article 1(2) of the Anti-Terrorism Act from the description of other crimes that come under the heading of extortion or other crimes aggravated because they are committed for extortive purposes.

141. The Commission also notes that Article 2, subparagraphs 1 and 4, of the Anti-Terrorism Law[166] provides for the possibility that offenses committed against property can be regarded as terrorist acts, without drawing a clear distinction between such offenses and those that could imperil a person's life or physical safety. Here, the international consensus is that the disavowal of terrorist violence and the obligation to prevent, suppress and eradicate it, are premised on the conviction that such violence is mainly an attack upon human life. By classifying crimes against property as terrorist offenses, Chile's Anti-Terrorism Act is ambiguous and creates confusion as to the behavior that the State criminalizes as a terrorist offense.

[166] For example, the crime of arson or havoc is mentioned, without specifying what the risk to life or safety might be. Reference is also made to placing, launching or firing bombs or explosive or incendiary devices of any kind that affect or can affect a person's physical safety or *cause damage.*

142. The observations that the Commission has made thus far apply also to the "attempt" to commit a terrorist offense, established in Article 7 of the Anti-Terrorism Act, inasmuch as the "attempt to commit a terrorist offense" is based on the definitions set forth in articles 1 and 2 of that law. Specifically, the criteria for determining whether a threat can be regarded as a terrorist offense under Article 7 of Law 18,314 are so broad that in the case of Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, the Angol oral criminal trial court took into consideration the fact that they were members of and leaders (*lonkos)* of the "Mapuche ethnic group."

143. The Commission believes that the elements described above are sufficient to conclude that the language of the descriptions of the terrorist offenses criminalized under articles 1, 2 and 7 of Law 18,314 is ambiguous and imprecise, and the conduct criminalized under those provisions cannot be unmistakably distinguished from other offenses criminalized under common criminal law.

144. The Commission notes that in its Fifth Periodic Report on Chile, dated April 2007, the Human Rights Committee wrote that "[t]he Committee is concerned about the definition of terrorism contained in the Counter-Terrorism Act No. 18.314, which may be excessively broad." [167] In the Committee's words:

> (...) 7. The Committee is concerned about the definition of terrorism contained in the Counter-Terrorism Act No. 18.314, which may be excessively broad. It is also concerned that this definition has allowed charges of terrorism to be brought against members of the Mapuche community in connection with protests or demands for protection of their land rights. (...) The State party should adopt a narrower definition of crimes of terrorism, so as to ensure that it is not applied to individuals for political, religious or ideological reasons. Such a definition should be limited to offences which can justifiably be equated with terrorism and its serious consequences, and must ensure that the procedural guarantees established in the Covenant are upheld. (...) The State Party should: (b) Amend Act No. 18.314 to bring it into line with article 27 of the Covenant, and revise any sectoral legislation that may contravene the rights spelled out in the Covenant.[168]

145. The United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism wrote the following in his 2007 report:

> For purposes of the enforcement of the law, Article 1 of Law No. 18314 describes terrorism as any action "committed with the intention of instilling in the population or in a portion thereof a well-founded fear of becoming victim to similar crimes, either due to the nature and effect of the methods used or evidence suggesting that it is part of a premeditated plan to attack a specific category or group of people" (paragraph 1) or for the purpose of pressuring authorities to make certain decisions or imposing demands" (paragraph 2). Under the principle of legality recognized in Article 15 of the International Covenant on Civil and Political Rights, the Special Rapporteurs consider that this definition is too broad and too vague. That principle, which is non-derogable even in the event of a state of emergency, means that criminal culpability must be determined on the basis of clear and unambiguous provisions established by law, so as to ensure that the principle of legal certainty is respected and that

[167] UN - International Covenant on Civil and Political Rights – Human Rights Committee – Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee. Chile. Doc Ccpr/C/Chl/Co/5 – April 17, 2007.

[168] UN- International Covenant on Civil and Political Rights – Human Rights Committee – Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee. Chile. Doc CCPR/C/Chl/Co/5 – April 17, 2007.

the principle is not subject to an interpretation that allows one to broaden the scope of the punishable conduct.[169]

146. The Commission notes that the risks of maintaining open-ended criminal classifications which can lead to different interpretations of conduct that is considered criminally reprehensible, particularly in the context of prosecution and punishment of terrorism, are a discriminatory application of such provisions or their use to criminalize broad situations of social protest. Given the lack of a clear definition as conduct that is considered terrorism, the domestic judges enjoy a wide margin of discretion for introducing general contexts of social protest or a person's membership of an ethnic group as determinants in classifying an act as terrorism. In the following section the Commission examines the effects of the imprecision and vagueness of several aspects of Articles 1, 2, and 7 of Law 18.314, with regard to the right of the victims to equality and nondiscrimination, as well as their right to freedom of expression. Therefore, the articles examined above are incompatible with the principle of legality recognized in Article 9 of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof, which constituted a violation of the said right to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

147. Lastly, the Commission observes that Mr. Segundo Aniceto Norín Catrimán and Mr. Pascual Huentequeo Pichún Paillalao also alleged a violation of their right to legality because they were convicted of the crime of "terrorist threats" which, in their opinion, does not exist as such or in those exact terms in Chilean law. After reading the complete text of the conviction, the Commission considers that if the conviction was for "terrorist threats", then the judgment should specify the provision of Law 18,314 in which "terrorist threat" is classified as a terrorist offense. While the court does use different language to refer to the crime of which the two were convicted, it is clear that, having established the facts, the court specified, in the judgment itself, the specific type of crime that the two men were supposedly threatening to commit and made reference to the provisions of the Anti-Terrorism Law in which threats are criminalized. Therefore, the Commission does not consider that the principle of legality was somehow violated by a simple abbreviation of the name of the crime of threatening terrorist arson.

148. Given the scope of this report's conclusions and recommendations, the Commission must make some reference to the progress recently made in Chilean law. The Commission notes that Chile's National Congress approved Law 20,467, which amends some provisions of Law 18,314. The following are among the principal changes that Law 20,467 introduced: 1) in Article 1, the definition of terrorist crimes was changed so that a common crime would become a terrorist offense when committed for the purpose of instilling in the population or a portion thereof a well-founded fear of becoming the victim of similar crimes, an end that will be inferred alternatively from three factors: (a) the nature and effects of the means employed, (b) evidence that the offense is part of a premeditated plan to attack a category or group of persons, or (c) the offense is committed to undo or frustrate the decisions of the authorities or to make demands upon them;[170] (2) the presumption of terrorist intent based on the means used, previously stipulated in Article

[169] HUMAN RIGHTS COUNCIL - Sixth session - PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin – ADDENDUM. Doc. UN A/HRC/6/17/Add.1, 28 November 2007, paragraph 8 [translation ours].

[170] Article 1 of Law 20,467 replaces Article 1 of Law 18,314, with the following text: "Article 1.- The offenses listed in Article 2 constitute terrorist offenses when the offense is committed with the intention of instilling in the population or in a portion thereof a well-founded fear of becoming victim to similar crimes, either due to the nature and effect of the methods used or evidence suggesting that it is part of a premeditated plan to attack a specific category or group of people, either in order to undo or thwart decisions by the authorities or to impose demands upon them."

1(1) of Law 18,314, was dropped; (3) clarification was introduced to the effect that common crimes shall be regarded as terrorists offenses, not when "any" of the conditions established in Article 1 is present but rather "when the conditions [therein] specified are present";[171] (4) in Article 2, the list of common crimes that can become terrorist offenses was changed. Here, the Commission notes that (a) the list still includes the crimes of fire and vandalism, and (b) in item 4 on the list, which concerns the placement, launching, or shooting of bombs, explosives or incendiary devices," the phrase "that affect or could affect personal safety or cause harm" was dropped;[172] and (5) in Article 7, the penalty for an attempt or threat to commit terrorist offenses was modified and the corresponding sentencing guidelines were introduced.[173]

149. The IACHR notes that these legislative amendments do not affect the facts to which the *case d'espèce* refers, which are criminal proceeding that have long since been concluded and that were conducted in their entirety under Law 18,314, prior to its amendment by Law 20,467. Nevertheless, because this report of the Commission examines Chile's anti-terrorism criminal laws in relation to the facts of this case, some initial comments are in order concerning the legislative amendments approved thus far, based on information in the public domain.

150. Here, the Commission observes that the amendments that Law 20,467 introduced do not alter the substance of articles 1, 2 and 7 of Law 18,314, which were applied to the petitioners and which this report discusses. Subsequent to the amendment, one notes a change in the structure of the definition of terrorist offenses; however, the Commission observes that the language in which the definition is written is identical to the language used in Law 18,314. The only changes are in the order of the phrases and in the conjunctions used to join the three hypothetical conditions that are the grounds for presuming that a crime was committed to achieve a terrorist end. In effect, under Article 1 of the Law 18,314:

> "Article 1. The offenses listed in Article 2 constitute terrorist offenses when any of the following circumstances apply:
>
> 1. The offense is committed with the intention of instilling in the population or in a portion thereof a well-founded fear of becoming victim to similar crimes, either due to the nature and effect of the methods used or evidence suggesting that it is part of a premeditated plan to attack a specific category or group of people. The intent of instilling fear among the general population shall be presumed, unless there is indication to the contrary, when the offense was committed by means of explosive or incendiary devices, weapons with great destructive power, toxic, corrosive or infectious agents, or other agents that could cause great havoc, or by mailing letters, packages or the like with explosive or toxic effects.

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[171] Article 1 of Law 20,467 replaces the introductory paragraph of Article 2 of Law 18,314, as follows: "In the introductory paragraph [of Article 2] the phrase "when any of the conditions indicated in the previous article is present" is replaced by the phrase "when the conditions therein specified are present."

[172] According to Article 1 of Law 20,467, subparagraph 1 of Article 2 of Law 18,314 shall read as follows: "1.- The crimes of homicide punishable under Article 391; the crimes of felonious assault criminalized in articles 395, 396, 397 and 398; the crimes of kidnapping and abduction of minors, punishable under articles 141 and 142; the crimes of mailing explosive devices, punishable under Article 403 bis; the crimes of arson and vandalism, punishable under articles 474, 475, 476 and 480, and violations of public health covered in articles 313(d), 315 and 316, all under the Penal Code, and the crimes of train derailment, punishable under articles 105, 106, 107 and 108 of the General Railway Law." Under that same article, subparagraph 4 of Article 2 of Law 18,314 shall read as follows: "the placement, mailing or shipping, activation, hurling, detonation or firing of bombs, explosives or incendiary devices of any type, arms or devices of great destructive power or toxic, corrosive or infectious agents."

[173] Under Article 1 of Law 20,467, Article 7 of Law 18,314 will read as follows: "The penalty for an attempt to commit any of the crimes to which this law shall be the penalty for the crime in question, reduced by one or two degrees. The penalty for conspiracy to commit any of the crimes to which this law refers shall be the penalty for the crime, reduced by two degrees. The provision of this clause shall not alter the provision of Article 3 bis. // The penalty for a serious and credible threat to commit any of the crimes mentioned in this law shall be the same as the penalties for an attempt to commit the crime in question, without the increased degrees mentioned in Article 3. This provision shall not apply if the deed deserves a harsher penalty, under Article 296 of the Penal Code."

2. The offense is committed for the purpose of pressuring authorities to make certain decisions or imposing demands.

151. Once the amendment was introduced, the definition of terrorist crimes was as follows:

> "Article 1.- The offenses listed in Article 2 constitute terrorist offenses when the offense is committed with the intention of instilling in the population or in a portion thereof a well-founded fear of becoming victim to similar crimes, either due to the nature and effect of the methods used or evidence suggesting that it is part of a premeditated plan to attack a specific category or group of people, either in order to undo or thwart decisions by the authorities or to impose demands upon them."

152. Thus, the new legal definition of terrorism preserves the precise terminology of the previous definition. The only change is in the structure of the provision, since subparagraph 2 of the previous Article 1 -one of the subjective elements in the legal description of terrorism- becomes one of the factors that would allow one to infer a terrorist intent in some of the crimes criminalized under the regular criminal law system; the verb "to thwart" was added; also, the presumption of terrorist intent based on the use of certain methods was eliminated. The elimination of this presumption of a terrorist intent notwithstanding, because the wording of the description of this criminal offense has not substantially altered, the Commission observes that the law is still flawed by overly broad, vague, imprecise language that fails to distinguish the offenses criminalized in Law 18,314 from other criminal offenses and that led the Commission to conclude that the formulation of the offenses criminalized in Law 18,314 was contrary to the principle of legality.

153. Similarly, the description of the crimes of attempting or threatening to commit terrorist offenses relies on the definition of those offenses contained in Article 1 and is thus flawed by the very same problems of vague, overly-broad and imprecise language that are at the crux of the Commission's conclusions in this report.

154. Summarizing, the IACHR concludes that while the Chilean Congress has passed a new law, the legislative amendments have not thus far meant a substantive change in the description of the terrorist behavior that would make the law compatible with the principle of legality recognized in Article 9 of the American Convention.

### *B. The convictions in light to the right to equal protection and non-discrimination*

155. Article 24 of the American Convention provides that:

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

156. Article 1(1) of the Convention provides that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

157. The Commission will examine the petitioners' arguments regarding the discrimination they are alleged to have suffered in the criminal cases prosecuted against them, in the following order: i) General observations on the right to equal protection and the prohibition of

discrimination based on ethnic or racial affiliation or origin; ii) the right to equality and the prohibition of discrimination in the context of judicial proceedings and anti-terrorism campaigns; iii) the selective application of anti-terrorism laws to members of the Mapuche indigenous people, in light of the right to equality and non-discrimination, and iv) an examination of whether the prosecution and conviction of the victims under the Anti-Terrorism Law was discriminatory.

### *1. The right to equal protection and the prohibition of discrimination based on ethnic or racial affiliation or origin*

158. The American Convention prohibits discrimination of any kind, which includes unjustified distinctions based on race, color, national or social origin, economic status, birth or any other social condition. The principle of equality and non-discrimination is one of the protections that underpin the guarantee of other rights and freedoms. Under Article 1(1) of the American Convention, every person is the *titulaire* of the rights recognized in such instruments and is entitled to have the State respect and ensure his free and full exercise of those rights, without discrimination of any kind. In the words of the Inter-American Court, "Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights."[174]

159. As the Inter-American Court has explained, "Article 1(1) of the Convention, a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein 'without any discrimination'. In other words, regardless of its origin or the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is per se incompatible with that instrument."[175]

160. The Court has explained the scope of Article 24 of the Convention, which recognizes the right to equality before the law and to equal protection of the law, without discrimination, as follows: "Although Articles 24 and 1(1) are conceptually not identical, (...) Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations."[176]

161. As for the notion of equality, the Inter-American Court observed that it "'springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to

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[174] I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, paragraph 83. The Human Rights Committee has made the same observation: *"Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."* Human Rights Committee, General Comment No. 18: Non-discrimination, November 11, 1989, paragraph 1.

[175] I/A Court H.R., *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 53.

[176] /A Court H.R., *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 54. See also, IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Community of the Toledo District v. Belize, October 12, 2004, paragraphs 162 *et seq.*

subject human beings to differences in treatment that are inconsistent with their unique and congenerous character."[177]

162. The Inter-American Court has also explained the relationship between the notion of equality before the law and non-discrimination where it wrote that "[t]he element of equality is difficult to separate from non-discrimination. Indeed, when referring to equality before the law, the [international] instruments (...) indicate that this principle must be guaranteed with no discrimination."[178] The Court explained the obligations that the principle of equality and nondiscrimination impose upon states, where it wrote that:

> "States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws""[179] and that "[i]n compliance with this obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.[180]

163. The inter-American system does not prohibit every distinction in treatment in the enjoyment of fundamental rights and freedoms; nevertheless, to be permissible, any such distinction must have an objective and reasonable justification, must serve a legitimate purpose, must respect the prevailing principles in democratic societies, and must be established by reasonable means and proportional to the end sought.[181]

164. Interpreting the American Declaration, the Commission has written that "[t]he notion of equality before the law set forth in the Declaration relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others. Further, Article II, while not prohibiting all distinctions in treatment in the enjoyment of protected rights and freedoms, requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought."[182]

165. In this same line of reasoning, the Inter-American Court has written the following:

> Precisely because equality and nondiscrimination are inherent in the idea of the oneness in dignity and worth of all human beings, it follows that not all differences in legal treatment are

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[177] /A Court H.R., *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 55.

[178] I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, paragraph 83.

[179] I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, paragraph 88.

[180] I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, paragraph 103.

[181] In the words of the IACHR: "While the doctrine of the inter-American human rights system does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, any permissible distinctions must be based upon objective and reasonable justification, must further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and the means must be reasonable and proportionate to the end sought." IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, Executive Summary, paragraph 15.

[182] IACHR, Case 9903, Report No. 51/01, Ferrer-Mazorra *et al.* (United States). Annual Report of the IACHR 2000, paragraph 238.

discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity. The European Court of Human Rights wrote that "(...) a difference in treatment is only discriminatory when it "has no objective and reasonable justification." (...) There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position.[183]

166. The Court held that

(...) no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.[184]

167. Racial discrimination is a form of discrimination that violates the inherent equality and dignity of every human being and has been universally condemned by the international community.[185] Article II of the American Declaration of the Rights and Duties of Man provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor" while Article 1(1) of the American Convention provides that States must respect and ensure the rights and freedoms of all persons subject to their jurisdiction "without any discrimination for reasons of race, color, (...), national or social origin (...) birth, or any other social condition."

168. The International Convention on the Elimination of All Forms of Racial Discrimination, to which Chile is party, defines this particularly odious form of discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (Article 1), and requires the States Parties, *inter alia,* "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation" (Article 2(1)(a).

169. In the specific case of indigenous peoples, the Committee on the Elimination of Racial Discrimination "has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination,"[186] and therefore called upon the States parties to "[e]nsure that

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[183] /A Court H.R., *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 56.

[184] /A Court H.R., *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 57. See also: I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, paragraphs 89 *et seq.*

[185] See, *inter alia,* the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, November 20, 1963 [General Assembly resolution 1904 (XVIII)], which solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations, an d of security understanding of and respect for the dignity of the human person..

[186] Committee on the Elimination of Racial Discrimination – General Recommendation No. 23, Indigenous Peoples; August 18, 1997, paragraph 1.

members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity."[187]

### *2. The right to equality and the prohibition of discrimination in the context of judicial proceedings and anti-terrorism campaigns*

170. One specific manifestation of the right to equality and non-discrimination is in the courts, where this right to equal protection combines with the guarantees of due process that are crucial to a fair trial. In the words of the Human Rights Committee:

> The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.[188]

171. The Human Rights Committee has also expressed that

> The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.[189]

172. The Committee on the Elimination of Racial Discrimination addressed the right to equal protection and non-discrimination in the courts in its General Recommendation No. 31,[190] where it wrote, *inter alia,* that "racial discrimination or xenophobia, when racial or ethnic discrimination does exist in the administration and functioning of the system of justice, it constitutes a particularly serious violation of the rule of law, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect."[191].

173. The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001, expressed its

> profound repudiation of the racism, racial discrimination, xenophobia and related intolerance that persist in some States in the functioning of the penal systems and in the application of the law, as well as in the actions and attitudes of institutions and individuals responsible for law enforcement, especially where this has contributed to certain groups being over-represented among persons under detention or imprisoned.

174. The right to equality and non-discrimination are among those rights most profoundly and deeply affected by States' anti-terrorist initiatives.[192] The Commission has stressed the point that "In the campaign against terrorism, states must be particularly vigilant to ensure that state agents, including

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[187] Committee on the Elimination of Racial Discrimination – General Recommendation No. 23, Indigenous Peoples; August 18, 1997, paragraph 2(b).

[188] Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial. Doc. UN CCPR/C/GC/32, August 23, 2007, paragraph 2.

[189] Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial. Doc. UN CCPR/C/GC/32, August 23, 2007, paragraph 8.

[190] Committee on the Elimination of Racial Discrimination, General Recommendation No. XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system.

[191] Committee on the Elimination of Racial Discrimination, General Recommendation No. XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. Preamble.

[192] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 10.

military forces, conduct themselves fully in accordance with the proscription against discrimination."[193] Of particular relevance to the instant case is the Commission's analysis of the risk of discrimination to which members of certain political, ideological, or religious groups are exposed in the fight against terrorism, particularly in the case of criminal proceedings:

> The Commission recognizes in this connection that the effective investigation of terrorist crimes may, owing to their ideological motivation and the collective means by which they are carried out, necessitate the investigation of individuals or groups who are connected with particular political, ideological or religious movements or, in the case of state-sponsored terrorism, the governments of certain states. The Commission must also emphasize, however, that anti-terrorist initiatives that incorporate criteria of this nature, in order not to contravene the absolute prohibition against discrimination, must be based upon objective and reasonable justification, in that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought. Distinctions based upon grounds expressly enumerated in the pertinent provisions of international human rights instruments are subject to an enhanced level of scrutiny (...).

175. Specifically, on the need for scrupulous observance of rights when a person's association with a group may be the grounds for investigating and prosecuting that person for terrorist crimes, the Commission observed that:

> This would require, for example, the existence of reasonable grounds connecting a particular group to terrorist activities before an individual's association with that group might properly provide a basis for investigating him or her for terrorist-related crimes. Even then, the extent to which and the manner in which investigative methods of this nature are undertaken and the resulting information is collected, shared and utilized must be regulated in accordance with the principles of reasonableness and proportionality, taking into account, *inter alia*, the significance of the objective sought and the degree to which the state's conduct may interfere with the person or persons concerned. (...)States must therefore remain vigilant in ensuring that their laws and policies are not developed or applied in a manner that encourages or results in discrimination, and that their officials and agents, including military forces, conduct themselves fully in conformity with these rules and principles."[194]

176. Summarizing, under international law, indigenous persons and peoples are *titulaires* of the right to equality, the right to be free from any form of racial discrimination –particularly any form of racial discrimination based on one's ethnic origin-, and the right to equal protection by the courts without their ethnicity becoming a cause for distinction, exclusion, restriction or unfavorable bias. These rights take on a specific added meaning in the case of indigenous persons. Article 2 of the United Nations Declaration on the Rights of Indigenous :Peoples provides that "[i]ndigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any form of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." Article 9 provides that "[i]ndigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right." For its part, ILO Convention 169 on Indigenous and Tribal Peoples contains the following provision in Article 3(1): "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination." These instruments enable a more precise interpretation of the scope and content of the non-discrimination clause and the right to equal protection recognized, respectively, in articles 1(1) and 24 of the American Convention, as they apply in the case of indigenous peoples.

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[193] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 15.

[194] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraphs 355-356.

177. As was explained above, the allegations of racial discrimination based on a "suspect" distinction, demand scrutiny on the part of international human rights bodies. In effect, as the Commission wrote, whenever some difference in treatment is based on the factors that international instruments explicitly list as prohibited discrimination, such a distinction must be subjected to particularly exacting scrutiny, in which the State is required to show a particularly important interest that the distinction serves and solid grounds for such a distinction.[195]

### *3. The selective application of anti-terrorism laws to members of the Mapuche indigenous people, in light of the right to equality and non-discrimination*

178. As mentioned in the section on proven facts, a number of international organizations have made reference to the selective application of the Anti-Terrorism Act in the case of persons who are members of the Mapuche indigenous community.

179. Thus, for example, while rejecting the use of violence as a mean of social protest, in his report to follow-up on the recommendations made by the previous UN Special Rapporteur on Chile, the current United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, observed the following in October 2009:

> 40. As for the State's policy regarding indigenous land and natural resources, the Special Rapporteur has received allegations claiming procedural irregularities and discrimination against Mapuche persons, mainly in the context of claims to land and natural resources. Traditional leaders and other heads and members of the Mapuche people have been convicted and are standing trial under various criminal laws for actions that are somehow related to the Mapuche's social protest involving its land claims. The Special Rapporteur does not condone the recourse to violence as a means of protest, even in those situations involving legitimate claims by indigenous peoples and communities. However, the commission of any acts of violence does not in any way justify the violation of the indigenous people's human rights by State police forces.
>
> (...)
>
> 46. Another disturbing aspect of the criminal policy is to enforce, especially in years past, the Anti-Terrorism Act (Law No. 18,314) to prosecute and convict Mapuche individuals for crimes committed in the context of social protest. (...)
>
> 58. The allegations made regarding the policy on crime is that it does not comply with international law and fails to observe domestic procedural guarantees. The collateral effect is that the indigenous people have been stigmatized and the general dynamic that has now taken hold between the Mapuches and state officials is one of conflict that does nothing to help find constructive solutions that go to the causes of the protest.
>
> (...)
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> 60. In the view of the Special Rapporteur, the policy applied in recent years in the case of the indigenous communities and persons and their acts of protest is in need of in-depth revision, to gear it toward finding solutions that reconcile the ends of law enforcement and respect for

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[195] See, for example, European Court of Human Rights, case of Abdulaziz v. United Kingdom, Judgment of May 28, 1985, Ser. A No. 94, paragraph 79. IACHR, Report on Terrorism and Human Rights, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 338, footnote 805. IACHR, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser.L/V/II.doc.68, January 20, 2007, paragraph 83. IACHR, Report No. 4/01, Case 11.625, Maria Eugenia Morales de Sierra v. Guatemala, January 19, 2001, paragraph 36. IACHR, Annual Report 1999. Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and non-discrimination, Chapter VI.

> international law, thereby creating a climate of democratic governability between the Mapuches and state officials.[196]

180. For its part, in its Concluding Observations on Chile, the August 2009 Report, the Committee on the Elimination of Racial Discrimination stated the following: "(...) 15. The Committee notes with concern that the Counter-Terrorism Act (No. 18314) has been mainly applied to members of the Mapuche people for acts that took place in the context of social demands relating to the defense of their rights to their ancestral lands (Article 2). // The Committee recommends that the State Party should: a) reform the Counter-Terrorism Act (No. 18314) to ensure that it is applied only to terrorist offences that deserve to be treated as such; b) Ensure that the Counter-Terrorism Act is not applied to members of the Mapuche community for acts of protest or social demands. (...) The Committee draws the State parties' attention to its General Recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system (section B, paragraph 5(e))."[197]

181. The United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, wrote the following:

> (...) 15. The Special Rapporteur notes with great concern that judges have been able to enforce the law in a discriminatory way; although property-related crimes generally carry sentences of fines or very short periods of imprisonment, in the case of the Mapuches the judges are said to classify such behaviors as acts of terrorism and apply very harsh penalties of imprisonment for periods of at least 10 years.
>
> 16. There are serious concerns that the enforcement of the Anti-Terrorism Act in this case may have something to do with the activities of these people in defense of human rights, particularly their activities to defend the Mapuche community. (...)
>
> 20. As for the enforcement of anti-terrorist law, the Government reported that the President of the Republic, Mrs. Michelle Bachelet, had pledged that the executive branch would not seek application of the Anti-terrorism Act when filing a complaint in a future case involving indigenous peoples asserting land rights, when the acts at issue are classified as crimes under the Anti-Terrorism Act but can also be prosecuted as common crimes. (...)
>
> 26. (...) The Special Rapporteur is gratified by the Chilean President's announcement that the executive branch will not apply the Anti-Terrorism Act when filing complaints in future cases involving indigenous peoples asserting land claims, when the acts at issue are classified as crimes under the Anti-Terrorism Act but can also be prosecuted as common crimes. (...)[198]

182. In its November 26, 2004 Concluding Observations on the reports submitted by the States Parties, the Committee on Economic, Social and Cultural Rights stated the following: "14. The Committee is deeply concerned about the application of special laws, such as the Law of State Security (No. 12.927) and the anti-terrorism law (No. 18.314), in the context of the current tensions over the

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[196] UN, Human Rights Council. Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Addendum. The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur. Document UN A/HRC/12/34/Add.6, October 5, 2009. [Translation ours].

[197] UN – International Convention on the Elimination of All Forms of Racial Discrimination – Committee on the Elimination of Racial Discrimination – Consideration of reports submitted by States parties under article 9 of the Convention. Concluding observations of the Committee on Racial Discrimination – Chile. UN Doc. CERD/C/CHL/15-18, August 13, 2009.

[198] UN – Human Rights Council – Implementation of General Assembly Resolution 60.251 of 15 March 2006 entitled 'Human Rights Council' – Report by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène – Addendum – Summary of cases transmitted to Governments and replies received. Doc. UN A/HRC/4/19/Add.1, June 5, 2007 [Translation ours].

ancestral lands in the Mapuche areas. (...) 35. The Committee recommends that the State party not apply special laws, such as the Law of State Security (No. 12.927) and the anti-terrorism law (No. 18.314), to acts related to the social struggle for land and legitimate indigenous complaints." [199]

183. In its May 14, 2009 Consideration of Reports submitted by States Parties, the Committee against Torture wrote that: "23. (...)The Committee also notes with concern that the State party has on occasion applied the Counter-Terrorism Act to members of indigenous peoples in connection with acts of social protest." [200]

184. In his 2007 Report, the United Nations' Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism wrote the following:

> 9. Under the current definition of the crime of terrorism, nine members of Mapuche communities have been convicted in the period from 2003 to 2005, of the crimes of "threatening terrorist arson", "launching a terrorist incendiary device" or "terrorist arson", all in connection with violent acts of social protests related to claims asserting their right to traditional indigenous lands. These convictions have been a source of deep concern in recent years and have elicited responses from various international human rights bodies, as well as special proceedings by the Human Rights Council. (...)
>
> 11. Furthermore, the situation of the Mapuche leaders and activists who are serving sentences under the anti-terrorist law was the subject of communications sent to Her Excellency's Government by various persons acting on mandates given by the Human Rights Council and dated March 24 and July 19, 2005, April 21 and May 11, 2006. These communications expressed concern over the allegations received claiming that the convicted persons' rights to due process had been violated by the very expansive definition of the crime of terrorism under Law No. 18314. [201]

185. In the Report of the United Nations Working Group on the Universal Periodic Review, Chile (June 4, 2009), the Working Group states that one observation made during the interactive dialogue among the participating states was that "Chile's antiterrorist law cannot be applied on the basis of ethnic, religious or political considerations, but only in accordance with the gravity of the crime committed." One of the recommendations on which Chile will present observations once the Council's final report is approved was the following: "4. Review the anti-terrorist law and its application so that it cannot be abused for persecution of persons from indigenous communities, including the Mapuche, for their peaceful political or religious activity. (Czech Republic)." [202]

186. This was the context at the time the victims in this case were prosecuted and convicted. The Commission observes that selective application of criminal law can manifest itself in a variety of ways. One is selective application of laws that concern conduct that is regarded as unlawful or punishable by the State, such as arson, for example. Under the standards herein

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[199] UN – Economic and Social Council – Committee on Economic, Social and Cultural Rights – Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant. Concluding Observations of the Committee on Economic, Social and Cultural Rights. Chile. Doc. E/C.12/1/Add.105, December 1, 2004.

[200] Committee against Torture. Consideration of Reports Submitted by States Parties under Article 19 of the Convention. Concluding observations of the Committee against Torture. Chile. UN CAT/C/CHL/CO/5, May 14, 2009, paragraph 23.

[201] HUMAN RIGHTS COUNCIL - Sixth session - PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin – ADDENDUM. Doc. UN A/HRC/6/17/Add.1, 28 November 2007. [Translation ours]

[202] Human Rights Council – Universal Periodic Review – Report of the Working Group on the Universal Periodic Review: Chile. Doc. UN A/HRC/12/10, June 4, 2009, paragraphs 47, 97.

described, if a person's race or ethnic origin is a factor taken into account to make what would ordinarily be a common crime a terrorist offense, then this would be a case of selective application of criminal law.

187. In other words, although states have the right and the duty to prosecute acts of violence that occur under their jurisdiction, including those that arise in the context of a social protest that turns violent, the selective application of special criminal standards that are more restrictive than ordinary criminal standards -as is the case with the antiterrorism laws in Chile- to members of an ethnic group constitutes a difference in treatment compared to others with a direct impact on the enjoyment of their substandard and procedural rights. The Commission finds that this difference in treatment, by including an ethnic membership criterion, is based on a suspect category, is presumably incompatible with the American Convention, and, therefore, demands particularly strict scrutiny by the Commission.

188. The Commission will now examine whether, in the instant case: i) belonging to and/or associating with the Mapuche indigenous people was taken into consideration when deciding to prosecute under the Anti-Terrorism Act and convict the victims of terrorist crimes; if so, the Commission will evaluate whether ii) the Chilean State provided reasonable justification for the difference in treatment.

### *4. Examination of whether the prosecution and conviction of the victims under the Anti-Terrorism Act was discriminatory*

189. The Commission again observes that under Law 18,314, an offense is classified as a crime of terrorism by adding the subjective element of "terrorist intent" to the description of a series of common crimes. In the three cases examined here, the courts evaluated the victims' conduct and deemed that it constituted "terrorist offenses" on the basis that the subjective element of a "terrorist intent" had been proven, whereupon the Anti-Terrorism Act became the applicable law.

190. According to the information available in the case record, the three verdicts of conviction that became final make repeated references to what the judges regarded as the sociopolitics of the Mapuche people and their social protests in Chile's regions VIII and IX.

191. For example, in the ***case prosecuted against Aniceto Norín and Pascual Pichún*** constant allusion was made to the so-called "Mapuche conflict" in order to make the case that the fires and threats under investigation were terrorist acts and to portray the defendants' terrorist intent as proven fact. Taken together, the conviction that the Angol oral criminal trial court handed down on September 27, 2003, contains various relevant passages that demonstrate that the classification of their conduct as terrorist acts was based in part on the socioeconomic context that the Court regarded as the backdrop against which the facts under investigation took place.

192. Of particular interest is *Consideranda* 13, where the Court explained why, in its judgment, the crimes of which the defendants were accused were terrorist crimes. In the words of the court, "the crimes herein specified must be viewed against the backdrop of a process of recovering Mapuche lands, in which the perpetrators took direct action, without respecting the legal and institutional order and by recourse to the use of force through measures that were planned, agreed and prepared in advance by radicalized groups that seek to create a climate of insecurity, instability and fear in various sectors of Regions VIII and IX." The Angol Oral Criminal Trial Court, in referring to this representation of the "Mapuche conflict," noted that "the purpose is to inspire in people a justified fear of being victims of similar attacks and, thereby, force them to stop developing their properties and abandon them."

193. To reach this conclusion, the Court relied on statements of the "context witnesses" during the course of the criminal case, witnesses who –the Commission notes- did not testify about the acts carried out specifically by Pascual Pichún or Aniceto Norín; instead, their testimony concerned other crimes or threats of which they had allegedly been victims, reports or subjective assessments of the situation and facts about the economic situation. Indeed, the Court mentioned that these witnesses were aware of threats or attacks on people or property "perpetrated by persons belonging to the Mapuche ethnic group." Mention was also made of a report in the press that referred to the "number of conflicts caused by mapuche groups through terrorist acts."

194. Then, in *Consideranda* 15 of the conviction, the Court listed six considerations, which followed the phase "As for the involvement of the two defendants, the following has to be considered": (1) it is a "public and notorious fact" that *de facto* organizations have existed within the area for some time that commit acts of violence or incite violence on the pretext of their territorial claims. Their *modus operandi* includes various acts of force targeted at the lumber businesses, small- and medium-size farmers, all of whom have one thing in common: they are owners of properties that are adjacent to, neighbor or are nearby indigenous communities that are asserting historical claims to those properties. The purpose of the measures is to reclaim lands that they believe are their ancestral lands. The illegal occupation of those lands is the means to accomplish the most ambitious goal. Through these actions, they believe they will gradually recover a portion of their ancestral territory and thereby strengthen the territorial identity of the Mapuche people"; (2) "[i]t has not been sufficiently established that these acts were caused by persons outside the Mapuche communities, since they are acts clearly intended to create a climate of harassment towards the property owners in the sector, in order to instill fear and get them to accede to their demands. This is the logic of the so-called "Mapuche Problem." The perpetrators knew the territory they were claiming and no Mapuche community or property was affected"; (3) that Pascual Pichún and Aniceto Norín are *lonkos* of their respective communities, which "means they have authority within their community and have some degree of command and leadership in those communities"; (4) that both defendants had been convicted of other crimes in the past, one of which involved occupations of land; (5) the communities of which the two defendants are *lonkos* are adjacent to the Nancahue tree farm, and that (6) according to the statement by a witness based on his investigations, both defendants are reportedly members of a violent *de facto* organization, the *Coordinadora Arauco Malleco*.

195. When the ***criminal case prosecuted against Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán*** is looked at as a whole, one finds that the Angol oral criminal trial court followed a line of reasoning similar to the line of reasoning it followed in the case against Pascual Pichún and Aniceto Norín in the sense that the crimes under investigation were classified as terrorist offenses based on context-related considerations having to do with the so-called "Mapuche conflict". Thus, in the conviction handed down on August 22, 2004, the Court presents a detailed outline of the evidence in the case file; then, in *Consideranda* 14, it proceeds to describe the criminal acts that the court deems to have been proven. Number six reads as follows:

> [i]t is a public and notorious fact that in 2001, persons associated with or belonging to the Mapuche ethnic group, using violent means to get their demands and territorial claims, assaulted persons, property, buildings, vehicles and machinery owned by private persons or businesses set up in various geographic areas of the province of Malleco, which had negative consequences for public safety and tranquility, the physical integrity of the citizens, and development in the area. The fire at the Poluco Pidenco tree farm fit into the conflict dynamic.[203]

[203] According to what the court wrote in the judgment, the testimony taken into account described a general context. As the verdict of conviction states: "Witnesses César Gutiérrez Chávez, Ricardo Martín Ruff, Víctor Luengo San Martín, Gerardo Cerda Agurto, Juan Zapata Acuña, Mario Garbarini Barra, Gerardo Jequier Schalchi said that they had been

196. Based on grounds such as these, in *Consideranda* 16 the Court concluded that the actions that had been proven constituted crimes under the Anti-Terrorism Act; in *Consideranda* 17, it made reference to evidence that supposedly proved that the defendants were the material authors of the fires, but made no reference to their intent to commit a terrorist crime; instead the court spoke of their material participation in setting the fire. Then, in *Consideranda* 19, the Court listed the reasons why the crimes were classified as terrorist offenses, and did so by alluding to the context in the region, which it referred to as the "Mapuche conflict." It wrote that the fire which occurred on December 19, 2001, "does qualify as a terrorist offense, inasmuch as the actions that underlie these crimes demonstrate that the form, methods and strategies employed had a malicious intent, which was to instill a generalized fear in the area, a situation that is a public and notorious fact that these judges cannot ignore; this is a serious conflict between a portion of the Mapuche ethnic group and the rest of the population, a fact neither argued by the parties nor unknown to them." For the court, the facts of the case –which it deemed to have been proven- had to be "viewed against the backdrop" of the Mapuche conflict. It wrote that "the crime established in *Consideranda* 16 must be viewed against the backdrop of a process of recovering Mapuche lands, in which the perpetrators took direct action, without respecting the existing legal and institutional order" and by recourse to violent actions committed by radicalized groups in the Province of Malleco, the purpose of which was to use violence to make demands of farmers and tree farmers in the area to get them to abandon their lands. In the court's view, "[t]he obvious inference is that the objective is to instill in the population a well-founded fear of falling victim to similar crimes."

197. As for the ***conviction of Víctor Ancalaf Llaupe***, the court's reasons for regarding the crimes as terrorist offenses were based on testimony and reports from authorities in which reference is made to the measures taken by certain members of the Mapuche indigenous people to oppose construction of the Ralco hydroelectric plant. The Commission notes that the testimony and reports in question make reference to other persons, but never name Víctor Ancalaf.[204] Having set out what the court deemed to be the facts in the case, in *Consideranda* 15 the court then proceeded to declare the existence of the crime to be proved and to classify the actions as terrorist acts, arguing that: "The facts indicate that these actions were taken for the purpose of instilling in a portion of the population a justified fear of falling victims to such crimes, given the circumstances and the nature and effects of the means employed; it is obvious that everything was part of a premeditated plan to attack property belonging to third parties who are engaged in work related to the construction of the Ralco Power Plant that will serve Alto Bío Bío, all for the purpose of forcing the authorities to make decisions that will slow or stop the construction work." Then, in *Consideranda* 17, the court summarizes the evidence that served as the basis for the court's finding that Victor Ancalaf was a material author of the attack on the truck, whereupon it

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victims of various crimes committed by Mapuches from communities near their properties or the land they worked. Union leaders Manuel Riesco Jaramillo, René Araneda Amigo and Juan Correa Búlnes said that they were aware that landowners and businessmen in the area were fearful that they might also be killed or injured, that damage might be done to their property, buildings, machinery and vehicles, by the violent actions undertaken by some Mapuche groups and communities in order to recover land that they claimed for themselves. This version was confirmed by the attorney from the Ministry of the Interior, Jorge Vives, who stated that the political authority is aware of these actions that undermine the rule of law; by prosecuting them, the government is simply fulfilling its obligation to ensure and maintain order and public safety."

[204] The testimony and reports in question include (i) a police report stating that in the past, there have been episodes of violence in the sector related to the construction of the Ralco Hydroelectric Plant, which "have caused people outside the Pehuenche communities to sympathize with the indigenous people in the fight against the State and Endesa", that these episodes "have formed the springboard of a symbolic struggle" waged by a small group of Mapuche persons who loudly oppose the projects; the three fires under investigation fit the same pattern of organization and modus operandi, and (ii) a report by the Chilean National Police Force and Gendarmerie, which observes that the three fires under investigation share similar characteristics that suggest "planning between the Pehuenche activists from the Alto Bío Bío and activists from other parts of the country, steadfast opponents to the construction of the Ralco Hydroelectric Plant," waged on the grounds that it is "destroying the environment and the ancestral culture and customs of the Pehuenche people."

immediately convicted the defendant of being the perpetrator of terrorist offenses. Summarizing, the court's classification of the crime as a terrorist offense relied heavily on contextual considerations, such as the Mapuche people's opposition to the construction of the Ralco Hydroelectric Plant; this, the court concluded, was the backdrop against which the attack occurred.

198. The IACHR wishes to clarify that the purpose of this analysis is not to determine if, based on the evidence at the disposal of the Chilean judicial authorities, the victims were rightly convicted. Nor is it the Commission's task to determine if the conduct of a particular person or group may be regarded as terrorist. As the Court has previously stated, the organs of the inter-American system for protection of human rights do not function as an mechanism of appeal or review of judgments issued in domestic proceedings. Their function is to determine the compatibility of the steps taken in those proceedings with the American Convention.[205]

199. Having read the convictions, the commission finds that in the case of ***Lonkos Segundo Aniceto Norín and Pascual Pichún***, the main grounds for the classification of the threats ascribed to them as "terrorist" was the ethnic origin of the accused, as well as their status as *Lonkos* of communities belonging to the Mapuche indigenous people. These elements are noted in the conviction as is the context of struggle and claims for land of the Mapuche people, which was represented by the Court as a series of illegal, violent acts, without a distinction drawn between the legitimate acts of social protest of the Mapuche people and the acts of violence that have occurred in said context. Nowhere in the judgment is a direct link made between the *Lonkos* and those acts of violence. To the contrary, assumptions are made based on their status as leaders of their communities. Although it is mentioned that the *Lonkos* reputedly belonged to a violent organization, no explanation is offered of their link to that organization or the reasons why it is considered a terrorist organization. Therefore, it is clear that the branding of the threats as terrorist constituted a patent difference of treatment based on the ethnic origin and status as *Lonkos* of Segundo Aniceto Norín and Pascual Pichún.

200. In the case of ***Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán, and Juan Ciriaco Millacheo Licán,*** as well as of ***Víctor Ancalaf***, the Commission sees that the judicial authorities inferred that owing to their membership of and/or link to the Mapuche indigenous people, the offenses with which they were charged were part of a series of acts of violence perpetrated sporadically in the broader context of the protests of that indigenous people. The Commission observes that these decisions mentioned the means used to commit the offenses charged and the effects that they caused as grounds to infer terrorist intent.

201. However, when a person's membership of an ethnic group is taken into consideration to classify an act as a terrorist offense, with the consequences attendant thereon under the country's domestic system of laws, one is faced with a possible act of racial discrimination which, as has been said, must be scrutinized with the utmost care by the organs of the inter-American system inasmuch as it is a "suspect category." This is so, regardless of whether or not in the domestic decisions other grounds were considered in reaching the respective conclusions.

202. In this regard, the Commission believes that it is not for it to determine if, in the absence of the ethnic membership element, the offenses charged should, in any case, have been

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[84] I/A Court H.R., *Case of Fermín Ramírez v. Guatemala.* Judgment of June 20, 2005. Series C, No. 126. par. 62. Citing. *Cf. Case of Juan Humberto Sánchez.* Judgment of June 7, 2003. Series C, No. 99, par. *120; Bámaca Velásquez Case.* Judgment of November 25, 2000. Series C, No. 70, par. 189; and *The "Street Children" Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C, No. 63, par. 222.

classified as terrorist. It was up to the domestic judicial authorities to make an objective review of the situation based on the evidence contained in the record on the specific facts that were brought to its attention and refrain from introducing the ethnic element in forming its conclusions about the nature of the offenses.

203. As the European Court has stated in cases concerning discrimination by judicial or administrative authorities, the various grounds on which a judge bases their decision combine to form their conclusion in ruling one way or another. Those grounds should not be considered alternatively, but concurrently, without it being possible to consider that one ground was predominant or that one of them alone was sufficient to make the decision.[206]

204. By the same token, the Commission considers that in the case of Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia ROXANA Troncoso Robles, José Benicio Huenchunao Mariñán, and Juan Ciriaco Millacheo Licán, as well as that of Víctor Ancalaf, it has also been shown that there was a difference in treatment based on their ethnic origin and/or link to the Mapuche people, inasmuch as the consideration of these elements had the effect of influencing the decision.

205. Next, the Commission will analyze if the difference in treatment in the decisions examined was justified on objective and reasonable grounds.

206. The Commission notes first that the Chilean State offered no arguments on the merits to justify this difference in treatment, and thereby failed its burden of proof. Nevertheless, the IACHR believes it is worthwhile examining whether an objective and reasonable justification for the difference in treatment can be extrapolated from the reasons cited by the domestic judicial authorities. The Commission observes that, the above-mentioned differences aside, the common denominator in the three convictions is the reference to a series of acts of violence committed by a group within a broader context of social protest and demands by the Mapuche indigenous people. In spite of the obvious difference between a general context of legitimate claims made through social protest and the occurrence of sporadic acts of violence, the judicial authorities base their decisions on a generalized social representation of the so-called "Mapuche conflict," in the terms described in the section on context (*supra* pars. 43-47).

207. In order for the differences in treatment based on contextual considerations to be regarded as justified, the judicial authorities should have established sufficient grounds to support both the victims' link to a specific context of violence, and the terrorist -as opposed to merely violent- classification of that specific context. In none of the three judicial decisions is it possible to find sufficient justification in that regard. On the contrary, according to the representation of the context and the standard applied by the judicial authorities, any act of violence committed by a person belonging to the Mapuche indigenous people should be considered an act of terrorism because previously other individuals belonging to the same indigenous people had committed acts of violence which had instilled fear in the population.

208. Thus, had these same crimes been committed by other persons, they would have been prosecuted and punished under the regular criminal justice system. However, in these three cases, the actions were classified as terrorist offenses based on the victims' affiliation and/or

[206] See, *mutatis mutandis,* European Court of Human Rights. Case of *E.B.* v. France. Judgment of 22 January 2008, paras. 80-90. This case concerned administrative and judicial decisions that refused a person the possibility of adoption on the grounds of her homosexuality. In the relevant part of its decision the European Court took note of the fact that sexual orientation had not been the only ground taken into account in the decisions. However, the Court determined that the consideration of the applicant's sexual orientation, even if only implicit, had had the effect of influencing the entire decision. In this case, the European Court concluded that the victim had suffered discrimination under Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

association with the Mapuche indigenous people; the rulings did not establish a direct relationship between the facts under investigation and the acts of violence allegedly committed by a minority group. Absent this legal reasoning, the difference in treatment based on ethnic origin and/or affiliation with a given ethnic group was not justified by the State. Therefore, the Commission concludes that it was an act of racial discrimination in violation of Article 24 of the American Convention in relation to Article 1(1) thereof, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

#### *5. The criminal convictions and the right to freedom of thought and expression*

209. The Commission has concluded that the victims in the instant case were tried and punished for terrorist offenses on account of the fact that they belonged to the Mapuche indigenous people. The Commission has also noted that these criminal proceedings were held in the context of social and political mobilizations of the Mapuche people commonly represented as the “Mapuche conflict” by a number of government authorities, including the judges that handed down the convictions in the instant case. The Commission believes that the references to ethnic factors in those judgments cannot be considered separately from the references to the social protest activities of the Mapuche people; it was precisely these activities that gave rise to the stereotypes of the Mapuche leaders and activists which, in turn, led certain acts to be classified as terrorist offenses.

210. The Commission has previously observed that social demonstrations are important to strengthen the democratic life of societies and that, generally speaking, this form of participation in public life, as an exercise in freedom of expression, plays a key social role. Therefore, the State is bound by an even stricter framework in justifying a limitation on the exercise of this right.[207] In the instant case, the Commission finds that the criminal decisions amounted to an arbitrary use of criminal law prompted, at least in part, by the fact that the persons convicted were linked to an indigenous people well known for its social mobilizations. The predisposition of the judges to discriminate led them, in their analysis of the applicable crime, to put lawful social protest activities together with illegal acts. In that sense, it represented an arbitrary interference in the exercise of freedom of thought and expression of these persons, in violation of Article 13 of the American Convention taken together with Article 1(1) thereof. Naturally, this interference also had an intimidating and suppressing effect on the freedom of expression of the Mapuche people in general, bearing in mind the severity and the criminal nature of the penalties involved.[208]

### *C. Indigenous peoples’ right to preserve their cultural identity, including their socio cultural structure, from discriminatory criminal prosecution of their traditional authorities.*

211. The IACHR must emphasize that for a Mapuche indigenous community, the criminal prosecution of its *Lonkos* and *Werkén,* the community’s traditional authorities, under the circumstances of racial discrimination and violation of the principle of legality shown to have existed in these cases, is a terrible injustice that has implications for the entire Mapuche social fabric. As previously explained, Pascual Pichún and Aniceto Norín are *Lonkos;* in other words,

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[207] IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 2002, Chapter IV, par. 34.

[208] See, IACHR, Office of the Special Rapporteur for Freedom of Expression. The Inter-American Legal Framework regarding the Right to Freedom of Expression. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009, par. 114.

they are the highest-ranking leaders or heads of their respective communities. Víctor Ancalaf is a *Werkén*, in other words, his community's messenger or envoy. Together, the *Lonko* and *Werkén* constitute the local indigenous leadership.

212. For the Mapuche people, *Lonkos* are traditional authorities whose role is a combination of spiritual matters and government business. In the Mapuche language the word *Longko* literally means "head": every *Lonko* is thus the head of his respective community or *Lof,* which in turn is composed of a group of families or an extended family. Traditionally, the Mapuche *Lonkos* head up decision-making in the political, economic, military and administrative affairs of the community; they sometimes lead the religious and spiritual life of their communities, as they are the repositories of ancestral wisdom and preside over such important ceremonies as *guillatun* (ceremonies for prayers or petitions). The *Werkén,* for their part, are the *Lonkos'* confidants and envoys and serve to reinforce the bond between family and community. Both the *Lonkos* and the *Werkén* are part of the Mapuche people's community leadership and are thus key parts of its social structure; preservation of the Mapuche people's socio cultural integrity and its continued existence over time hinges upon the leadership's proper performance of its role. To impair or obstruct the performance of these functions thus affects the social structure and cultural integrity as a whole.

213. Time and time again the bodies of the inter-American human rights system have upheld the right of indigenous peoples and of their individual members to have their socio-cultural integrity protected and respected. The Court and the Commission have invoked the guarantees protected under the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man; for interpretation purposes, they have also cited relevant provisions of the International Covenant on Civil and Political Rights (particularly Article 27), the International Convention on the Elimination of All Forms of Racial Discrimination, ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, the United Nations Declaration on the Rights of Indigenous Peoples, and other instruments.[209]

214. Thus, the IACHR (a) in its 1985 resolution on the situation of the Yanomami people of Brazil, held that *"international law in its present state, and as it is found clearly expressed in Article 27 of the International Covenant on Civil and Political Rights, recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity"*[210] and that *"the Organization of American States has established, as an action of priority for the member states, the preservation and strengthening of the cultural heritage of these ethnic groups and the struggle against the discrimination that invalidates their members' potential as human beings through the destruction of their cultural identity and individuality as indigenous peoples;"*[211] (b) in its 1997 report on the situation of human rights in Ecuador, it wrote that *"[w]ithin international law generally, and inter-American law specifically, (…)special protections for indigenous peoples may be required to ensure their physical and cultural survival";"*[212] and (c) in the 2002 report on the Mary and Carrie Dann case, the Commission emphasized that *"by interpreting the American Declaration so as to safeguard the integrity, livelihood and culture of indigenous peoples through the effective protection of their individual and collective human rights, the Commission is respecting the very purposes underlying the Declaration which, as expressed in its*

[209] See, in this regard:: IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann v. United States, December 27, 2002, paragraphs 124-132. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, paragraphs 86-88.

[210] IACHR, Resolution No. 12/85, Case 7615 – Yanomami People (Brazil), March 5, 1985, para. 7

[211] IACHR, Resolution No. 12/85, Case 7615 – Yanomami People (Brazil), March 5, 1985, para. 9

[212] IACHR, Report on the Situation of Human Rights in Ecuador, 1997, Chapter IX.

*Preamble, include recognition that "[s]ince culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power."*[213]

215. The indigenous peoples' right to socio-cultural integrity has been expressly recognized in various provisions of the United Nations Declaration on the Rights of Indigenous Peoples, under which "*[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State*" (Article 5); "*[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture*" (Article 8.1); "*States shall provide effective mechanisms for prevention of, and redress for:*
*(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities*" (Article 8.2.a); "*Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures (...)*" (Article 11); "*Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions (...)*" (Article 20.1); and "*Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.*" (Article 34)

216. Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples upholds their right to "*the dignity and diversity of their cultures, traditions, histories and aspirations*", a collective right that requires States to "*take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society*" (Article 15). ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries also contains a number of clauses that protect these peoples' cultural integrity. For example, this Convention provides that "*[g]overnments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity,*" action that shall include measures for "*promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions*" (Article 2); that "*[s]pecial measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned*" (Article 4); that in applying the provisions of ILO Convention 169, "*the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals*" and that "*the integrity of the values, practices and institutions of these peoples shall be respected*" (Article 5); and that "*these peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.*" (Article 8.2). Also within the framework of international human rights, the Committee on the Elimination of Racial Discrimination has urged the States to "*[r]ecognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation*" and that they "*[e]nsure that indigenous*

[213] IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann v. United States, December 27, 2002, paragraph 131.

*communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages."*[214]

217. Summarizing, international human rights law, which is a key factor in interpreting the American Declaration and the American Convention, fully recognizes indigenous peoples' right to preserve their socio cultural integrity. Hence, the member states of the OAS have an obligation, under Article 1(1) of the American Convention and others, to respect and ensure the right to preservation of socio cultural integrity, which has individual and collective dimensions.

218. The issue here is not simply a decision by court authorities that prevents indigenous leaders from discharging their cultural responsibilities by depriving them of their freedom, thereby obstructing the performance of self-governance functions, organizational functions and rituals critical to the integrity of Mapuche culture, its preservation and reproduction; the case *sub examine* also involves an outrage committed against the very dignity of the Mapuche people as a whole, as the Chilean State's entire judicial-penal apparatus was set in motion in a manner incompatible with human rights, and against those who hold the highest position within their ancestral culture. This course of judicial action was not only discriminatory and contrary to the principle of legality, but also a failure to comply with the State's duty to protect and respect the socio cultural integrity of the indigenous peoples, and a total disregard for the dignity of the Mapuche indigenous people.

### D. The right to freedom of expression and the political rights recognized in Articles 13 and 23 of the American Convention

219. Article 13 of the American Convention provides:

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

220. Article 23 of the American Convention states:

> 1. Every citizen shall enjoy the following rights and opportunities:
>
> a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
>
> c. to have access, under general conditions of equality, to the public service of his country.
>
> 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

221. In all three criminal proceedings examined in the instant report ancillary penalties were imposed under Article 9 of the Constitution of Chile. As was mentioned in the section on proven facts, this provision specifically sets out the following consequences for terrorist crimes:

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[214] Committee on the Elimination of Racial Discrimination – General Recommendation No. 23, Indigenous Peoples, August 18, 1997, paragraphs 4.a and 4.e.

> Those found guilty shall be disqualified for 15 years from discharging public duties or holding public office, regardless of whether or not the appointment is by popular election; from being the rector or director of an educational establishment or performing teaching activities therein; from operating a social communications media outlet or being a director or manager thereof, or performing therein functions connected with the broadcast or dissemination of opinions or information; and from being the leader of a political organization, an organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time.

222. The Commission has already concluded in the instant report that the victims were convicted of crimes that were classified as terrorist offenses, on account of their status as members, leaders, and activists of the Mapuche indigenous people, or -in the case of Patricia Troncoso- their links thereto. The Commission further concluded that these considerations were not justified and that, consequently, the convictions for terrorist crimes constituted acts of discrimination against the victims.

223. The Commission notes that one of the implications of the classification of an offense as terrorist is the imposition of the penalties set forth in Article 9 of the Constitution, which, owing to their content, affect the exercise of other rights recognized in the American Convention, including freedom of expression and political rights. Bearing in mind that these specific penalties for terrorist crimes were based on decisions that have already been found to be discriminatory, the Commission concludes that the State of Chile also violated the rights set forth in Articles 13 and 23 of the American Convention, in connection with Article 1(1) thereof, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles, and Víctor Manuel Ancalaf Llaupe.

### *a. The violation of the guarantees of due process and the principle of legality, recognized in articles 8 and 9[215] of the American Convention*

224. Article 8 of the American Convention provides that:

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
>
> (...)
> f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
> (...)
> h. the right to appeal the judgment to a higher court.
> (...)
> 4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
>
> (...)

225. Article 1(1) of the Convention reads as follows:

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[215] Transcribed earlier in this report.

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

226. The petitioners have alleged numerous violations of their procedural rights and guarantees under articles 8 and 9 of the American Convention. Of those allegations, the Commission believes that certain points are of particular relevance: i) the convictions in light of the principle of individual criminal responsibility and the presumption of innocence; ii) the right of defense and the use of anonymous witnesses; iii) the right to appeal a ruling; iv) the right to be tried by a competent, independent and impartial tribunal, and v) the double jeopardy rule.

227. The petitioners did present other arguments, such as: (i) the alleged violation of the presumption of innocence, and the admission and weighing of evidence of guilt and exculpatory evidence, and their application to the criminal cases against Mapuche indigenous persons; (ii) the failure to observe the rights to time and means to prepare one's defense and to question and call witnesses, recognized in articles 8(2)(c) and 8(2)(f) of the American Convention, in the Angol oral criminal trial court's criminal prosecution and conviction of Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán, inasmuch as the testimony that the Public Prosecutor's Office introduced against them at trial was different from the evidence provided to the defense attorneys during the investigative phase of the case and that was used to build their defense; (iii) the failure to observe the rule prohibiting retroactive application of criminal law, recognized in Article 9 of the Convention, to the detriment of petitioners Pascual Pichún and Aniceto Norín, inasmuch as the use of anonymous witnesses during the trial phase of the proceedings meant that a more restrictive criminal procedure law was being applied retroactively to their case; (iv) the failure to respect the right of equality of arms and to summon witnesses, to the detriment of petitioners Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán, in that the State allegedly paid witnesses to testify against them on the pretext that it was protection money, which meant that the procedural treatment the defendants received was different from what other, non-Mapuche defendants prosecuted under criminal law would receive; or (v) the failure to recognize the right of petitioners Juan Patricio Marileo *et al.* to equal protection because the oral criminal trial court applied different criteria in deciding what evidence and exculpatory evidence it would hear, which was especially detrimental to Patricia Troncoso, José Benicio Huenchunao and Juan Ciriaco Millacheo.

228. Taking into account the conclusions formulated in previous sections, which are more general with respect to the cases prosecuted against the victims, the Commission does not deem it necessary to comment on this group of allegations, either because the Commission does not have sufficient information to arrive at a conclusion or because they are covered by the conclusions already formulated.

229. Before embarking upon its analysis, the Commission is reminded that in their anti-terrorism strategies, States must be careful to respect the right to due process, the right to a fair trial and the right to judicial protection recognized in articles 8, 9 and 25 of the American Convention, all of which are nonderogable rights;[216] as the IACHR has previously explained,

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[216] The Inter-American Court of Human Rights has singled out the non-derogable rights within the inter-American system, which include, *inter alia,* the rule of law and the principle of legality and, therefore the judicial guarantees essential to protect rights that are not subject to suspension during states of emergency. I/A Court H.R., Advisory Opinion OC-8/87, paragraphs 21-27. IACHR, *Second Report on the Situation of Human Rights in Peru* (2000), paragraphs 71-73; IAHR, *Report*

"[w]here member states endeavor to investigate, prosecute and punish individuals for crimes relating to terrorism, the Commission stipulates that member states remain bound by fundamental and non-derogable due process and fair trial protections in all instances, whether in times of peace, states of emergency or armed conflict. These protections encompass fundamental principles of criminal law as well as entrenched procedural and substantive safeguards." [217] In any criminal proceeding conducted against them, persons accused of terrorism-related crimes must have all the legal guarantees that constitute due process.[218]

### 2. *The convictions in light of the principle of individual criminal responsibility and the presumption of innocence*

230. One of the most fundamental principles of criminal law that informs the very guarantees of the right to due process and the right to a fair trial is the principle of individual criminal responsibility.[219] This general principle, which is a basic precept that the main international courts[220] and the States' domestic criminal laws[221] recognize, holds that no one may be convicted of a crime except on the basis of his/her individual responsibility; it implies that no one can be held criminally responsible for acts of third parties or for belonging to a certain group or organization. The corollary of this principle is the prohibition against collective criminal responsibility, a rule that holds that "Punishment shall not be extended to any person other than the criminal" (Art. 5 of the American Convention).

231. As noted earlier, the Inter-American Commission has stressed that the principle of legality is one of the basic procedural guarantees that States must respect in the anti-terrorist campaigns they wage.[222] As the Commission observes, this means that the punishable conduct must be formulated in law in clear and unambiguous language; but it also means that legislative or other measures must be taken to ensure that judges can take into account the circumstances of the offenses and of the individual offenders when they deliver a judgment for the commission of terrorist conduct.[223] Along these same lines, the Inter-American Court wrote that:

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*on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 52, and Executive Summary, paragraph 24.

[217] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 16.

[218] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 220.

[219] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 222.

[220] Rome Statute of the International Criminal Court, Article 25; Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 7; Statute of the International Criminal Tribunal for Rwanda, Article 6.

[221] IACHR, *Report on Terrorism and Human Rights,* OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 222.

[222] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 226, and Executive Summary, paragraph 17.

[223] In the Commission's words,"[i]n order to ensure that punishments imposed for crimes relating to terrorism are rational and proportionate, member states are also encouraged to take the legislative or other measures necessary to provide judges with the authority to consider the circumstances of individual offenders and offenses when imposing sentences for terrorist crimes." IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 17.

> Under the rule of law, the principles of legality and non-retroactivity govern the actions of all the State's bodies in their respective fields, particularly when the exercise of its punitive power is at issue.[224].
>
> In a democratic system, precautions must be strengthened to ensure that punitive measures are adopted with absolute respect for the basic rights of the individual, and subject to careful verification of whether or not unlawful behavior exists.[225]
>
> In this regard, when applying criminal legislation, the judge of the criminal court is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the behavior of the defendant corresponds to a specific category of crime, so that he does not punish acts that are not punishable by law."[226]

232. In the section on the rights to equality before the law and non-discrimination, the Commission concluded that the Chilean court authorities invoked the fact that the victims were either of Mapuche origin or associated with the Mapuche indigenous people to infer that the offenses with which they were charged were committed in the context of a series of acts attributed to a minority group, and on that basis concluded that the conduct could be classified as terrorist offenses. When it held that the decisions taken in these cases were discriminatory, one factor the Commission considered was the fact that the courts failed to properly establish how the conduct attributed to the victims was connected to that minority group. Taking into account the principle of individual criminal responsibility, the Commission finds that the convictions for "terrorist offenses" extrapolated the victims' terrorist intentions from contextual inferences, which is why the convictions are also incompatible with the principle of individual culpability that underlies contemporary criminal law, and the right to a presumption of innocence, all of which are protected under the American Convention as principles that inform the right to due process and to a fair trial (Article 8 of the Convention) and the rule expressly prohibiting collective criminal responsibility (Article 5 of the Convention).

233. In this regard, in the three convictions analyzed in the instant report the courts made reference to acts committed by third parties before or around the same time as the offenses with which the victims were charged. During the trials a series of witnesses were summoned to testify who described a series of acts unrelated to the victims. Also summoned were witnesses who gave testimony about the alleged fear-inspiring effects of those acts. As the judgments show, the only link between the third-party acts and the victims in the instant case is the ethnic origin of those who reportedly committed them. In spite of that, these testimonies were decisive factors in the conclusions reached by the judges with respect to the subjective element of the crime of terrorism.

234. Under international human rights law, it is unacceptable for a person to be convicted of terrorist crimes based on inferences drawn from the sociopolitical or geographic context and the acts of third parties within that context. Any criminal trial and conviction must be based entirely and only on the individual conduct of the person on trial. While context and circumstances may play a role when that individual conduct is assessed, any verdict of criminal responsibility must be

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[224] I/A Court H.R., *Case of De la Cruz Flores v. Peru*, Judgment of November 18, 2004 (Merits, Reparations and Costs), Series C. No. 115, paragraph 80. Citing *Case of Ricardo Canese, supra* nota 1, paragraph 177, and *Case of Baena Ricardo et al.* Judgment of February 2, 2001. Series C No. 72, paragraph 107.

[225] I/A Court H.R., *Case of De la Cruz Flores v. Peru*, Judgment of November 18, 2004 (Merits, Reparations and Costs), Series C. No. 115, paragraph 81 Citing: *Case of Baena Ricardo et al., supra* nota 97, paragraph 106; and, *inter alia, Eur. Court H.R. Ezelin judgment of 26 April 1991, Series A no. 202*, paragraph 45; and *Eur. Court H.R. Müller and Others judgment of 24 May 1988, Series A no. 133*, paragraph 29.

[226] I/A Court H.R., *Case of De la Cruz Flores v. Peru*, Judgment of November 18, 2004 (Merits, Reparations and Costs), Series C. No. 115, paragraph 82. See also, I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru*, Judgment of November 25, 2005 (Preliminary Objection, Merits, Reparations and Costs), Series C No. 137, paragraphs 187, 189, 190.

based on the conduct of the individual on trial, not on the conduct of third parties. This is of particular relevance in the case of terrorist offenses, where the international consensus is that the elements of the crime of terrorism are eminently subjective in nature, namely, the motive of the author.

235. For the reasons explained in this section the Commission finds that the Chilean State also violated the rights recognized in articles 8(1), 8(2) and 9 of the American Convention, in relation to the obligations established in Article 1(1) thereof, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

### *3. The right of defense and the use of anonymous witnesses*

#### *2.1 General comments on the right recognized in Article 8(2)(f) and anonymous witnesses.*

236. The guarantee provided in Article 8(2)(f) of the American Convention is one of those basic guarantees to which all persons are entitled, with full equality, in any criminal case prosecuted against him/her, as it is directly related to the adequate time and means to defend oneself from the charges against one, which is essential to ensuring a fair trial.[227] Citing the European Court, the Inter-American Court has written that "one of the prerogatives of the accused must be the opportunity to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf, under the same conditions as witnesses against him."[228]

237. Another practice denounced by the organs of the inter-American human rights system as contrary to the right to be tried by a competent, independent and impartial tribunal is the use of "faceless" justice systems, principally because the anonymity of the prosecutors, judges and witnesses deprives the defendant of the basic guarantees of justice. A defendant in such circumstances does not know who is accusing him or her and therefore cannot know whether that person is qualified to do so. The defendant is also prevented from carrying out any effective examination of the opposing witnesses, as he or she does not possess any information regarding the witness' background or motivations and does not know how the witness obtained information about the facts in question. For these reasons, the use of systems of secret justice, including the use of witnesses whose identity is not revealed, has been deemed by the Inter-American Court and the Commission to constitute, in principle, a violation of the due process guarantee of being able to question witnesses and the guarantee regarding publicity for criminal trials.[229]

238. In the 1999 Report on the Situation of Human Rights in Colombia, for example, the Commission addressed the use of anonymous witnesses and explained that:

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[227] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 235.

[228] I/A Court H.R., *Case of Castillo Petruzzi et al.*, Judgment of May 30, 1999 (Merits, Reparations and Costs), Series C No. 52, paragraph 154. See also, I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru*, Judgment of November 25, 2005 (Preliminary Objection, Merits, Reparations and Costs ), Series C No. 137, paragraph 152; I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*, Judgment of November 25, 2004 (Merits, Reparations and Costs), Series C No. 119, paragraph 184; *Eur. Court H. R., Case of Barberà, Messegué and Jabardo,* Decision of December 6, 1998, Series A no. 146, paragraph 78 and Eur. Court H. R.*, Case of Bönishc,* judgment of May 6, 1985, Series A no. 92, paragraph 32.

[229] IACHR, *Third Report on the Situation of Human Rights in Colombia,* OEA/Ser.L/V/II.102 Doc. 9 rev. 1, February 26, 1999, Chapter V, paragraphs 121-127. *IACHR, Annual Report 1996*, Chapter V, paragraphs 32 and 85 (Colombia). IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 233.

> The defendant is also prevented from carrying out any effective examination of the witnesses against him. The right to examination is largely important, because it provides the defendant with the opportunity to question the witness's credibility and knowledge of the facts. The defendant cannot adequately examine a witness if he does not possess any information regarding the witness's background or motivations and does not know how the witness obtained information about the facts in question. The "faceless" justice system thus also leads to the violation of Article 8(2)(f) of the American Convention, guaranteeing the right of the defense to examine witnesses.[230]

239. Other international human rights bodies have denounced the use of anonymous witnesses as antithetical to the right of defense that underlies all due process. Thus, the Human Rights Committee held that a justice system that allows the use of anonymous witnesses does not comply with Article 14 of the International Covenant on Civil and Political Rights.[231]

240. Nevertheless, there are circumstances in which the investigation and prosecution of certain types of crime, including crimes of terrorism, can expose those who cooperate with the administration of justice to serious threats against their lives and physical integrity. Clearly, States also have the obligation to prevent violence against those who cooperate with the administration of justice, and to protect their rights to life and physical integrity.[232] In such cases, international case law has accepted that certain exceptional measures can be taken to protect witnesses from the real dangers that their cooperation in criminal cases may expose them to, provided those exceptional measures do not infringe upon the essential guarantees of due process, a matter that must be determined on a case-by-case basis. As the Commission wrote, "this may in turn require that certain exceptional measures be taken to protect the life, physical integrity and independence of judges on a case by case basis, always providing, however, that the nature or implementation of such measures does not compromise a defendant's non-derogable fair trial guarantees, including the right to a defense and the right to be tried by a competent, independent and impartial tribunal."[233] And as the Commission elaborated in its Report on Terrorism and Human Rights,

> The right of a defendant to examine or have examined witnesses presented against him or her could also be, in principle, the subject of restrictions in some limited instances. It must be recognized in this respect that efforts to investigate and prosecute crimes, including those relating to terrorism, may in certain instances render witnesses vulnerable to threats to their lives or integrity and thereby raise difficult issues concerning the extent to which those witnesses can be safely identified during the criminal process. [See IACHR, Report Colombia (1999), Chapter V, paragraphs 67-69]. (...) Subject to these caveats, procedures might in principle be devised whereby witnesses' anonymity may be protected without compromising a defendant's fair trial rights. Factors to be taken into account in evaluating the permissibility of such procedures include the sufficiency of the grounds for maintaining a particular witness's anonymity and the extent to which the defense is nevertheless able to challenge the evidence of the witness(es) and attempt to cast doubt of the reliability of their statements, for example through questioning by defense counsel. Other pertinent considerations include whether the court itself is apprised of the witness's identity and is able to evaluate the reliability of the witness's evidence, and the significance of the evidence in the case against the defendant, in particular whether a conviction may be based solely or to a decisive extent on that evidence. [See, for example, European Court of Human Rights, Doorson v. the Netherlands, March 26, 1996, R.J.D. 1996-11, No. 6, paragraphs 70-76. (...) The Statutes and the Rules of Procedure of the International Criminal Tribunals for the Former

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[230] IACHR, *Third Report on the situation of human rights in Colombia,* OEA/Ser.L/V/II.102 Doc. 9 rev. 1, February 26, 1999, Chapter V, paragraph 123.

[231] UN, Human Rights Committee – Consideration of reports submitted by states parties under Article 40 of the Covenant – Concluding observations by the Human Rights Committee – Colombia. UN CCPR/C/79/Add.76, April 9, 1997, paragraph 21.

[232] American Convention on Human Rights, Article 1(1); IACHR, *Third on the situation of human rights in Colombia*, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, February 26, 1999, Chapter V, paragraphs 67-70.

[233] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 233.

> Yugoslavia and for Rwanda constitute examples of contemporary efforts to fairly adjudicate serious crimes in circumstances where participants may be particularly vulnerable to threats, and include provisions for the protection of the identities of victims and witnesses. *See, e.g.,* ICTY Statute (...) Article 22 (...); ICTY, Rules of Procedure and Evidence (...) Rule 75(B)(III).[234]

241. The European Court of Human Rights has adopted a number of decisions involving persons who were criminally convicted based on the statements of anonymous witnesses, or witnesses testifying against them but whom they have not been able to cross examine. The European Court has held that as a general rule the European Convention does not preclude such measures when the life or physical safety of the witnesses is at stake. However, the European Court held that (a) such witnesses must be counterbalanced by other measures in the proceedings, to be determined on a case by case basis, so as to compensate for the handicap under which the defense is laboring, and (b) the testimony of anonymous witnesses cannot be the decisive factors in arriving at a decision to convict.[235]

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[234] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 251.

[235] As happened, for example, in the case of *Kostovski v. Netherlands* [European Court of Human Rights; case of Kostovski v. Netherlands, decision of November 20, 1989. Series A No. 166, RUDH 1989, 191]. In this case, two Dutch courts had used as evidence statements made by two anonymous persons who did not appear in court. The European Court explained that in principle, "all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. (...) This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1) [of the European Convention] provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings." For the European Court, keeping the identity of the witnesses secret was an obstacle for the right of defense: "If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious." Considering the circumstances of the case, the Court held that "in these circumstances it cannot be said that the handicaps under which the defence laboured were counterbalanced by the procedures followed by the judicial authorities." Following this line of reasoning, the Court observed that the European Convention "does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6 (art. 6)." In a similar ruling in the 1996 case of *Doorson v. the Netherlands* [European Court of Human Rights, case of *Doorson v. the Netherlands*. Judgment of March 26, 1996, ECHR Rep. 1996-II], the European Court reiterated its position on this matter. In this case, the Court (a) stated clearly that in those cases in which the life, liberty or security of persons who cooperate with the courts as witnesses may be at stake, the protection of their rights under the European Convention requires that States Parties organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify; (b) reiterated that the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. The subsequent use of their statements by the trial court to found a conviction is, however, capable of raising issues under the Convention, although such use is not under all circumstances incompatible with due process; (c) explained that maintaining the anonymity of the witnesses at trial presents the defense with difficulties which criminal proceedings should not normally involve; nevertheless, those difficulties shall not be deemed a violation of the Convention if they are found to be sufficiently counterbalanced by the procedures followed by the judicial authorities at trial; (d) ruled in this specific case, the counterbalancing procedure followed by the judicial authorities in obtaining the evidence of the witnesses was sufficient to have enabled the defence to challenge the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements, since during the appeals phase, the witnesses were interrogated in the presence of the defence attorney and the examining judgment, which in the Court's view struck the proper balance between the interests at stake; (e) even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements and that such statements must be treated with extreme care. The Court reiterated these rules in subsequent cases, among them *Van Mechelen et al v. Netherlands,* 1997 [European Court of Human Rights, case of *Van Mechelen et al v. the Netherlands*, Judgment of April 23, 1997, Rep. 1997-III, RUDH 1997, 209, paragraphs 49-55], *Jasper v. United Kingdom[*European Court of Human Rights, case of *Jasper v. the United Kingdom*, Judgment of February 16, 2000, Rep.

### *2.2 Analysis of the case*

242. The Commission will now examine whether, in the present case, the use of anonymous witnesses was warranted based on the criteria described in the preceding paragraphs. The State has told the Commission that the use of anonymous witnesses was permitted because it is allowed under Chile's Anti-Terrorism Act. A relevant point here is that under the principles of public international law, the States' international obligations must be performed in good faith, and states cannot invoke their domestic law as an excuse for non-compliance with international law.[236] This principle also applies in the area of human rights, which the universal, regional and inter-American human rights bodies have recognized on numerous occasions. Regardless of whether Chile's domestic laws allow the use of anonymous witnesses in trials in which the defendant is charge with violations criminalized under its Anti-Terrorism Act, the Commission must determine whether, in a given case, witness protection measures are compatible with the State's international obligations under the American Convention.

243. The Commission observes that the Chilean courts used anonymous witnesses in two of the criminal trials examined in this report.

244. In the trial prosecuted against ***Pascual Pichún and Aniceto Norín***, testimony was taken from two anonymous witnesses. During the first phase of the case up to the adoption of the verdict of acquittal, the identity of these witnesses was not revealed, either to the accused or to their attorneys; during the second phase of the case, the trial itself, the attorneys were told the identity of the protected witnesses, but were told they could not reveal their identity to the accused. At the oral proceedings, the witnesses testified behind a screen that hid them from all those in attendance, except for the judges. A written copy of their statements was provided to the defense attorneys beforehand, who had an opportunity to cross-examine them, as the record of the case shows.

245. The Court took those statements into account when determining both the existence of the crimes and the defendants' guilt. In effect, the statements were weighed together with other evidence, as follows: in the case of the crime of threatening terrorist arson against the owners and managers of the Nancahue tree farm, the evidence the court considered was the testimony of "protected witness No. 1", as well as the testimony of five other witnesses, an expert and two documents; in the case of the "terrorist arson" at the home of Juan A. Figueroa, the evidence the court considered included that given by two anonymous witnesses, six other witnesses, five experts and one document.

246. Through their attorney, the defendants requested that the identity of protected witness No. 1 be revealed so that criminal cases could be brought against him for perjury. However, in *Consideranda* 23 of its verdict, the Court did not accede to their request on the grounds of the "*nature and seriousness of the crimes established in this ruling.*" The petitioners reported –and the State did not contest- that once Secret Witness No. 1 had testified, the defense attorneys offered to enter new evidence to refute the anonymous witness' assertions and to raise

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2000-II, paragraphs 51-53]*,* and in cases for terrorist crimes, the case of *A et al. v. United Kingdom [*European Court of Human Rights, case of *A and others v. the United Kingdom*, Judgment of February 19, 2009, pararagraphs 202 *et seq.*].

[236] *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Article 27. *See also* I/A. Court H.R., Advisory Opinion OC-14/94, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Articles 1 and 2 of the American Convention on Human Rights), 9 December 1994, Ser. A Nº 14, para. 35; Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, Nº 17, p.32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, Nº 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, Nº 46, p. 167. IACHR, *Report on Terrorism and Human Rights,* OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 42, footnote 109.

questions as to his credibility. The Court dismissed their offer and gave no explanation other than its discretionary authority to either allow or disallow evidence.

247. Then, in *Consideranda* 16, the Court describes the evidence that convinced it that Pascual Pichún was the material author of the crime of threats. It listed that evidence as follows: the testimony given by Protected Witness No. 1, who told the court that Pascual Pichún had told him that he planned to set a fire; Juan Agustín Figueroa Elgueta and Juan Agustín Figueroa Yávar, manager and owner of the Nancahue tree farm, who were those directly aggrieved; Osvaldo Carvajal Rondanelli, who told the court that his private investigations had found that Pascual Pichún was a member of the *Coordinadora Arauco Malleco*, although he did not provide any information as to his material participation in the threats. Another factor taken into account was an undated letter signed by Pascual Pichún and a check that Juan A. Figueroa had made out to Pascual Pichún in February 2001.

248. The case prosecuted against ***Víctor Ancalaf*** also used the testimony of anonymous witnesses, under the inquisitorial procedural system in force in the Concepción region at the time of the investigation and trial. The petitioners contend, and the State does not deny, that under this procedural system, much of the investigative phase of the case against Víctor Ancalaf was conducted in secrecy, which posed a significant obstacle for his right of defense, especially inasmuch as he was not given the opportunity to examine the witnesses at the time of their deposition; "*the defense knew nothing of the testimony for months.*"

249. The Commission observes that of the evidence that the Court summarized in *Consideranda* 17 as the basis for its conviction of Víctor Ancalaf for material participation in the attack under investigation, the only testimony that implicated him directly as the author of the truck fire was that given by the two anonymous witnesses. All the other statements refer to meetings held by opponents of the Ralco project or general assessments of Víctor Ancalaf's conduct; however, they say nothing about the actually perpetration of the attacks. The only pieces of testimony that directly state that Víctor Ancalaf participated in the episode being investigated was that given by "anonymous witness from confidential file No. 3," "anonymous witness from confidential file No. 5" and the "anonymous witness from confidential file No. 4."

250. The Commission therefore finds that (a) the restrictions on the defendants' right of defense were not sufficiently counterbalanced by other measures in the proceedings that would have offset the handicap that the anonymity caused for the defense, and (b) in both instances, the statements made by the anonymous witnesses were decisive in the court's decision to convict.

251. In the case prosecuted against Pascual Pichún and Aniceto Norín, the Court expressly denied the request from the attorneys representing Pascual Pichún, who wanted to enter evidence to disprove the testimony given by Anonymous Witness No. 1, whose statement was the only one that did not come from one of the alleged victims or the latter's relatives and that was taken into account to demonstrate Pascual Pichún's involvement in the crime of terrorist threats. The fact that the identity of the witness was revealed to the defense attorneys but they were prohibited from revealing it to their clients was a substantial drawback in terms of the effectiveness of the cross-examination, since the latter had to be conducted without basic information as to the witness' motives or suitability, information that only the defendants –not their attorneys- would know. This substantial abridgment of the right of defense was not counterbalanced in the subsequent phases of the trial, especially given the court's refusal to reveal the identity so that the witness could be prosecuted for perjury, and its refusal to allow new evidence to demonstrate the witness' lack of credibility.

252. The Court that heard the case against Víctor Ancalaf decided to convict, based almost entirely on the testimony of the anonymous witnesses, who were not cross examined by

the defense; these were the only statements that accused Víctor Ancalaf of having participated in the attack on the truck.

253. Given these considerations, the Commission concludes that the Chilean State is responsible for violation of the right recognized in Article 8(2)(f) of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof, to the detriment of Aniceto Norín, Pascual Pichún and Víctor Ancalaf.

### *3. The right of appeal*

#### *3.1 General comments on the right to appeal a court ruling*

254. The right to appeal a judgment before another or higher court is a fundamental guarantee of due process whose purpose is to avoid a miscarriage of justice from becoming *res judicata.* Under the case law of the inter-American system, the purpose of this right is "to prevent a flawed ruling, containing errors unduly prejudicial to a person's interests, from becoming final." [237] Due process of law would lack efficacy without the right of defense at trial and the opportunity to defend oneself against a sentence by means of a proper review.[238]

255. International human rights law does not concern itself with the label given to the existing remedy to appeal a judgment.[239] What matters is that the remedy meets certain standards. First, it must occur before the sentence becomes *res judicata*[240] and must be decided within a reasonable period, i.e., it must be *timely.* It must also be an effective remedy; in other words, it must provide results or responses to the end that it was intended to serve,[241] which is to prevent the consummation of an injustice. It must also be accessible, and not require the kind of formalities that would render this right illusory.[242]

256. The Commission must underscore the point that the efficacy of a remedy is closely linked to the scope of the review. This is so because judicial authorities are fallible and can make mistakes that result in injustice. Judicial error is not confined to the application of the law, but may happen in other aspects of the process such as the determination of the facts or the weighing of evidence. Hence, the remedy of appeal will be effective in accomplishing the purpose for which it was conceived if it makes possible a review of such issues without determining *a priori* that review will only be allowed with respect to certain aspects of the court proceedings.

257. In *Abella v. Argentina,* the Inter-American Commission wrote the following:

> Article 8(2)(h) refers to the minimum characteristics of a remedy that serves as a check to ensure a proper ruling in both substantive and formal terms. From the formal standpoint the right to appeal the judgment to a higher court to which the American Convention refers

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[237] I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 158.

[238] IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella (Argentina), November 18, 1997, para. 252.

[239] I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 165; UN Human Rights Committee. Communication No. 701/1996, Gómez Vázquez v. Spain, Decision of August 11, 2000, para. 11.1.

[240] I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 158. See also, Human Rights Committee of the International Covenant on Civil and Political Rights. Communication No. 1100/202, Bandajevsky v. Belarus, Decision of April 18, 2006, para. 11.13.

[241] I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 161.

[242] I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 164.

should, in the first place, apply to every first instance judgment with the purpose of examining the unlawful application, the lack of application, or the erroneous interpretation of rules of law based on the operative part of the judgment. The Commission also considers that to guarantee the full right of defense, this remedy should include a material review of the interpretation of procedural rules that may have influenced the decision in the case when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of the rules on the weighing of evidence, whenever they have led to an erroneous application or non-application of those rules..
[...]

The remedy should also allow the higher court a relatively simple means to examine the validity of the judgment appealed in general, as well as to monitor the respect for fundamental rights of the accused, especially the right of defense and the right to due process.[243].

258. For its part, the ICCPR's Human Rights Committee has repeatedly held that:[244]

The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.[245]

259. The IACHR echoes the observation by the ICCPR's Human Rights Committee to the effect that the right of appeal does not necessarily mean a retrial or a new "hearing" if the court that hears the appeal is not prevented to study the facts of the case.[246] What the norm requires is the opportunity to point out and get an answer to possible errors of various kinds that the judge or the court may have made, without precluding *a priori* certain categories such as the facts and the weighing and taking of evidence. The manner and means through which the review is conducted will depend on the nature of the questions raised and the characteristics of the criminal procedural system in the State in question.

260. It should be noted that the American Convention "does not endorse any specific criminal procedural system. It gives the States the liberty to determine which one they prefer, as long as they respect the guarantees established in the Convention itself, the internal legislation, other applicable international treaties, the unwritten norms, and the imperative stipulations of international law."[247]

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[243] IACHR, Report No. 55/97, Case 11.137, Merits, Juan Carlos Abella, Argentina, November 18, 1997, paragraphs 261-262.

[244] The wording of Article 14(5) of the International Covenant on Civil and Political Rights is very similar to Article 8(2)(h) of the American Convention. Therefore, the UN Human Rights Committee's interpretations of the substance and scope of Article 14(5) are useful in interpreting Article 8(2)(h) of the American Convention.

[245] UN Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial,* para. 48. See also: Aliboev v. Tajikistan, Communication No.985/2001, Decision of October 18, 2005; Khalilov v. Tajikistan, Communication No. 973/2001, Decision adopted on March 30, 2005; Domukovsky *et al.* v. Georgia, Communications Nos. 623-627/1995, Decision adopted on April 6, 1998, and Saidova v. Tajikistan, Communication No. 964/2001, decision adopted on July 8, 2004.

[246] UN Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial,* para. 48.

[247] I/A Court H.R., *Case of Fermín Ramírez v. Guatemala*. Judgment of June 20, 2005. Series C No. 126, para. 66.

261. It is up to the State to order the measures necessary to ensure that its criminal procedural system conforms to its international obligations in the area of human rights, especially the minimum guarantees of due process as set forth in Article 8 of the American Convention. Thus, for example, in the case of criminal procedural systems like Argentina's, which operates mainly by the principles of the orality and immediacy of the proceedings, States are required to ensure that those principles do not involve exclusions or restrictions of the scope of the review that the court authorities have the authority to perform. Furthermore, a court's review of a ruling ought not to pervert the principles of orality and immediacy.

262. As for the remedy's *accessibility,* the Commission considers that, in principle, the rules requiring that a remedy meet certain minimum requirements is not incompatible with the right recognized in Article 8(2)(h) of the Convention. Those minimum requirements include, for example, the filing of the remedy, since Article 8(2)(h) does not require automatic review, or the rule stipulating a reasonable period of time within which the remedy must be filed. However, in certain circumstances, the court's refusal to hear an appeal because the latter does not meet the formal requirements established either by statute or by judicial practice in a given region may result in a violation of the right to appeal a judgment.

263. Finally, the right to appeal a judgment is one of a set of guarantees that taken together constitute due process and that are inextricably interlinked.[248] Therefore, the right to appeal a judgment must be interpreted in conjunction with other procedural guarantees if the characteristics of the case so require. An example is the close relationship that exists between, the right to appeal and a duly reasoned judgment and the possibility of seeing the complete record of any oral proceedings.[249] The relationship between the guarantee protected under Article 8(2)(h) of the American Convention and access to an adequate defense also enshrined in Article 8(2) of the American Convention is especially relevant. The ICCPR's Human Rights Committee has written that "[t]he right to have one's conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level."[250].

264. Ascertaining whether a right has been violated when an appeal was filed requires a case-by-case analysis that evaluates the concrete facts surrounding the matter brought to the Commission's attention, based on the general criteria outlined in the preceding paragraphs. The Commission will now examine whether the guarantee protected under Article 8(2)(h) of the American Convention was respected in each victim's case.

### *3.2 Analysis of the case*

265. For the Commission, the petitioners' right to appeal their conviction to a higher court was violated by Chile's justice system, by the manner in which the courts that heard their cases applied that right. It is important to point out that under Article 364 of Chile's Code of Criminal Procedure, *"verdicts delivered by an oral criminal trial court are not subject to appeal."* The only recourse against such verdicts is a motion seeking to have the verdict vacated which, under Article 372 of that Code, can only go forward on the grounds set forth therein.

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[248] I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law,* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 120.

[249] See in this regard, UN Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial,* paragraphs 47, 48, 49 and 50.

[250] See in this regard, UN Human Rights Committee. General Comment No. 32 (2007). *Article 14. Right to equality before courts and tribunals and to a fair trial,* para. 51.

266. The appellate courts and the Supreme Court with which the motions seeking to have the convictions in the present case vacated were filed, gave a particularly narrow interpretation of their jurisdiction to decide the motions, which was that they could only address matters of law, and then on the grounds strictly prescribed law.

267. Given the standards described above regarding the scope of the revision, the Commission considers that the petitioners' right to appeal their convictions, recognized in Article 8(2)(h) of the American Convention, in relation to Articles 1(1) and 2 thereof, was violated because they were not afforded the opportunity to have questions of fact or of evidence reviewed because of the preexisting exclusion under domestic law.

#### *4. The right to be tried by a competent, independent and impartial tribunal*

268. The right to a trial before a competent, impartial and independent judge or tribunal is among those that tend to fall victim to the most frequent and serious violations in the anti-terrorist campaigns waged by the States.[251] Yet, this right is one of the fundamental principles of criminal law and informs the guarantees of due process and of an impartial trial. In their counter-terrorism strategies, States must take particular pains to respect this right,[252] especially when bringing individuals to trial.[253] The Human Rights Committee wrote that: "The requirement of competence, independence and impartiality of a tribunal in the sense of Article 14, paragraph 1, is an absolute right that is not subject to any exception."[254]

#### *4.1 The right to a competent judge or tribunal*

269. According to the case law of the inter-American system, the right to a competent judge or tribunal "generally prohibits the use of *ad hoc*, special, or military tribunals or commissions to try civilians for terrorist-related or any other crimes."[255] The Commission has written that this right is violated when a person is tried by a court established *ex post facto* to the facts with which the person was charged, thereby changing the jurisdiction that was in effect at the time the events occurred.[256]

270. Petitioners Aniceto Norín and Pascual Pichún contend that they were tried by tribunals that did not have jurisdiction to hear their case: first, by the Supreme Court of Chile, when it vacated the original verdict of acquittal based on a ground that, under Chilean law, the Supreme Court does not have jurisdiction to address; and second, by the oral criminal trial court

[251] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 10.

[252] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 18.

[253] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 218.

[254] Human Rights Committee, General Comment 32 –Article 14: Right to equality before courts and tribunals and to a fair trial. Doc. UN CCPR/C/GC/32, August 23, 2007, paragraph 19; Human Rights Committee. Communication No. 263/1987, *González del Río v. Peru*, paragraph 5.2.

[255] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, Executive Summary, paragraph 18.

[256] IACHR, Application filed with the Inter-American Court in the Case of García Asto and Ramírez Rojas v. Peru. Cited in: I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru*, Judgment of November 25, 2005 (Preliminary Objection, Merits, Reparations and Costs), Series C No. 137, paragraph 145.

that, in their view, was not the court with jurisdiction on the date the events for which they were prosecuted occurred.

271. The IACHR does not have the authority to determine, under Chile's domestic law, which judge has jurisdiction to hear a given case or to consider specific factors such as the government's role as accuser or how this affects issues relating to the competence of the court. Despite that fact, because a violation of Article 8(1) of the American Convention has been alleged, the Commission will determine whether, based on the provisions invoked in the petition and mentioned by the State, the petitioners' argument has any basis in the American Convention.

272. The petitioners explained that in December 2001, at the time of the fires for which Pascual Pichún and Aniceto Norín were prosecuted, a provision concerning attribution of jurisdiction was in force under Law 18,314 which held that the jurisdiction-related provisions of another law, Law 12,927, would apply in certain circumstances. Under Law 12,927, the competent courts would be justices serving on the appeals courts, acting as single-judge courts; these courts would have jurisdiction to take up criminal cases in which a provincial government or regional intendant was either a complainant or petitioner. However, in 2000 Law 19665 had reportedly eliminated these single-judge courts' jurisdiction over criminal cases. The law eliminated that clause of the Judiciary Statute that gave such jurisdiction to the justices on appeals court. The petitioners therefore contend that on the date of the events in question no court in Chile had jurisdiction to take up the facts for which Pascual Pichún and Aniceto Norín were prosecuted.

273. The Commission observes that this argument appears to be based on a partial assessment of the criminal procedural system in force in Chile at the time of the events. Chile's new code of criminal procedure entered into force in region IX on December 16, 2000, which was when Law 19,665 also entered into force in Region IX. Law 19,665 was part of the reform and introduced the amendments to the Judiciary Statute. It created oral criminal trial courts (Art. 4), and determined what their composition and territorial jurisdiction would be. Under this law, these courts had material competence to "take up and decide cases involving crimes or misdemeanors" (Article 11, which introduced Article 18 of the Judiciary Statute). As part of the sweeping reform introduced with this Law, its Article 11 introduced amendments to the Judiciary Statute, with the result that justices on the appeals courts no longer had jurisdiction over criminal matters. Thus, as of December 2000, one year before the episodes for which Pascual Pichún and Aniceto Norín were prosecuted, oral criminal trial courts had already been established in region IX, with territorial jurisdiction and the competence to hear criminal cases.

274. The petitioners, therefore, appear to have cited an isolated provision of Law 18,314 that was not expressly amended by the rules that entered into force in December 2000[257] and that defers to the provisions of another law. The other law, for its part, refers to the jurisdiction of a justice on the appeals court –acting as a single-judge court-, even though the amendments to the Code of Criminal Procedure had eliminated that competence.[258] Later, the law to reconcile Chile's criminal justice system with the amended Code of Criminal Procedure –Law 19,806, which

[257] The petitioners are alluding to Article 10 of Law 18,314, prior to its amendment under the reconciliation of law and which read as follows: "Article 10.- Proceedings instituted for the offenses criminalized under this law shall be undertaken by the courts *ex officio* or when a complaint is filed in accordance with the general rules. // The foregoing notwithstanding, such proceedings may also be instituted at the request or upon a complaint from the Ministry of the Interior, from the Regional Intendants, from the Governors of the provinces and from the garrison commanders, in which case the provisions of Title VI –Jurisdiction and Procedure- of Law 12,927 shall be followed, except in the case of Article 27(ñ). // The authorities to which the above subparagraph refers may also prepare complaints even when the case is already in progress, in which case the provisions on jurisdiction and procedure in that subparagraph shall also apply."

[258] Article 11 of Law 19,665, which entered into force on March 9, 2000, eliminated the appeals court justices' jurisdiction over such cases. In Region IX, that law began to be enforced in December 2000.

entered into force on May 31, 2002-, amended Article 10 of Law 18,314 to eliminate the reference to the jurisdiction of the justices of the appeals court.[259]

275. The information available indicates, therefore, that even before the events in this case occurred, the reform of the Code of Criminal Procedure created oral criminal trial courts and held that single-judge courts would no longer have jurisdiction in criminal cases. The fact that up until May 31, 2002, Article 10 of the Anti-Terrorism Act still attributed jurisdiction to justices on the appeals court, which by then no longer had such jurisdiction, cannot be interpreted as the petitioners do, which is that on the date of the events in this case, no court in Chile had jurisdiction to hear the crimes being prosecuted. As Chile's system of criminal procedural law was in flux at the time, the Commission believes that the most reasonable interpretation is that the provision in Article 10 of the Anti-Terrorism Act that attributed jurisdiction to the justices on the appeals courts should be understood as repealed by the generic elimination of these justices' jurisdiction under Law 19665; therefore, the proper application is what Law 19665 provides, i.e. giving the oral criminal trial courts jurisdiction to take up complaints alleging violations of criminal law.

276. The oral criminal trial courts in Region IX were established one year before the events in this case occurred and had general competence to take up violations of criminal law in their respective jurisdictions. One provision of the Anti-Terrorism Act mentioned in the complaint assigned jurisdiction to certain court authorities, when in fact their jurisdiction had been eliminated one year earlier. The fact that this provision was still on the books, does not constitute a violation of Article 8(1) of the Convention.

### *4.2 The right to an independent judge or tribunal*

277. For justice to be independent the courts must be separate from the other branches of government and must be free of influence, pressure, threat or interference from any quarter or for any reason; it also means that courts must have the necessary qualities to discharge their functions appropriately and independently, which includes tenure and adequate professional preparation.[260]

278. In their observations on the merits, petitioners Aniceto Norín and Pascual Pichún alleged a violation of their right to an independent judge, based on the fact that the provincial and regional governments had become parties to the criminal cases that ended in their conviction for terrorist crimes. Their contention was that the system whereby judges are promoted in Chile, particularly promotions from the oral criminal trial court to the appellate court, depends on the appointments made by the President of the Republic. They therefore argue that the fact that government representatives became accusers in their trial before the Angol oral criminal trial court, affected that court's independence.

[259] The text of Article 10 of Law 18,314, as amended by Law 19,806, reads as follows: "Article 10. Inquiries into offenses criminalized under this law shall be undertaken by the courts *ex officio* or when a complaint is filed in accordance with the general rules. // The foregoing notwithstanding, such proceedings may also be instituted at the request or upon a complaint from the Ministry of the Interior, from the Regional Intendants, from the Governors of the provinces and from the garrison commanders."

[260] IACHR, *Report on the situation of human rights in Chile* (1985), OEA/Ser.L/V/II.77.rev.1, Doc. 18, May 8, 1990, Chapter VIII, paragraph 139. IACHR, *Report on the situation of human rights in Haiti* (1995), OEA/Ser.L/V.88 Doc. 10 rev., February 9, 1995, Chapter V, paragraphs 276-280. IACHR, *Report on the situation of human rights in Ecuador* (1997), OEA/Ser.L/V/II.96 Doc. 10 rev. 1, April 24, 1997, Chapter III. IACHR, *Report on the situation of human rights in Mexico* (1998), OEA/Ser.L/V/II.100 Doc. 7 rev. 1, September 24, 1998, Chapter V, paragraphs 393-398. IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 229.

279. The Commission deems that the information supplied by the petitioners is not sufficient for an in-depth analysis of a possible violation of the right to an independent judge. Such an analysis would require detailed information on the domestic laws, appointment and promotion procedures, and the functional and dependency relationships among the various authorities in question. The information the Commission has available is not sufficient to rule one way or the other on this argument.

***4.3 The right to an impartial judge or tribunal***

280. The impartiality of the court, for its part, denotes absence of prejudice or bias in the mind of the judge or the court, both from the subjective and objective perspective. It also means that sufficient guarantees are there to avoid any legitimate doubt in this regard; in other words, that the judges are not biased for or against a particular case and they cannot be reasonably perceived to be so.[261] In the words of the Human Rights Committee,

> The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. "Impartiality" of the court implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.[262] Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.[263]

281. Petitioners Pascual Pichún and Aniceto Norín allege that Article 8(1) of the American Convention, which recognizes the right to an impartial judge, was violated by the fact that the oral criminal trial court took it as a 'public and notorious fact' that violent, illegal organizations existed and operated in Region IX. In their view, an impartial court would not have taken these facts as proven by simply branding them as "public and notorious". Petitioners Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciríaco Millacheo Licán consider that their right to be tried by an impartial court was violated by the fact that an excerpt from the verdict of conviction that the oral criminal trial court delivered in their case is, language-wise, identical to another conviction that the same court delivered in another criminal case also involving members of the Mapuche indigenous community.

282. Earlier in this report, the IACHR addressed the violation of the American Convention by virtue of the reference to the context in Region IX as one of the grounds for classifying the conduct under investigation as terrorist action and attributing individual criminal responsibility to the petitioners on that basis.

283. The Commission also considers that these measures show that the judges on the oral criminal trial court came to this case with preconceived notions about the law and order situation associated with the so-called "Mapuche conflict," biases that caused them to take as

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[261] IACHR, Case 11.139, Report No. 57/96, William Andrews (United States), *Annual Report IACHR 1997*, paragraphs 159-161. See also European Court of Human Rights, Case of Findlay v. United Kingdom, February 25, 1997, paragraph 73. IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 229.

[262] Communication No. 387/1989, *Karttunen v. Finland*, paragraph 7.2.

[263] Communication No. 387/1989, *Karttunen v. Finland*, paragraph 7.2.

proven fact that Region IX was the scene of a series of violent activities and that the events in the case the court was hearing "fit into" that string of violent activities; it also caused the judges on the court to copy, virtually verbatim, the very same reasoning the court had already used in judging the individual conduct on trial in an earlier criminal proceeding. Having assessed and classified the facts on the basis of prefabricated concepts about the context that surrounded them, and by having convicted the defendants on the basis of those biases, the Chilean judges violated the defendants' right to an impartial judge, and in so doing violated Article 8(1) of the American Convention, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

### *5. The double jeopardy rule*

284. The principle of n*on bis in idem,* recognized in Article 8(4) of the American Convention, is one of the fundamental precepts of criminal law and a basic guarantee of the right to due process and a fair trial.[264] The Inter-American Court has described this principle as "intended to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause."[265] The Court has observed that "one of the elements regulated by Article 8(4) is the conduct of a first trial that ends in a final decision of acquittal."[266]

285. The principle of *non bis in idem* is also recognized in Article 14(7) of the International Covenant on Civil and Political Rights, which states that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

286. As the Human Rights Committee wrote, "Paragraph 7 [of Article 14 of the International Covenant on Civil and Political Rights] prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted."[267] Interpreting the scope of this guarantee, the Human Rights Committee has also written that

> [A]rticle 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of ne bis in idem. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal.[268]

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[264] IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 218.

[265] I/A Court H.R., *Case of Loayza Tamayo*, Judgment of September 17, 1997, Series C No. 33, paragraph 66. IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, paragraph 224.

[266] I/A Court H.R., *Case of Cantoral Benavides v. Peru*, Judgment of August 18, 2000 (merits), Series C No. 69, paragraph 137.

[267] Human Rights Committee, General Comment 32 –Article 14: Right to equality before courts and tribunals and to a fair trial. Doc. UN CCPR/C/GC/32, August 23, 2007, paragraph 3.

[268] Human Rights Committee, General Comment 32 –Article 14: Right to equality before courts and tribunals and to a fair trial. Doc. UN CCPR/C/GC/32, August 23, 2007, paragraph 54.

287. One observation by the Committee has a particular bearing on this case, i.e., that "[t]he prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial." [269] [270].

288. It is the opinion of the Commission that the guarantee of *non bis in idem* can be applied in cases in which the verdict of acquittal is final. Furthermore, the Human Rights Committee's clarification applies in the inter-American sphere, i.e., in the sense that the nullification of a lower court ruling by a higher court is not in itself a violation of the principle, if the judgment was still subject to challenge. In the instant case, under Article 372 of the Chilean Code of Criminal Procedure in force at the time, the verdict of acquittal delivered by the oral criminal trial court on April 14, 2003 was still subject to challenge via a motion seeking to have the ruling vacated. For that reason, the nullification of that decision and the nullification of the trial do not constitute violations of Article 8(4) of the American Convention.

## *VI. CONCLUSIONS*

289. Based on the considerations of fact and of law established in the present report, the Inter-American Commission concludes that:

1. The State of Chile violated the principle of legality, recognized in Article 9 of the American Convention, in relation to the obligations set forth in articles 1(1) and 2 thereof and to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

2. The State of Chile violated the right to equal protection of the law and non-discrimination, recognized in Article 24 of the American Convention, in relation to the obligations set forth in articles 1(1) and 2 thereof to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

3. The State of Chile violated the right to freedom of expression and the political rights, established in Articles 13 and 23 of the American Convention, in relation to the obligations set forth in article 1(1) of the American Convention to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

4. The State of Chile violated the principle of individual criminal responsibility and the presumption of innocence, recognized in Articles 8(1), 8(2) and 9 of the American Convention, in relation to Article 1(1) thereof and to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

5. The State of Chile violated the right of defense of *Lonkos* Aniceto Norín and Pascual Pichún, and of *Werken* Víctor Ancalaf, specifically their right to question the witnesses in the court,

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[269] Communication No. 277/1988, *Terán Jijón v. Ecuador*, paragraph 5.4.

[270] Human Rights Committee, General Comment 32 –Article 14: Right to equality before courts and tribunals and to a fair trial. Doc. UN CCPR/C/GC/32, August 23, 2007, paragraph 56.

in keeping with Article 8(2)(f) of the American Convention, in relation to the obligations set forth in articles 1(1) and 2 thereof.

6. The Chilean State violated the right to appeal a judgment, recognized in Article 8(2)(h) of the American Convention, in relation to the obligations set forth in articles 1(1) and 2 thereof, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

7. The Chilean State violated the right to an impartial judge, recognized in Article 8(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

8. The violations of the human rights recognized in articles 8, 9, 24, 13 and 23, described above, had a resulting impact on the socio cultural integrity of the Mapuche people as a whole.

9. The Chilean State did not violate the rights to a competent and independent judge or the principle of *non bis in idem,* recognized in articles 8(1) and 8(4), respectively.

## *VII. RECOMMENDATIONS*

290. Based on the foregoing analysis and the conclusions reached in this report, especially the fact that the Anti-Terrorism Act applied in this case is incompatible with the American Convention and the convictions imposed were discriminatory,

***THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE STATE OF CHILE:***

1. Eliminate the effects of the terrorism convictions imposed on Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Lican, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

2. If the victims so choose, they shall have the opportunity to have their convictions reviewed in a proceeding conducted in accordance with the principle of legality, the prohibition of discrimination and the guarantees of due process, in the terms described in this report.

3. Make adequate reparations to the victims for the pecuniary and non-pecuniary damages caused by the violations declared in the present report.

4. Adapt the Anti-Terrorism Act embodied in Law 18,314, so that it is compatible with the principle of legality recognized in Article 9 of the American Convention.

5. Adapt the domestic laws governing criminal procedure so that they are compatible with the rights recognized in articles 8(2)(f) and 8(2)(h) of the American Convention.

6. Adopt measures of non-repetition to eradicate the discriminatory prejudices based on ethnic origin in the exercise of public power and, most especially, in the administration of justice.

***CONCURRING OPINION IN THE CASE OF THE LONKOS, LEADERS AND ACTIVISTS OF THE MAPUCHE INDIGENOUS PEOPLE***

***PAULO SERGIO PINHEIRO***

With due respect, I hereby make known that I concur with the tenor and direction of the merits report approved by the IACHR, but deem it necessary to expressly raise an issue which, under current circumstances in Chile, is directly associated with applying anti-terrorist legislation to members of the Mapuche indigenous people. Specifically, I am referring to the failure of the Chilean State to protect the rights of the child in implementing strategies to respond to social mobilization and protests of the indigenous people of the Araucania Region.

Generally speaking, application of an anti-terrorist law, which dates back to the time of the dictatorship and places restrictions on the substantive and procedural rights of individuals, is unacceptable in a contemporary democracy. It cannot be tolerated that such a law be used as an instrument to silence the Mapuche indigenous people's social protests, mobilizations and demonstrations, which constitute forms of expression protected under Article 13 of the American Convention and are, furthermore, aimed at recovering their ancestral territory. To apply this law under circumstances that violate the principles of the presumption of innocence and non-discrimination and that disrespect the principle of legality, as was proven to occur in the cases of the Lonkos, leaders and activists of the Mapuche people under review in the merits report, is at odds with the American Convention on Human Rights. And what is even more inexcusable, for legal reasons that I shall briefly explain hereunder, is to make the law extend to indigenous children and young people.

***A. Publicly Known Information on the Current Situation in Chile***

Several international human rights protection organizations have spoken out against indigenous children and adolescents currently being prosecuted in Chilean criminal courts, under Law 18.314 or other special legal provisions, for conduct allegedly committed in the context of public demonstrations conducted by the Mapuche people over the past years. We have received information on the cases of José Antonio Ñirripil, Cristian Alexis Cayupan, Luis Humberto Marileo, Patricio Queipul, Leonardo Quijón, Rodrigo Huechipan and Jacinto Marín, in addition to others. These Mapuche children and teenagers are being subjected to special rules of prosecution, investigation, punishment and judgment, under an anti-terrorist law and, in some instances, are being deprived of their liberty in preventive detention or other similar situations; while others are in

hiding. These children and young people are being prosecuted for crimes such as unlawful association related to terrorism, attempted homicide related to terrorism, terrorism-related robbery with intimidation or terrorism-related arson.

In addition to enforcement of the anti-terrorist law in these specific cases, the Chilean State has responded to the Mapuche people's social movements, protests and mobilizations by instituting criminal proceedings in court, including criminally prosecuting Mapuche teenagers and children under regular criminal laws. In fact, many other Mapuche young people are also being criminally prosecuted under regular laws applicable to adolescents in conflict with the law, for offenses committed in the context of the Mapuche mobilizations and protests. These children and teenagers are being prosecuted for crimes such as illegal possession of firearms, bodily harm, destruction of property, or throwing firebombs.

Currently, some of the Mapuche young people being tried under Law 18.314 for crimes that they allegedly committed when they were underage are being held in preventive detention, and the judges have refused to lift the detention order, or grant alternative precautionary measures such as home arrest with work release.

Recently, Chile's National Congress approved Law 20.467, which amends some provisions of Law 18.314. Following the latest amendment to be approved, the relevant provision of Law 18.314 reads as follows:

> "Article 3. Should conduct [that is] criminalized under Law No. 18.314 or under other laws be carried out by minors under the age of 18 years old, by application of the principal of special status, the procedure and sentence reductions set forth in Law 20.084, which establish a system of criminal responsibility of adolescents, shall always apply.
> It shall be an aggravating circumstance of the crimes set forth in Law No. 18.314 to act with minors under 18 years old."

Pursuant to Law 18.314 as amended, a child or adolescent can be prosecuted for crimes of terrorism, but the juvenile criminal law rules of procedure and sentence reduction shall apply to him. However, the definition of the crimes and punishments set forth in adult Law 18.314, which sets particularly harsh prison sentences, remains in effect; consequently, even though the procedure for determination of sentences and reductions of prison terms in Law 20.084 is applicable, an adolescent could receive a long prison sentence. The new amendment to the anti-terrorist law should apply to current criminal proceedings, given that the amended provisions are more favorable in both substantive and procedural terms; however, it is reported that in some of the cases of the young Mapuche people, the Courts have interpreted the amendment to Law 18.314 in such a way that the anti-terrorist law provisions are still applied and, consequently, allow practices such as the testimony of unidentified witnesses or require a special majority [of judges] to lift preventive detention measures. One of the main purposes of the recent amendment to Law 18.314 was to restrict application of the procedural and sentencing rules provided therein so that the rules of procedure and sentencing under juvenile criminal law could be applied to juveniles instead of the rules provided by the anti-terrorist law. Nonetheless, Mapuche adolescents being prosecuted under the anti-terrorist law are still being held today under the rules of procedure and deprivation of liberty set forth in Law 18.314, and are unable to benefit from the provisions of the amendment. As was established in the merits report, Chile's anti-terrorist law is at odds with several articles of the American Convention on Human Rights, particularly Articles 8, 9 and 24, in its wording as well as its implementation by judges. Furthermore, application of the restrictive measures, as well as other measures, set forth in the Anti-Terrorist Law, to children and adolescents, the length of preventive detention, the use of testimony of witnesses whose identity is kept secret, or other measures, are all blatant violations of the rights of juveniles.

Moreover, in the police and military response to the social mobilizations of the Mapuche people, there have been repeated charges brought before a variety of international bodies that the right of indigenous children and teenagers to life and physical and psychological integrity has been infringed. Several human rights protection organizations, as well as international bodies, have denounced that judicial and police authorities are violating the rights of the Mapuche youth, who have been victims of arbitrary detentions and, in many instances, have been subjected to interrogations on the location of other members of the Mapuche people; these interrogations are often violent and take place during the school day or when the children or teenagers are on their way to school from home. The alleged crimes include cases of infringement of the children's and teenagers' right to life or personal integrity, in that they were wounded by bullets or harmed by tear gas fired or thrown, respectively, by the public security forces; or were forced to endure the fear or trauma of police search operations in the home, school or community. In 2007, the UN Committee on the Rights of the Child expressed its concern over reports of indigenous children and teenagers being subjected to acts of police brutality and, consequently, recommended that the Chilean State make sure that such acts do not occur and adopt preventive and corrective measures when it is suspected that such acts have taken place.[271]

### *B. Binding International Legal Standards*

The application of the anti-terrorist law to Mapuche children and teenagers, criminal prosecution of children and teenagers, whether under regular laws or special laws, for crimes associated with the context of the Mapuche people's social mobilization and protest, and the infringement of the basic rights of indigenous children and teenagers as a result of acts of the police and public security forces, is all at odds with some of the fundamental standards set forth in the international law of the human rights of children and adolescents. The State of Chile must step up its efforts to ensure that these critical standards are duly upheld by all public authorities; otherwise, it would be breaching its international responsibility.

Firstly, at the most basic level, the application of Law 18.314 to a person under the age of 18 years old implies accepting that a child can be considered a terrorist. In the view of the author of this concurring opinion, even though a child may be the actual perpetrator of conduct matching the legal definition of terrorism, his level of volition and maturity, in principle, precludes him from being considered anything other than a victim of what is most definitely criminal manipulation by groups or individuals who pursue the political objectives which, by definition, characterize violent terrorism. The political connotation and structural definition of the crime of terrorism, along with the elements of motivation and predetermination by which it is characterized, make it impossible for a child or teenager to be considered a terrorist.

Application of an anti-terrorist statute, such as Chile's, is also at odds with the principle of protection of the rights of children and adolescents in conflict with the law. In fact, Chile's anti-terrorist law is particularly severe and has been designed to provide a more forceful response to particularly serious criminal acts; anti-terrorist criminal legislation, therefore, is the most restrictive tool available to the State to suppress conduct that strikes at society as a whole. In juvenile criminal law systems, however, it is quite the opposite; there must be a less forceful and more careful response in determining punishments, which must be predicated on a lower level of punitive action, avoid the deprivation of liberty, be geared toward social reintegration and, thus, allow for as much contact with the family, community and school, as possible. The application of anti-terrorist legislation to children and adolescents is diametrically opposed to this and, therefore, to the very logic upon which systems of juvenile criminal responsibility are built.

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[271] UN Committee on the Rights of the Chilld – 44th Period of Sessions –Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Chile. UN Document CRC/C/CHL/CO/3, April 23, 2007, par. 30.

Any child or adolescent who comes into conflict with the law enjoys several internationally recognized minimum rights; children and teenagers who break criminal law must be dealt with under special systems of criminal responsibility. International rules and standards applicable to juvenile justice are enshrined in the Convention on the Rights of the Child, as well as in other international instruments, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, and the United Nations Guidelines for the Prevention of Juvenile Delinquency.[272]

In order for a special system of criminal responsibility to be implemented, special rules of procedure and sentencing, as well as limitations on the deprivation of liberty, must apply to children and adolescents. According to the UN Committee on the Rights of the Child, the guarantees established in the Convention on the Rights of the Child pertaining to juveniles who allegedly have violated criminal laws, or who are accused of or plead guilty to violating criminal laws, fully respect their procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort. The Committee notes that the administration of juvenile justice must promote, inter alia, the use of alternative measures such as diversion and restorative justice, consistently taking into account the best interests of the child.[273] A special law establishing the limits and characteristics of criminal responsibility of juveniles, Law 20.084 of 2007, has already been enacted by the Chilean State. Under this law, the Chilean State can criminally prosecute and punish children 14 to 18 years of age, in a manner that is consistent with international standards: avoiding deprivation of liberty, ensuring due process, and making sure that punishments are aimed at social reintegration of juveniles. Instituting criminal proceedings against indigenous children and adolescents under the procedure set forth in Law 18.314, which significantly restricts the scope of the minimum guarantees which constitute due process, is difficult to reconcile with these internationally recognized principles, as explained in the merits report of the instant case.

The principle of the best interests of the child must be the guiding light for acts of Chilean public officials, including officers of the police, judges, prosecutors and public defenders. In fact, one of the pillars of any juvenile criminal justice system is to protect the best interests of the child. This principle, in the opinion of the Inter-American Court of Human Rights, "is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child."[274] The scope of this international principle has been defined by the Committee on the Rights of the Child as follows: "In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children."[275] The principle of protection of the

[272] United Nations Committee on the Rights of the Child: General Comment No. 10 (2007) – Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 4.

[273] United Nations Committee on the Rights of the Child: General Comment No. 10 (2007) – Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, pars. 1, 3.

[274] Inter-American Court of Human Rights. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/2002, August 28, 2002, par. 56.

[275] UN Committee on the Rights of the Child: General Comment No. 10 (2007) Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par 10.

bests interests of the child permeates the criminal justice system; thus, the Committee on the Rights of the Child has explained that "the protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders."[276] As for indigenous children and adolescents, the principle of protection of the best interests of the child has an even more specific nature. In fact, the Committee on the Rights of the Child has noted "the application of the principle of the best interests of the child to indigenous children requires particular attention. The Committee notes that the best interests of the child is conceived as both a collective and an individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights. (...) When State authorities, including legislative bodies, seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group."[277] Application of Chile's anti-terrorist law to an indigenous child or adolescent is incompatible with the principle of protection of the best interests of the child.

Another key principle established by the Convention on the Rights of the Child is the promotion by states of non-judicial intervention as the first response to juveniles in conflict with the law. The general policy of juvenile justice is that States are bound under the Convention on the Rights of the Child to provide special attention to the prevention of juvenile delinquency, the introduction of alternative measures allowing for responses to juvenile delinquency without resorting to judicial procedures.[278] The Committee on the Rights of the Child has noted that "according to article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable," and therefore, they are to take "measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services."[279] Among other things, it prevents the stigmatization of such children and adolescents. Submitting the Mapuche children and adolescents to judicial criminal procedures, as the first resort of authorities, amounts to disregard for this international obligation by the Chilean State.

The Convention on the Rights of the Child, as interpreted by the Committee on the Rights of the Child, provides for several fundamental principles regarding the dignified treatment that must be accorded to children and adolescents in conflict with the law: these principles include: (i) treatment that is consistent with the child's sense of dignity and worth –"this inherent right to dignity and worth [which] has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child;"[280] (ii) treatment that reinforces the child's respect for the human rights and freedoms of others–a principle that "requires a full respect for and implementation of the guarantees for a fair trial (...). If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and

[276] UN Committee on the Rights of the Child: General Comment No. 10 (2007) – The Rights of the child in juvenile justice. UN Document CRC/C/GC/10, April 25, 2007, par. 10.

[277] UN Committee on the Rights of the Child: General Comment No. 11 (2009) – Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, pars 30-31.

[278] UN Committee on the Rights of the child: General Comment No. 10 (2007) – The Rights of the child in juvenile justice. UN Document CRC/C/GC/10, April 25, 2007, par. 4.

[279] UN Committee on the Rights of the Child: General Comment No. 10 (2007) – Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 24.

[280] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 13.

fundamental freedom of others?;"[281] (iii) treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society – a principle which "must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child,"[282] and which means that "all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children;"[283] and (iv) prohibit and prevent all forms of violence in the treatment of children in conflict with the law.[284] When interventions are carried out in the context of a judicial procedure, the Committee on the Rights of the Child has demanded that "pursuant to article 40 (1) of CRC, reintegration requires that no action may be taken that can hamper the child's full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society."[285]

So, when the competent authority institutes judicial proceedings, the principles of a fair and just trial must be fully applied. The Committee on the Rights of the Child has further noted that "the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pretrial detention, as a measure of last resort."[286] Every child or adolescent who is criminally prosecuted must be treated justly and have an impartial trial, which fully adheres to the due process guarantees set forth in Article 40.2 of the Convention on the Rights of the Child, Article 14 of the International Covenant on Civil and Political Rights, Article 8 and Article 25 of the American Convention on Human Rights. These guarantees include the prohibition of ex post facto application of criminal laws, the presumption of innocence, the right to be heard, the right to effective participation in the proceedings, the right to receive direct and speedy information on the charges, the right to legal or any other appropriate assistance, the right to speedy decision with the participation of the parents, the right to the presence and examination of witnesses, the right to appeal, the right to the free assistance of an interpreter and full respect for his or her private life.[287] In this regard, the Committee on the Rights of the Child has emphasized that "a key condition for a proper and effective implementation of these rights or guarantees is the quality of the persons involved in the administration of juvenile justice. The training of professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers and others is crucial and should take place in a systematic and ongoing manner. These professionals should be well informed about the child's, and particularly about the adolescent's physical, psychological, mental and social development, as well as about the special needs of the

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[281] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 13.

[282] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 13.

[283] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 13.

[284] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 13.

[285] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 29.

[286] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 28.

[287] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, pars. 40-67.

most vulnerable children, such as, (...) children belonging to racial, ethnic, religious, linguistic or other minorities (...)."[288]

Respect for the right of indigenous children to be heard and for their opinions to be taken into account, in accordance with Article 12 of the Convention on the Rights of the Child, is equally as important. The Committee on the Rights of the Child has explicitly stated on this topic that "with regards to the individual indigenous child, the State party has the obligation to respect the child's right to express his or her view in all matters affecting him or her, directly or through a representative, and give due weight to this opinion in accordance with the age and maturity of the child. The obligation is to be respected in any judicial or administrative proceeding. Taking into account the obstacles, which prevent indigenous children from exercising this right, the State party should provide an environment that encourages the free opinion of the child. The right to be heard includes the right to representation, culturally appropriate interpretation and also the right not to express one's opinion."[289] The Committee has also reminded States parties that pursuant to Article 12 of the Convention on the Rights of the Child, "all children should have an opportunity to be heard in any judicial or criminal proceedings affecting them, either directly or through a representative. In the case of indigenous children, States parties should adopt measures to ensure that an interpreter is provided free of charge, if required, and that the child is guaranteed legal assistance, in a culturally sensitive manner."[290]

It is noted that some of the Mapuche juveniles being prosecuted under the anti-terrorist law are currently being held in preventive detention, which goes against the grain of the international standards that are binding on the Chilean State. The rule of deprivation of liberty as a last resort stems from the need to protect the right to development of children and adolescents in conflict with the law. In the view of the Committee on the Rights of the Child, "the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37 (b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child's right to development is fully respected and ensured."[291] The Committee has further emphasized that "the leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily;"[292] that "the States parties should take adequate legislative and other measures to reduce the use of pretrial detention;"[293] that "the duration of pretrial detention should be limited by law and be subject to regular review;"[294] that "decisions regarding pretrial detention, including its duration, should be made by a competent, independent and impartial authority or a judicial body,

[288] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 40.

[289] UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 38.

[290] UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 76.

[291] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 11.

[292] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 79.

[293] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 80.

[294] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 80.

and the child should be provided with legal or other appropriate assistance;"[295] and that "every child deprived of his/her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."[296]

### *C. Criminal Prosecution of Indigenous Children and Teenagers*

The Committee on the Rights of the Child has explained that indigenous children, as provided in the Convention on the Rights of the Child, require special measures of protection in order to fully enjoy their rights;"[297] it has noted that "indigenous children face significant challenges in exercising their rights,"[298] and has held that "contrary to article 2 of the Convention, indigenous children continue to experience serious discrimination in a range of areas."[299] Hence, it has asserted that indigenous children have the inalienable right to be free from discrimination,[300] and has noted that "indigenous children are among those children who require positive measures in order to eliminate conditions that cause discrimination and to ensure their enjoyment of the rights of the Convention on equal level with other children,"[301] and these measures must include whatever is necessary to ensure their access to culturally appropriate services in the area of juvenile justice. In every act, Chilean authorities must be respectful of the specific cultural characteristics of indigenous children and adolescents, by making sure that they have full access and enjoyment of their traditions, language and culture.

Specifically with regard to indigenous children and youth who come in contact with the juvenile justice system, the Committee on the Rights of the Child has expressed its concern over the fact that "incarceration of indigenous children is often disproportionately high and in some instances may be attributed to systemic discrimination from within the justice system and/or society;" therefore, "to address these high rates of incarceration, the Committee draws the attention of States parties to article 40(3) of the Convention requiring States to undertake measures to deal with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate. The Committee, in its general comment No. 10 on children's rights in juvenile justice (2007) and in its concluding observations, has consistently affirmed that the arrest, detention or imprisonment of a child may be used only as a measure of last resort."[302]

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[295] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 81.

[296] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 82.

[297] UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 5.

[298] UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 5.

[299] UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 5.

[300] UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 23.

[301] UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 25.

[302] UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 74.

Based on Article 2 of the Convention on the Rights of the Child, non-discrimination is one of the core principles that States must adhered to in developing and implementing juvenile justice policy. As the Committee on the Rights of the Child has asserted, the States Parties to said Convention "have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as (...) indigenous children (...). In this regard, training of all professionals involved in the administration of juvenile justice is important (...), as well as the establishment of rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation."[303]

In its concluding remarks on Chile in 2007, the Committee on the Rights of the Child expressed its concern for the discrimination of which Chilean indigenous children are victims. Consequently, it recommended "that the State party increase its efforts to review, monitor and ensure implementation of legislation guaranteeing the principle of non-discrimination and full compliance with article 2 of the Convention, and adopt a proactive and comprehensive strategy to eliminate discrimination on gender, ethnic, religious or any other grounds and against all vulnerable groups throughout the country."[304]

According to accounts provided by different international organizations,[305] children and teenagers of the Mapuche people say they are victims of social discrimination in general, because of their physical appearance and their first and last names, which would reveal the ethnic group they belong to. In non-indigenous social settings, many of them report feeling excluded, scorned or rebuffed; furthermore, they feel that others consider them to be in a lower social class because they are Mapuche. This situation of discrimination is further exacerbated by the conditions of extreme and widespread poverty of the Mapuche indigenous people.

In light of this backdrop of discrimination, there is no question that subjecting indigenous children and adolescents to a pattern of criminal prosecution, which infringes their rights, under circumstances that run counter to the principle of equality, will only contribute to further engrain this perception of systematic and structural discrimination and lead to the possible consequential individual and collective effects.

It is imperative, therefore, for the Chilean State to strive to effectively fulfill the minimum international guarantees that it pledged to respect regarding all persons under the age of 18 years old in dealing with indigenous children and youth. As vulnerable individuals who receive special protection under international law, Mapuche children and adolescents enjoy a set of fundamental rights and to disregard such rights is a breach of the international responsibility of the Chilean State.

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[303] UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 6.

[304] UN Committee on the Rights of the Child, 44th Period of Sessions, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Chile. UN Document CRC/C/CHL/CO/3, April 23, 2007, par. 30.

[305] http://www.unicef.org/adolescence/chile_39013.html