INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF NORÍN CATRIMÁN *ET AL.* (LEADERS, MEMBERS AND ACTIVIST OF THE MAPUCHE INDIGENOUS PEOPLE) *v.* CHILE

JUDGMENT OF MAY 29, 2014
(MERITS, REPARATIONS AND COSTS)

In the case of *Norín Catrimán et al.,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:[1]

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Diego García-Sayán, Judge
Alberto Pérez Pérez, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and to Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this Judgment structured as follows:

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[1] Judge Eduardo Vio Grossi, a Chilean national, did not take part in the examination and deliberation of this Judgment, in accordance with the provisions of Article 19(1) of the Court's Rules of Procedure.

TABLE OF CONTENTS

I - INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On August 7, 2011, in accordance with Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the case of "*Segundo Aniceto Norín Catrimán, Juan Patricio Marileo Saravia, Víctor Ancalaf Llaupe et al. (Lonkos,*[2] *leaders and activists of the Mapuche indigenous people) with regard to the Republic of Chile"* (hereinafter, "the State" or "Chile"). According to the Commission the case refers to the alleged "violation of the rights enshrined in Articles 8(1), 8(2), 8(2)(f), 8(2)(h), 9, 13, 23 and 24 of the American Convention on Human Rights, in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe, owing to their prosecution and conviction for terrorist offenses, in application of a criminal law that was inconsistent with the principle of legality, and also involved a series of irregularities that affected due process, including unjustified and discriminatory consideration of their ethnic origin." According to the Commission, the case took place against "a well-known backdrop of selective implementation of anti-terrorist legislation to the detriment of members of the Mapuche indigenous people in Chile."

2. *Proceedings before the Commission.* The proceedings before the Commission were as follows:

a) *Petitions.* This case includes four petitions[3] that, at the explicit request of the State, the Commission decided jointly in Merits Report 176/10.[4] The petitions were as follows:

i. Petition presented on August 15, 2003, by Segundo Aniceto Norín Catrimán, represented by the lawyers Jaime Madariaga De la Barra and Rodrigo Lillo Vera (Case 12,576, Petition No. 619/03).

ii. Petition presented the same day by Pascual Huentequeo Pichún Paillalao (with the same case and petition numbers as the previous petition).

iii. Petition presented on April 13, 2005, by Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles (Case 12,611, Petition No. 429/05).

iv. Petition presented on May 20, 2005, by 69 leaders of the Mapuche indigenous people and by the lawyers Ariel León Bacian, Sergio Fuenzalida Bascuñán and José Alywin Oyarzún, on behalf of Víctor Manuel Ancalaf Llaupe (Case 12,612, Petition No. 581/05).

b) *Admissibility Reports.* On October 21, 2006, and May 2, 2007, the Commission approved Admissibility Reports No. 89/06 (Petition No. 619/03), No. 32/07 (Petition No. 429/05) and No. 33/07 (Petition No. 581/05), in which it determined that it was competent to examine the claims presented by the petitioners with regard to the presumed violations of Articles 8, 9 and 24 of the Convention, in relation to the general obligations established in Articles 1(1) and 2

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2 "Lonkos" are the highest traditional authorities of the Mapuche communities. See *infra* para. 78.

3 *Cf.* Petition 619-03 Aniceto Norín Catrimán and Pascual Pichún Paillalao; Petition 429-05 Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán, and Petition 581-05 Víctor Manuel Ancalaf Llaupe and other Mapuche leaders (file of annexes to the Merits Report 176/10, appendix 1, folios 96 to 126, 1734 to 1775 and 2536 to 2578).

4 *Cf.* Merits Report No. 176/10, Case of Segundo Aniceto Norín Catrimán, Juan Patricio Marileo Saravia, Víctor Ancalaf Llaupe *et al. v.* Chile, November 5, 2010 (merits file, tome I, folios 9 to 109).

of this instrument, and that the petitions were admissible as they met the requirements established in Articles 46 and 47 of the Convention.[5]

c) *Merits Report.* Pursuant to Article 50 of the Convention, on November 5, 2010, the Commission issued Merits Report No. 176/10 (hereinafter also "the Merits Report" or "Report No. 176/10"),[6] in which it reached a series of conclusions and made several recommendations to Chile:

- *Conclusions.* The Commission concluded that the State was responsible for the violation of the following rights recognized in the American Convention:

(i) "the principle of legality recognized in Article 9 of the American Convention, in relation to the obligations set forth in Articles1(1) and 2 thereof, to the detriment of [the eight presumed victims in this case]";

(ii) "the right to equal protection of the law and non-discrimination recognized in Article 24 of the American Convention, in relation to Article 1(1) thereof, to the detriment of [the eight presumed victims in this case]";

(iii) "the right to freedom of expression and political rights established in Articles 13 and 23 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of [the eight presumed victims in this case]";

(iv) "the principle of individual criminal responsibility and the presumption of innocence under Articles 8(1), 8(2) and 9 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of [the eight presumed victims in this case]";

(v) "the right of defense of *Lonkos* Aniceto Norín and Pascual Pichún, and of *Werken* Víctor Ancalaf, specifically their right to question the witnesses present in the court, in keeping with Article 8(2)(f) of the American Convention, in relation to the obligations set forth in Articles 1(1) and 2 of this instrument";

(vi) "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 of this instrument, to the detriment of [the eight presumed victims in this case]";[7]

(vii) "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 [the eight presumed victims in this case]," and

viii) "the violations of the human rights recognized in Articles 8, 9, 24, 13 and 23 had a resulting impact on the socio-cultural integrity of the Mapuche people as a whole."

In addition, the Commission established that "Chile did not violate the rights to a competent and independent judge or the principle of *non bis in idem,* recognized in Article 8(1) and 8(4) [of the American Convention] respectively."

The Commission determined that the presumed victims were the following eight persons: Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

- *Recommendations.* The Commission made the following recommendations to the State:

(i) "Eliminate the effects of the terrorism convictions imposed on [the eight presumed victims in this case]";

(ii) "If the [presumed] 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 th[e Merits] report";

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5 *Cf.* Admissibility Report No. 89/06 (Petition 619-03), Aniceto Norín Catrimán and Pascual Pichún Paillalao *v.* Chile, October 21 2006; Admissibility Report No. 32/07 (Petition 429-05), Juan Patricio Marileo Saravia *et al. v.* Chile, May 2, 2007, and Admissibility Report No. 33/07 (Petition 581-05), Víctor Manuel Ancalaf Llaupe *v.* Chile, May 2, 2007 (file of annexes to the Merits Report 176/10, appendix 1, folios 629 to 646, 1608 to 1620 and 2337 to 2349).

6 *Cf.* Merits Report No. 176/10, *supra* nota 4 (merits file, tome I, folios 9 to 109).

7 In a brief of August 16, 2013, the Commission clarified that "in its Merits Report, it had analyzed the application of articles 373 and 374 of the Code of Criminal Procedure, establishing that this had violated the right to appeal the judgment. In this regard, since these articles were not applied to Mr. Ancalaf [Llaupe] , the conclusion in the Merits Report should be understood with regard to the other victims in the case" (merits file, tome IV, folio 2285).

(iii) "Make adequate reparations to the [presumed] victims for the pecuniary and non-pecuniary damage caused by the violations declared in the […] report";

(iv) "Adapt the Counter-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";

(v) "Adapt the domestic laws governing criminal procedure so that they are compatible with the rights recognized in Article 8(2)(f) and 8(2)(h) of the American Convention," and

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

d) *Notification of the State.* On December 7, 2010, the Commission notified the Merits Report to the State and asked it to provide information on compliance with the recommendations within two months. At the request of Chile, this time frame was extended one month until April 1, 2011. On that date, the State presented a report on the measures taken to comply with some of the recommendations made in the Merits Report and contested some of the report's conclusions. On April 7, 2011, Chile asked for another extension, and this was granted by the Commission for four months. On July 7, 2011, the State submitted a report and on August 5, 2011, it presented "another report, which, in substance, repeated its report of July 7, 2011."

e) *Submission to the Court.* On August 7, 2011, the Commission submitted all the facts and human rights violations described in the Merits Report to the jurisdiction of the Inter-American Court because of "the need to obtain justice for the [presumed] victims owing to non-compliance with the recommendations by the Chilean State." The Commission appointed Commissioner Dinah Shelton and then Executive Secretary Santiago A. Canton as its delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, Silvia Serrano Guzmán, María Claudia Pulido and Federico Guzmán Duque, lawyers of the Executive Secretariat, as legal advisers. The Commission provided the names of the representatives of the eight presumed victims together with the respective powers of attorney and contact information.[8]

3. *Request of the Inter-American Commission.* Based on the above, the Inter-American Commission asked the Court to declare the international responsibility of Chile for the violations indicated in the above-mentioned conclusions of its Merits Report (*supra* para. 2). It also asked the Court to order the State to implement specific measures of reparation.

II – PROCEEDINGS BEFORE THE COURT

4. *Designation of two common interveners of the representatives of the presumed victims*. The representatives of the eight presumed victims failed to reach an agreement on the designation of one common intervener. The Court therefore authorized the designation of more than one common intervener in application of Article 25(2) of its Rules of Procedure. The representatives advised that the Center for Justice and International Law (hereinafter "CEJIL") and the International Federation for Human Rights (hereinafter "the FIDH") would act as common interveners representing all the presumed victims.[9]

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[8] (1) "Jaime Madariaga De la Barra and Ylenia Hartog, representing Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao"; (2) "José Aylwin Oyarzún, Sergio Fuenzalida and the Center for Justice and International Law (CEJIL), representing Víctor Manuel Ancalaf Llaupe," and (3) "[the] International Federation for Human Rights and Alberto Espinoza Pino, representing Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles." *Cf.* Brief submitting the case to the Inter-American Court.

[9] They also forwarded copies of powers of attorney granted by presumed victims Pascual Huentequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán to the FIDH.

5. *Notification of the State and the representatives*. The Court notified the Commission's submission of the case to the State on October 28, 2011, and to the two common interveners (CEJIL and FIDH) on October 31, 2011.

6. On December 30, 2011, Ylenia Hartog submitted a request to participate as a third common intervener and that the Court grant a new time limit for presenting a brief with motions, arguments and evidence. The Inter-American Court decided to deny these requests, taking into account the stage of the proceedings at which they were presented: after the notification of the submission of the case to the two designated common interveners, and a day before the expiry of the time frame for the common interveners to present their motions and arguments briefs.[10]

7. *CEJIL brief with motions, arguments and evidence*. – On December 30, 2011, CEJIL, common intervener of the representatives of the presumed victims, submitted its brief with motions, arguments and evidence (hereinafter "the CEJIL motions and arguments brief") to the Court, under Article 40 of the Court's Rules of Procedure. CEJIL agreed in substance with the Commission's allegations, asked the Court to declare the international responsibility of the State for the alleged violation of the same articles of the American Convention as those indicated by the Inter-American Commission, and added that Chile had also violated the rights contained in Articles 5, 8(1) (obligation to substantiate an accusation), 8(2)(c), 8(2)(d), 8(5) and 17 of the American Convention, in relation to Article 1(1) of this instrument, and the contents of Articles 7(1), 7(3), 7(5) in relation to "the principle of innocence [Article 8(2)]" and Articles 1(1) and 2 of the said instrument, to the detriment of Víctor Manuel Ancalaf Llaupe. CEJIL also affirmed that the violation of the rights contained in Articles 5 and 17 of the Convention had also been to the detriment of "Mr. Ancalaf Llaupe's wife,] Karina Prado and his five children," who the Commission had not included as presumed victims in its Merits Report. Consequently, it asked the Court to order diverse measures of reparation, as well as the payment of costs and expenses. In addition, in this brief, it presented the request of presumed victim Ancalaf Llaupe to access the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter "the Court's Assistance Fund").

8. *FIDH brief with motions, arguments and evidence*. On December 31, 2011, FIDH, common intervener of the representatives of the presumed victims, submitted its brief with motions, arguments and evidence (hereinafter "the FIDH motions and arguments brief") to the Court. The FIDH agreed, in substance, with the Commission's allegations, asked the Court to declare the international responsibility of the State for the alleged violation of the same articles of the American Convention as those indicated by the Inter-American Commission, and added that Chile had also violated the rights contained in Articles 5 and 7 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Ciriaco Millacheo Licán, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia and José Benicio Huenchunao Mariñán. The FIDH also affirmed that the violation of the rights contained in Article 5 had also been to the detriment of the next of kin of the presumed victims, who the Commission had not included in its Merits Report. Consequently, it asked the Court to order diverse measures of reparation, as

[10] On December 28, 2011, the presumed victims Patricia Roxana Troncoso Robles and Segundo Aniceto Norín Catrimán informed the Court of their decision to substitute the power of representation they had given to the FIDH and presented new powers of attorney in favor of the lawyer, Ylenia Hartog. With regard to the requests made by the lawyer, Ylenia Hartog on December 30, 2011, the Court considered that, based on the principles of procedural promptness and preclusion, it was not appropriate to accept these requests at the stage of the proceedings at which they were presented, because this would have reopened the decision to authorize the participation of more than one common intervener adopted by the Court at the proper procedural moment, and would have also entailed extending the non-extendible time frame established in the Court's Rules of Procedure for the stage of submission of the briefs with motions, arguments and evidence of the common interveners. The Court recalled, *inter alia*, the obligation of the two common interveners authorized to intervene in this case to provide the other representatives with information on the status of the proceedings before the Court, and to receive and channel any motions, arguments and evidence that they might wish to forward to the Court.

well as the payment of costs and expenses. On the same date, the FIDH also sent a brief in which it presented the request of the presumed victims Pichún Paillalao and Jaime Marileo Saravia to access the Court's Assistance Fund.

9. *Access to the Court's Legal Assistance Fund.* – On May 18, 2012, the President of the Court (hereinafter "the President") issued an Order,[11] declaring admissible the requests of three presumed victims to access the Victims' Legal Assistance Fund (*supra* paragraphs 7 and 8) and took decisions in this regard.

10. *Answering brief.* On May 25, 2012, Chile submitted to the Court its brief answering the submission of the case, and with observations on the motions and arguments briefs (hereinafter "answering brief").[12] In this brief, it "reject[ed], each and every one of the human rights violations attributed to it in the Commission's Merits Report and in the briefs with motions, arguments and evidence of the representatives of the presumed victims." The State appointed Miguel Ángel González Morales, Ambassador of the Republic of Chile to the Republic of Costa Rica, and Juan Francisco Galli Basili as its Agents, and Luis Petit-Laurent Baldrich, Jorge Castro Pereira and Alejandro Rojas Flores as Deputy Agents.[13]

11. *Briefs of supposed "waiver."* On September 13, 2012, the Secretariat advised that the Court had decided "not to accord legal effects" to the briefs received on June 19, 2012, supposedly signed on May 7, 2012, by presumed victims Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, in which they supposedly communicated their "waiver of any action related to this case." Before taking this decision, the Court had received observations from the said presumed victims, their representatives, and the State in which the representatives questioned the validity of the supposed waiver documents and Messrs. Norín Catrimán and Pichún Paillalao stated that they did not wish to waive their status as presumed victims in these proceedings. The Court determined that Messrs. Norín Catrimán and Pichún Paillalao would continue to be considered presumed victims taking into account this ambiguity and according primacy to their last indication of their wishes of July 2012, which allowed it to be affirmed with certainty that it was not their desire to waive their status of presumed victims in these proceedings.[14]

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[11] *Cf. Case of Norín Catrimán et al. (Lonkos, leaders and activists of the Mapuche indigenous people) v. Chile*. Order of the President of the Court of May 18, 2012, which can be consulted on the Court's website at: http://corteidh.or.cr/docs/merits_victimas/norin_fv_12.pdf.

[12] Under the provisions of Article 41 of the Court's Rules of Procedure, States have a non-extendible time frame of two months to present the answering brief. However, since the representatives appointed more than one common intervener in this case, the President of the Court decided that, pursuant to Articles 25(2) and 41(1) of the Court's Rules of Procedure, and in order to safeguard the procedural equality of the parties, Chile had the right to present its answering brief within the non-extendible time frame of three months.

[13] Subsequently, in a brief of May 16, 2013, Chile also appointed Hernán Quezada Cabrera as the State's agent.

[14] On July 30 and August 28, 2012, Ylenia Hartog, representative of the presumed victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles, presented two briefs in which, *inter alia*, she asked that she be allowed to participate as a common intervener, "[o]wing to the situation of defenselessness and the change of circumstances" owing to the "supposed waiver that had been presented." In notes of the Secretariat of September 13, 2012, on the instructions of the Court Ms. Hartog was again advised what the President of the Court had indicated previously; that, pursuant to Article 31(3) of the Court's Rules of Procedure, the decisions of the Court may not be contested in any way and, therefore, the Court's decision, communicated in notes of the Court's Secretariat of February 20, 2012, in which Ms. Hartog's request to participate as a third common intervenor in this case was refused, could not be reconsidered. Furthermore, on the instructions of the Court, the Secretariat of the Court advised Ms. Hartog that when the Court had given her the opportunity to present observations on the supposed withdrawal of Mr. Norín Catrimán, this had been done exceptionally, because the Court had considered it pertinent and useful to know her opinion on this specific matter. Consequently, she was reminded that communications addressed to the Court should be forwarded through the common interveners of the representatives of the presumed victims.

12. *Decease of presumed victim Pascual Huentequeo Pichún Paillalao*. On March 31, 2013, the FIDH advised the Court, among other matters, that Pascual Huentequeo Pichún Paillalao had died on March 20 that year.

13. *Summons to a hearing.* On April 30, 2013, the President of the Court issued an Order,[15] in which he summoned the Inter-American Commission, the common interveners of the representatives and the State to a public hearing (*infra* para. 15) to receive the final oral arguments of the common interveners and of the State, and the final oral observations of the Commission, on the merits and eventual reparations and costs. He also summoned two presumed victims, two witnesses and three expert witnesses to testify at the public hearing. In addition, the President defined the specific destination and purpose of the assistance of the Victims' Legal Assistance Fund (*supra* para. 9). The President also ordered that statements be received by affidavit from five presumed victims, two of whom were summoned *ex officio* by the Court, and also from twenty-nine witnesses and eleven expert witnesses.

14. On May 21 and 22, 2013, CEJIL forwarded the expert opinion of Ruth Vargas Forman with regard to Víctor Manuel Ancalaf Llaupe, and also the expert opinions of Mauricio Duce Julio, Claudio Fierro Morales and Manuel Cancio Meliá, and the testimony of the witnesses Matías Ancalaf Prado and Karina del Carmen Prado. On May 22 and 24, 2013, the FIDH sent the statements of three presumed victims (Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and José Benicio Huenchunao Mariñán), and of seventeen witnesses,[16] and the expert opinions of Carlos Felimer del Valle Rojas, Fabien Le Bonniec, and Ruth Vargas Forman with regard to the presumed victims Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia and Juan Ciriaco Millacheo Licán. On May 27, 2013, Ylenia Hartog, representative of the presumed victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles,[17] submitted their written statements.[18] On May 23 and 27, 2013, the Secretariat of the Court received the expert opinions of Ruth Vargas Forman with regard to the presumed victims Mr. Norín Catrimán and Ms. Troncoso Robles. On May 28, 2013, the Commission presented the expert opinions of Jan Perlin and Rodolfo Stavenhagen.

15. *Public hearing*. The public hearing took place on May 29 and 30, 2013, during the ninety-ninth regular session of the Court held at its seat.[19] During the hearing, the Court

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[15] *Cf. Case of Norín Catrimán et al. (Lonkos, leaders and activists of the Mapuche indigenous people) v. Chile*. Order of the President of the Court of April 30, 2013, which can be consulted on the Court's website at: http://www.corteidh.or.cr/docs/asuntos/norincatriman_30_04_2013.pdf.

[16] On May 22, 2013: Flora Collonao Millano, Carlos Pichún, Rafael Pichún, Pascual Alejandro Pichún Collonao, Claudia Espinoza Gallardo, Soledad Angélica Millacheo Licán, Lorenza Saravia Tripaillán, Freddy Johnatan Marileo Marileo, Juvelina Ñanco Marileo, Juan Julio Millacheo Ñanco, Gloria Isabel Millacheo Ñanco, Luis Hernán Millacheo Ñanco, Zulema Marta Mariñán Millahual, and Mercedes Huenchunao Mariñán. On May 24, 2013: Sandra Jelves Mella, Pablo Ortega Manosalva and Luis Rodríguez-Piñero Royo.

[17] Ylenia Hartog is the representative of the presumed victims Segundo Ancieto Norín Catrimán and Patricia Roxana Troncoso Robles, but her participation in these proceedings as a common intervener was not accepted (*supra* para. 6 and footnotes 10 and 12). In view of the fact that the President ordered, *ex officio,* that the statements of these two presumed victims be presented, Ms. Hartog submitted this evidence.

[18] On May 29, 2013, representative Ylenia Hartog presented a brief and its annexes in which she requested certain measures of reparation for the presumed victims, Segundo Ancieto Norín Catrimán and Patricia Roxana Troncoso Robles, and also requested the admission of several documents and a CD.

[19] There appeared at this hearing: (a) for the Inter-American Commission: Commissioner Rose Marie B. Antoine, Delegate, Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Secretariat legal adviser; (b) for the common interveners of the representatives of the presumed victims; for CEJIL: Liliana Tojo, Juliana Bravo Valencia, Gisela de León and Sergio Fuenzalida Bascuñan; for the FIDH: Myriam del Pilar Reyes, Jimena Reyes and Jaime Madariaga de la Barra, and (c) for the State: Miguel Ángel González, Ambassador of the Republic of Chile to Costa Rica, Agent, Juan Francisco Galli, lawyer, Co-agent, Milenko Bertrand-Galindo Arriagada, lawyer of the Ministry of Justice, Jorge Castro, Bernardita Vega, Paula Badilla, Camila Palacios, Felipe Rayo, María Jaraquemada and Alejandro Rojas.

received the statements of two presumed victims, the testimony of two witnesses, and the expert opinions of three expert witnesses, as well as the final oral arguments and observations of the parties and of the Inter-American Commission.[20] Also during the hearing, the Court asked the parties and the Commission to submit specific helpful information.

16. *Request for helpful evidence and explanations*. On June 10, 2013, on the instructions of the President, the State and the Commission were asked to submit specific helpful documentation, information and explanations.[21]

17. *Amici curiae briefs*. Under Article 44 (*Amicus curiae* presentations) of the Court's Rules of Procedure, the following five *amici curiae* briefs were presented: (i) on March 2, 2012, the lawyer Vicente Laureano Bárzana Yutronic presented a brief; (ii) on May 24, 2012, Minority Rights Group International presented a brief;[22] (iii) on June 14, 2013, the Human Rights Center of the *Universidad Diego Portales* presented a brief;[23] (iv) on June 14, 2013, Claudia Gutiérrez Olivares, Professor of Ethics and Political Philosophy of the *Universidad de Chile*, presented a brief, and (v) on June 14, 2013, Osvaldo Javier Solís Mansilla, lawyer and researcher, presented a brief.

18. *Final written arguments and observations, and helpful evidence and explanations.* On June 28 and 29, 2013, the common interveners forwarded their final written arguments[24] and presented the information requested by the Court during the public hearings as helpful evidence, together with information on costs and expenses.[25] On June 28, 2013, the State presented its final written arguments, and included its answer to the request for helpful information and evidence, and on July 10, it presented some of the documents requested. On June 30, 2013, the Inter-American Commission presented its final written observations. On August 16, 2013, the Commission responded to the request for helpful explanations and clarifications made by the Court and its President. On August 16, September 6, 16, 23 and 27, and October 17 and 23, 2013, in response to the requests of the Court or its President, the

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[20] The recording of the public hearing held on May 29 and 30, 2013, is available at: https://vimeo.com/album/2409874

[21] The Inter-American Commission was asked to clarify whether the copy of the judicial case files in the proceedings before the domestic courts against Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao and Patricia Roxana Troncoso and against José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia and Patricia Roxana Troncoso Robles, provided in the file of the proceedings before the Commission (appendix 1), included all the files that the State had listed and forwarded to the Commission under a note of November 3, 2008, and, if necessary, to provide a complete copy of this documentation. The State was asked, *inter alia*: (a) for a complete copy of the case files of the criminal proceedings against seven of the presumed victims; (b) regarding the case file of the proceedings against Víctor Manuel Ancalaf Llaupe, to review the copy of the confidential case records provided by the Commission and, if any part of the case file is missing, to provide a complete copy; (c) to provide a complete copy of certain documents corresponding to the said proceedings; (d) to provide certain documents and explanations in relation to the measures taken to conceal the identity of witnesses in the criminal proceedings held against Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Patricia Roxana Troncoso Robles, and against Víctor Manuel Ancalaf Llaupe; (e) to provide a copy of some of Chile's domestic laws; (f) to provide certifications that confirm the time that the presumed victims in this case were held in pre-trial detention and the total time that they served their prison sentences and also the ancillary penalties, as well as documents that substantiate its indications in the answering brief regarding the "prison benefits."

[22] The brief was presented by Carla Clarke, Head of Law of Minority Rights Group International with the collaboration of Answer Styannes and Javier Dávalos.

[23] The brief was presented by Judith Schönsteiner, Director of the Human Rights Center of the *Universidad Diego Portales*, and Camila de la Maza, lawyer, of the University's Clinic for Public Interest Litigations.

[24] On July 2, 2013, representative Hartog transmitted a brief with final arguments. In a note of the Secretariat of the Court dated July 22, 2013, she was advised that the Court would determine the admissibility of this document at the proper procedural moment.

[25] On July 22, 2013, the FIDH presented "the annex of the expenses" it had incurred.

State transmitted another part of the helpful documents and explanations that had been required[26] (*supra* paras. 15 and 16).

19. *Request to incorporate documents into the body of evidence.* On August 2 and 16 and September 6, 2013, based on Article 57(2) of the Court's Rules of Procedure, the two common interveners requested the incorporation into the body of evidence of the preliminary report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism issued on July 30, 2013, in relation to the visit he made to Chile from July 17 to 30 that year, and the Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee on the Elimination of Racial Discrimination, at its eighty-third session held from August 12 to 30, 2013, and provided the electronic links to these documents.[27] On September 6, 17 and 19, 2013, the State and the Commission forwarded their observations of this proposal of the common interveners. On October 2, 2012, CEJIL presented observations on certain "arguments" included by the State in these observations. Subsequently, on May 9, 2014, 2014, the FIDH asked the Court, based on Article 57(2) of the Rules of Procedure, to "incorporate into the body of evidence the report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism […] concerning the Special Rapporteur's visit to Chile [in July 2013], published on April 14, 2014." CEJIL and Chile presented observations on this request.

20. *Observations on the helpful evidence and explanations.* On August 2 and 16, 2013, CEJIL and the FIDH, respectively, submitted their observations on the documentation presented by the State on June 28, 2013, in response to the request for helpful evidence (*supra* paras. 15, 16 and 18). On August 30, 2013, the common interveners submitted their observations on the documentation, information and explanations presented by the State on August 16, 2013. On September 1 and 6, 2013, CEJIL submitted its observations on the documentation, information and explanations presented by the State on September 6, 2013. On September 19, 2013, the Commission presented its observations on the helpful evidence provided by the State on August 16 and September 6, 2013, and on September 26, 2013 indicated that "it ha[d] no additional observations to make" concerning the documentation presented by the State on September 16 and 23, 2013. On October 2, 2013, the FIDH presented its observations on the helpful evidence presented by the State on September 16 and 23, 2013, and on October 9, 2013, advised that it had "no additional observations concerning the documents presented by the State […] on September 27, 2013."

21. *Disbursements from the Assistance Fund.* Chile did not submit observations on the information on the disbursements from the Victims' Legal Assistance Fund, which had been forwarded to the State as stipulated in article 5 of the Court's Rules for the Operation of this Fund.

III – COMPETENCE

22. The Inter-American Court is competent to hear this case pursuant to Article 62(3) of the Convention, because Chile has been a State Party to the American Convention since August 21, 1990, and accepted the contentious jurisdiction of the Court on that date.

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[26] In its brief of August 16, 2013, the State also submitted general observations on the final arguments of the FIDH.

[27] In its brief, the FIDH also included general observations on the final arguments of the State.

IV – PRELIMINARY CONSIDERATIONS

23. Before examining the pertinent facts and the application of the norms of the American Convention to those facts, some preliminary considerations must be made concerning the determination of the presumed victims, the delimitation of the factual framework, and certain arguments that were presented belatedly.

A) Determination of the presumed victims

24. The common interveners of the representatives asked the Court to consider as presumed victims persons who had not been considered as such by the Inter-American Commission in the Merits Report. The Court will now summarize the arguments of the parties in this regard and explain why the Court will only consider as victims the persons mentioned as such in the Merits Report.

1. Arguments of the parties

25. In its motions and arguments brief, CEJIL included as presumed victims the wife and children of presumed victim Víctor Manuel Ancalaf Llaupe, considering that Chile had violated their rights recognized in Articles 5 (Right to Humane Treatment) and 17 (Rights of the Family) of the Convention. Regarding the fact that the Commission had not included these family members as presumed victims, CEJIL indicated that "approximately two years before the Merits Report was approved, […] the petitioners for Víctor Ancalaf Llaupe had advised the Inter-American Commission that the members of the Ancalaf family had been affected by the facts of this case, […] describing the problems that each one had suffered" and requesting that they be considered presumed victims. In its final written arguments, CEJIL insisted that it had provided the Commission with this information at the appropriate procedural opportunity and that it had repeated it when requesting that the case be submitted to the Court. It added that "[t]he Inter-American Court has the opportunity to rectify the Commission's serious omission," and maintained that the State's right of defense had not been breached because "it has been able to examine and respond to – if it so wished – the arguments of this party in relation to the status as victims of [Mr.] Ancalaf's family."

26. In its motions and arguments brief, the FIDH stated that "the next of kin of the [presumed] direct victims of the case […] are also [presumed] victims, owing to the [supposed] violation of Article 5 of the American Convention, which was alleged with regard to them at the appropriate opportunity." The FIDH submitted to the Court a list in which it individualized the family members of six of the presumed victims. The FIDH also stated that, "[i]f the next of kin identified above are not considered victims in this case, it asked […] the Court to urge the State to make reparation to them." In addition, the FIDH asked that "Juan Carlos Huenulao Llelmil, a Mapuche who was convicted of the same facts that are the grounds for the instant case be considered a beneficiary of reparations." It indicated that, "even though [Mr. Huenulao Llelmil] was not considered a victim before the Inter-American Commission, this does not prevent him from being considered a victim before the Court," in view of the fact that "the State is fully aware of his existence and his situation," because "he was deprived of liberty in the same way as the other victims in this case and for the same events on which this case is founded."

27. The State did not present any arguments in relation to the determination of the presumed victims in this case before the Court.

2. Considerations of the Court

a. Family members of the presumed victims

28. In its Merits Report the Commission named Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Víctor Manuel Ancalaf Llaupe and Patricia

Roxana Troncoso Robles as presumed victims. In the brief submitting the case to the Court the Commission referred to these same eight persons as the presumed victims.

29. Article 35(1) of the Court's Rules of Procedure establishes that the case shall be submitted by the presentation of the Merits Report, which must "identify the presumed victims." Thus, it corresponds to the Commission to identify the presumed victims in a case before the Court precisely and at the proper procedural moment.[28] Consequently, it is not possible to add new victims following the Merits Report, save in the exceptional circumstances established in Article 35(2) of the Court's Rules of Procedure,[29] which are not applicable in this case, because they refer to situations in which "it has not been possible to identify one or more of the alleged victims of the facts of the case because the case concerns massive or collective violations." Therefore, in application of Article 35, the content of which is unequivocal, it has been the Court's consistent case law that the presumed victims must be indicated in the Merits Report established in Article 50 of the Convention.[30]

30. There are no valid arguments that would provide grounds for deviating from the unambiguous text of the Court's Rules of Procedure or from its consistent case law.

31. In particular, it is not sufficient that evidence was submitted opportunely to the Commission that would have allowed considering other persons as presumed victims (as regards Víctor Ancalaf Llaupe's family,[31] but not the families of the other seven presumed victims), because the Commission did not include them in its Merits Report.

32. The mention made by this Court in previous cases of the representatives' obligation "to indicate all the presumed victims during the proceedings before the Commission and to avoid doing so following the issue of the Merits Report"[32] is not an exception to the above-mentioned consistent case law because, far from recognizing that this is not in keeping with the provisions of Article 35(1) of the Rules of Procedure, it means that the representatives may only ask that certain persons be considered presumed victims before the Merits Report is issued. Once the Commission has issued this Report, only the persons included in it can be considered presumed victims. These considerations are applicable to the situation of the family members of Víctor Manuel Ancalaf Llaupe because, although the Commission was provided with evidence that sought to substantiate their condition of presumed victims, they were not included in the Merits Report, even in the summary of the position of the petitioners concerning the different violations that were alleged.

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[28] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, para. 23.

[29] Article 35(2) of the Court's Rules of Procedure stipulates that "[w]hen it has not been possible to identify one or more of the alleged victims of the facts of the case because it concerns massive or collective violations, the Court shall decide whether to consider those individuals as victims." *Cf. Case of García and family members v. Guatemala. Merits, reparations and costs*. Judgment of November 29, 2012 Series C No. 258, para. 34, and *Case of J. v. Peru*, para. 23. *Mutatis mutandi,* under the Court's previous Rules of Procedure: *Case of Radilla Pacheco v. Mexico, Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 110, and *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 42.

[30] *Cf. Case of García Prieto et al. v. El Salvador. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2007. Series C No. 168, para. 65, and *Case of J. v. Peru*, para. 23.

[31] Following the issue of Admissibility Report No. 33/07, and more than two years before the issue of the Merits Report, Víctor Manuel Ancalaf Llaupe's representative forwarded evidence to the Commission for its consideration in relation to why the members of Mr. Ancalaf's family should be considered presumed victims of a possible violation of human rights in a brief that the Commission asserts was forwarded to Chile, and the State has not contested this (file of annexes to the Merits Report 176/10, appendix 1, folios 2095 to 2099).

[32] *Case of García and family members v. Guatemala*, para. 35, and *Case of J. v. Peru*, para. 24.

33. Consequently, the Court decides that it will only consider as presumed victims the eight persons that the Commission included as such in Merits Report No. 176/10: Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Víctor Manuel Ancalaf Llaupe and Patricia Roxana Troncoso Robles. Consequently, the Court will not rule on the arguments presented by common interveners concerning the alleged violations of Articles 5 and 17 of the Convention to the detriment of the next of kin of the presumed victims.

34. The above does not preclude the State, at its own discretion, from adopting measures of reparation in their favor if the pertinent facts are verified.

b. The person convicted for similar acts to those of the presumed victims

35. Furthermore, there are also insufficient grounds to admit the request of the FIDH that Juan Carlos Huenulao Llelmil be considered a presumed victim (*supra* para. 26) because, as indicated, he was convicted for the same acts as the presumed victims in this case. None of the petitions before the Commission that gave rise to this case (*supra* para. 2.a) was lodged by Mr. Huenulao Llelmil or on his behalf, and the said petitions did not allege that Chile was responsible for the presumed violations of his human rights. None of the three Admissibility Reports (*supra* para. 2.b) referred to Juan Carlos Huenulao Llelmil, and neither did the Commission identify him as a presumed victim in the Merits Report. From the evidence to which the FIDH refers,[33] the Court has verified that, in the same way as five of the presumed victims in this case, Juan Carlos Huenulao Llelmil was convicted of the offense of terrorist arson[34] in relation to the fire that occurred on December 19, 2001, on the "Poluco Pidenco" property (*infra* para. 81.e). However, Juan Carlos Huenulao Llelmil was sentenced in a later judgment, and not in the judgment sentencing these presumed victims (*infra* para. 126).

36. Previously the Court has declared that the fact that other persons are in some way connected to the facts of the case is not sufficient for the Court to be able to consider them presumed victims and eventually declare violations of their rights.[35] Although it is true that proceedings under international human rights law cannot abide by a rigid formalism, because their main and determining mandate is the due and complete protection of such rights,[36] it is also true that specific procedural elements preserve the necessary conditions to ensure that the procedural rights of the parties are not reduced or unequal.[37] Consequently, it is not possible to dispense with the procedure before the Commission established in Articles 48 to 50 of the

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[33] *Cf.* Judgment delivered on May 3, 2005, by the Angol Oral Criminal Trial Court (file of annexes to the FIDH motions and arguments brief, annex 42, folios 1544 to 1595).

[34] As stipulated in article 476.3 of the Criminal Code, and articles 1(1), 2(1) and 3 bis of Law No. 18,314 ("Counter-terrorism Act").

[35] *Cf. Case of González et al. ("Cotton Field") v. Mexico.* Order of the Inter-American Court of January 19, 2009. Request to expand the list of presumed victims and refusal of submission of documentary evidence, *considerandum* 35.

[36] *Cf. Case of Castillo Petruzzi et al. v. Peru. Preliminary objections.* Judgment of September 4, 1998. Series C No. 41, para. 77; *Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 12, and *Case of González et al. ("Cotton Field") v. Mexico*. Order of the Inter-American Court of January 19, 2009. Request to expand the list of presumed victims and refusal of submission of documentary evidence, *considerandum* 45.

[37] *Cf. Case of Velásquez Rodríguez, Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, paras. 33 and 34; *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 41, and *Case of González et al. ("Cotton Field") v. Mexico.* Order of the Inter-American Court of January 19, 2009, *considerandum* 45.

Convention, because it fulfills specific functions that benefit both the individual petitioners and the States.[38]

37. Based on the foregoing, the Court considers that the request to consider Juan Carlos Huenulao Llelmil a presumed victim in this case is inadmissible. Nevertheless, this does not preclude the State, at its own discretion, from adopting measures of reparation in his favor if it verifies the similarity with the facts of this case.[39]

B) Determination of the factual framework

38. Under Article 35(1) of the Court's Rules of Procedure, the Commission presents the case "by the submission of the report to which article 50 of the Convention refers, which must establish *all the facts that allegedly give rise to a violation,"* and that "for the case to be examined, the Court shall receive the following information: […] (e) the evidence received, including the audio and the transcript, indicating the alleged facts and the arguments that refer to them." Consequently, the factual framework of the proceedings before the Court is constituted by the facts contained in the Merits Report submitted to its consideration. Legally, the presumed victims and their representatives may cite the violation of rights other than those included in the Merits Report, provided they abide by the facts contained in the said document, because the presumed victims are the holders of all the rights recognized in the Convention.[40]

39. Nevertheless, as regards the factual framework, it is not admissible for the parties to allege new facts that differ from those contained in the Merits Report, although they may describe those that explain, clarify or reject the facts mentioned in this Report and submitted to the Court's consideration.[41] In the instant case, in their arguments, the common interveners cited facts that were not included in the Merits Report or, if they were, were not described in detail. In the following sections the Court will analyze whether it can consider that the facts cited in this way explain, clarify or reject the facts contained in the Merits Report.

1. The pre-trial detention measures

40. In the motions and arguments briefs, the common interveners of the representatives argued the violation of the rights to personal liberty and to the principle of the presumption of innocence, protected in Articles 7 and 8(2) of the Convention, in relation to the pre-trial detention measures to which the presumed victims were subject.

41. The Commission did not rule on the right to personal liberty in its Merits Report, merely referring to the "pre-trial detention" imposed on Pascual Huentequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán. In the motions and arguments briefs, CEJIL referred to the pre-trial detention of Víctor Manuel Ancalaf Llaupe, and the FIDH to that of José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, Pascual Huetequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán.

42. Chile did not present arguments or preliminary objections, or substantial objections in relation to the factual framework of the case. In its answering brief, it indicated, in general, that it rejected "each and every one of the human rights violations attributed to it in the

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[38] *Cf. Matter of Viviana Gallardo et al*. Decision of the Court of November 13, 1981. Series A No. 101/81, paras. 22 to 25, and Case of *González et al. ("Cotton Field") v. Mexico*. Order of the Inter-American Court of January 19, 2009, *considerandum* 45.

[39] *Cf. Case of Radilla Pacheco v. Mexico*, para. 111, and *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2010. Series C No. 219, para. 252.

[40] *Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261, para. 19.

[41] *Cf. Case of the "Five Pensioners" v. Peru*, para. 153, and *Case of J. v. Peru*, para. 27.

Commission's Merits Report, and in the briefs with motions, arguments and evidence of the representatives of the presumed victims," and did not present arguments to contest the alleged violation of Article 7 of the Convention. In its final written arguments, the State referred to Chile's criminal procedural law which regulates pre-trial detention, without referring to the specific cases of the presumed victims. In addition, the State did not raise any objection related to the expert evidence proposed by the common interveners the purpose of which included the issue of pre-trial detention.[42]

43. A particularity of this case is that, in the Merits Report, the Inter-American Commission decided the four petitions included in the case submitted to the Court jointly and, therefore, in the said report, it included a brief description of the criminal proceedings against the eight presumed victims. This description was completed by the common interveners in more detail. In the Court's opinion, the facts described by the common interveners in their motions and arguments briefs regarding the pre-trial detention measures to which the presumed victims were subject constitute facts that complement and provide details in relation to the factual determinations included in the Merits Report, insofar as the pre-trial detentions were ordered within the framework of the criminal proceedings against the presumed victims described by the Inter-American Commission. Consequently, these facts will be considered part of the factual framework, and the Court will examine them in relation to the eight presumed victims taking into account the documentary evidence in the three domestic criminal case files.

2. The initial arrests and their judicial control

44. The statements made by presumed victims Florencio Jaime Marileo Saravia and Víctor Manuel Ancalaf Llaupe during the public hearing in this case include affirmations concerning the facts relating to the legality of the initial arrests of some of the presumed victims and the time that elapsed between these arrests and the respective judicial control.

45. The Merits Report made no mention of these factual aspects, and neither the Commission nor the common interveners presented specific arguments in relation to the legality of the initial arrest. Moreover, it should be stressed that, even though the initial arrests were ordered in the context of the investigations that formed part of the criminal proceedings in this case, in order to analyze whether violations of the rights recognized in Articles 7(2) and 7(4) of the Convention were possibly constituted, it would be necessary to examine compliance with the formal requirements and the Court was not provided with sufficient probative elements in this regard to make this analysis. Consequently, these facts are not part of the factual framework of this case and the Court will not rule on them.

3. Allegations of violence during the initial arrests and inhumane detention conditions

46. Some of the arguments of the common interveners concerning the alleged violation of Article 5 of the Convention refer to supposed facts relating to the "arrest [of the presumed victims] during vast police operations" and to the supposed "violent raids on the communities," as well as to the supposed "violent way" in which the "first arrest [of Víctor Manuel Ancalaf Llaupe] was made by the Chilean Police Force (*Carabineros de Chile*)." In addition, in its arguments on the alleged violation of this article, CEJIL included general facts concerning the "inhumane detention conditions to which the persons […] kept" in the El Manzano Prison, where

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[42] *Cf.* Affidavit prepared on May 17, 2013, by expert witness Claudio Alejandro Fierro Morales on: "the [alleged] impairment of due process of law and the judicial guarantees of the persons prosecuted under the regime regulated in the Counter-terrorism Act; the characteristics of the former criminal procedure system, and the compatibility of the said legal frameworks with the relevant international standards," and Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio on "the scope of the constitutional and legal rules concerning pre-trial detention in Chile and their use in the practice by the courts of justice. In particular, [he referred to] the legal ground of 'danger to the security of society'" (file of statements of the presumed victims, witnesses and expert witnesses, folios 3 and 37 to 80).

Mr. Ancalaf Llaupe was confined, were subject. CEJIL did not describe specific facts in relation to Mr. Ancalaf Llaupe's detention conditions, or explain in its arguments how the general conditions of this prison that it described had affected the presumed victim.

47. In its Merits Report, the Commission did not refer to the way in which the initial arrests of the presumed victims were made and there is no reference to their detention conditions in the prisons. Consequently, it cannot be considered that the supposed acts of violence in the initial arrest of the presumed victims and the alleged raids on the communities during their detention explain, clarify or reject the facts presented in the Merits Report; rather they introduce new elements. Therefore, they do not form part of the factual framework of this case.

C) Time-barred arguments

48. The Court has verified that, in their final arguments and observations, as well as in subsequent briefs, the Commission and the parties presented new arguments on the alleged violations of Articles 2, 9, 8(2)(f) and 24 of the Convention.[43] Since their presentation was time-barred, the Court will not rule on them.[44]

V – EVIDENCE

49. As established in Articles 50, 57 and 58 of the Rules of Procedure and in keeping with its consistent case law concerning evidence and its assessment,[45] the Court will examine and assess the documentary evidence forwarded by the parties and the Commission on different procedural occasions, the statements of the presumed victims and witnesses made during the public hearing before the Court, by affidavit or by a written statement, the expert opinions provided at the said hearing or by affidavit or by a written statement, together with the helpful evidence requested by the Court and by its President (*supra* paras. 15 and 16), and the documents obtained and incorporated by the Court *ex officio*. The Court will abide by the principles of sound judicial discretion, within the corresponding legal framework when making its assessment.[46]

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[43] In its final written arguments, the FIDH introduced a new argument on the presumed violation of the principle of legality in relation to the supposed application of a norm on the anonymity of witnesses even though this was not in force at the time of the events for which the presumed victims were tried. Also, following the presentation of its final arguments, the FIDH forwarded a new argument relating to the fact that "the decision taken by the Public Prosecution Service to conceal the identity of a witness cannot be appealed (merits file, tome V, folio 2247). In their final arguments, the Commission and CEJIL presented, for the first time, arguments on the alleged violation of the principle of legality owing to the imposing of the ancillary penalties established in article 9 of the Chilean Constitution (merits file, tome IV, folios 1937 and 1938 and tome V, folios 2092 and 2093). In its final written arguments, the FIDH asked the Court "to take into account, in particular in relation to the guarantees of non-repetition, that discriminatory criminal prosecution by the application of the Counter-terrorism Act to the Mapuche continues [in force]" in order to take legal action against social protests" and made an analysis of the years from 2005 to 2013. Regarding the alleged failure to comply with the obligation to adopt domestic legal provisions in relation to the right of the defense to examine witnesses (Article 8(2)(f) of the Convention), the FIDH affirmed this violation in its motions and arguments brief, but it was only in its final arguments that it included specific substantiation in this regard.

[44] *Cf. Case of González Medina and family members v. Dominican Republic*. *Preliminary objections, merits, reparations and costs*. Judgment of February 27, 2012. Series C No. 240, para. 280, and *Case of J. v. Peru*, para. 282.

[45] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*. *Merits*. Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of January 30, 2014. Series C No. 276, para. 23.

[46] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*, para. 76, and *Case of Liakat Ali Alibux v. Suriname*, para. 23.

A) Documentary, testimonial and expert evidence

50. The Court received various documents presented as evidence by the Inter-American Commission and the parties, attached to their main briefs (*supra* paras. 1, 7, 8 and 10) or in answer to the Court's requests for helpful evidence at the public hearing, or by its President (*supra* paras. 15 and 16).

51. In addition, affidavits were received from: Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán, presumed victims proposed by the FIDH; Carlos Felimer del Valle Rojas, Fabien Le Bonniec, Federico Andreu-Guzmán, expert witnesses proposed by the FIDH; Manuel Cancio Meliá, Claudio Alejandro Fierro Morales, Mauricio Alfredo Duce Julio, expert witnesses proposed by CEJIL, and Ruth Vargas Forman expert witness proposed by both common interveners; Flora Collonao Millano, Carlos Patricio Pichún Collonao, Rafael Genaro Pichún Collonao, Pascual Alejandro Pichún Collonao, Claudia Ximena Espinoza Gallardo, Soledad Angélica Millacheo Licán, Lorenza Saravia Tripaillán, Freddy Jonathan Marileo Marileo, Jovelina Rosario Ñanco Marileo, Juan Julio Millacheo Ñanco, Gloria Isabel Millacheo Ñanco, Luis Hernán Millacheo Ñanco, Zulema Marta Mariñán Millahual, Sandra Jelves Mella, Mercedes María Huenchunao Mariñán, Pablo Osvaldo Ortega Manosalva and Luis Rodríguez-Piñero Royo, witnesses proposed by the FIDH; Matías Ancalaf Prado and Karina del Carmen Prado Figueroa witnesses proposed by CEJIL; as well as the written statements of Rodolfo Stavenhagen expert witness proposed by the Inter-American Commission and the FIDH, and of Jan Perlin expert witness proposed by the Inter-American Commission. In addition, written statements were received from the presumed victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles required by the President of the Court *ex officio*.

52. Regarding the evidence provided during the public hearing, the Court received the statements of the presumed victims Florencio Jaime Marileo Saravia proposed by the FIDH and Víctor Manuel Ancalaf Llaupe proposed by CEJIL; of the witnesses Juan Pichún Collonao proposed by the FIDH and Juan Domingo Acosta Sánchez proposed by the State, and of the expert witnesses Martin Scheinin proposed by both common interveners, Jorge Contesse proposed by CEJIL, and Claudio Fuentes Maureira proposed by the State.

53. The FIDH did not present eleven statements that it had proposed and that, as decided by the President of the Court (*supra* para. 13), should have been provided by affidavit.[47] The State desisted from the statement of the witness Jaime Arellano Quintana convened by the President to testify by affidavit.

B) Admission of the evidence

1. Documentary evidence

54. In the instant case, the Court grants probative value to those documents presented by the parties and the Commission at the proper procedural opportunity that were not contested or opposed, and the authenticity of which was not challenged,[48] to the extent that they are pertinent and useful for determining the facts and the possible legal consequences.[49]

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[47] Testimony of Juan Carlos Huenulao Llelmil, José Necul Cariqueo, Margarita Ester Millacheo Nanco, Patricia Raquel Millacheo Nanco, Cristina Rosalía Millacheo Nanco, José Pedro Millacheo Nanco, Belén Catalina Huenchunao Reinao, Juan Lorenzo Huenchunao Santi and José Fernando Díaz Fernández, and expert opinions of Raúl David Sohr Bliss and Eduardo Mella Seguel.

[48] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4 para. 140, and *Case of Liakat Ali Alibux v. Suriname*, para. 25.

[49] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 140, and *Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 272, para. 45.

a) *Response to requests for information and helpful evidence*

55. Regarding the documentation presented by the parties with their final written arguments and by the State in briefs of July 10, August 16, September 6, 17, 23 and 27, and October 17 and 23, 2013, in answer to the Court's requests for information and helpful evidence during the public hearing, and those of its President in the Secretariat's notes dated June 10, August 23 and September 11, 2013 (*supra* paras. 15, 16 and 18), the Court finds it in order to admit the documents provided by the parties under Article 58(b) of the Rules of Procedure and they will be assessed in the context of the body of evidence.

b) *Objections to evidence provided by the State*

56. CEJIL and the FIDH presented objections to certain evidence provided by the State when responding to the request for helpful information concerning its lack of a direct relationship with the purpose of this case.[50] They also made observations on the reliability of the source and the errors and omissions in the information provided by the State in relation to the statistical data on trials held in application of the Counter-terrorism Act between 2000 and 2013. The Court finds it in order to admit this part of the documents provided by the State under Article 58(b) of the Rules of Procedure, and it will be assessed in the context of the body of evidence, bearing in mind the observations of the common interveners and the rules of sound judicial discretion.

c) *Extracts from judgments presented with arguments*

57. In the briefs presenting helpful evidence and with observations on this, the State and the FIDH, made observations on the final written arguments of the opposing party. These observations are inadmissible because they have no regulatory basis and were not requested by the Court or its President. With those briefs, the common interveners and the State also included extracts from domestic judgments deciding appeals for annulment filed in other cases that would be useful for ruling on the alleged violations of Articles 8(2)(h) and 2 of the Convention. Therefore, in application of Article 58(a) of its Rules of Procedure, the Court admits these extracts from judgments.

d) *Newspaper articles*

58. The common interveners also presented newspaper articles. The Court has considered that newspaper articles may be assessed when they refer to well-known public facts or declarations of State officials, or when they corroborate aspects related to the case.[51] Therefore, the Court decides to admit the documents of this type that are complete or that, at least, allow the source and date of publication to be verified, and will assess them taking into account the body of evidence and the rules of sound judicial discretion.[52]

e) *Documents indicated by electronic links*

59. The parties and the Commission have also indicated some documents by means of electronic links. In its case law, the Court has determined that if one of the parties or the Inter-American Commission provides, at least, the direct electronic link to the document that it cites as evidence and it is possible to access it, neither legal certainty nor procedural balance are affected, because it can be located immediately by the Court and by the other parties.[53] Consequently, documents indicated in this way are admitted.

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[50] Evidence presented by the State "to prove full implementation" of Convention 169 of the International Labour Organization (ILO), and on the laws in force on issues relating to indigenous peoples.

[51] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 146, and *Case of Liakat Ali Alibux v. Suriname*, para. 27.

[52] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 146, and *Case of Liakat Ali Alibux v. Suriname*, para. 27.

[53] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of J. v. Peru*, para. 42.

f) *Documents issued after the presentation of the motions and arguments briefs*

60. According to Articles 35(1), 36(1), 40(2) and 41(1) of the Court's Rules of Procedure, evidence must be presented or offered together with the briefs submitting the case, or with motions, arguments and evidence, or the answering brief, as applicable. It will not be admissible outside these procedural opportunities, save in the exceptional cases established in Article 57(2). In other words, if satisfactory justification is provided that, owing to *force majeure* or serious impediment, such evidence was not presented or offered on those procedural occasions, or if it refers to an event that occurred after the procedural occasions indicated.[54]

61. On November 19, 2012, CEJIL asked that, based on the provisions of Article 57(2) of the Court's Rules of Procedure, the book "*Seminario internacional: terrorismo y estándares en derechos humanos*"[55] "accompany the documentary evidence that has already been provided, taking into account its importance and usefulness for the discussion and analysis of [this] case," and explained that "although the procedural time frames for providing evidence ha[d] already expired, it had been materially impossible to provide the book [with its motions and arguments brief], owing to the publication date," because "the seminar was held in November 2011, and it was not until June 2012 that the first edition was published." CEJIL indicated the electronic link at which the book was available. The State asked that this evidence be rejected because "in this particular case, the basic requirements of Article 57(2) of the Rules of Procedure had not been met for the Court to authorize, exceptionally, the belated incorporation of additional evidence to the proceedings." The Court notes that the book on the said seminar was published after CEJIL had presented its motions and arguments brief, so that this documentary evidence meets the formal requirements for admissibility under Article 57(2) of the Rules of Procedure, and will incorporate it into the body of evidence in order to assess it according to the rules of sound judicial discretion.

62. CEJIL and the FIDH asked, in their brief with observations on the helpful evidence presented by the State and in a communication of September 6, 2013 (*supra* para. 19), that the Court incorporate two documents: the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his visit to Chile issued on July 30, 2013, and the Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee on the Elimination of Racial Discrimination, at its eighty-third session (12 to 30 August 2013).[56] The common interveners cited Article 57(2) of the Rules of Procedure and founded their offer on "the recent publication of [the documents], their public dissemination, and their evident usefulness and relevance for the analysis of the events that have been debated in the proceedings."

63. The State opposed the offer of this evidence on the basis that it referred to "preliminary documents that should follow the usual procedure before becoming a final document." It also affirmed that, since they were preliminary documents, "they only contain impressions that, following their normal course, must subsequently be crosschecked with data and comments of the State and other actors during the procedure of preparing the final [document]." The Commission presented time-barred arguments in this regard. CEJIL presented observations on

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[54] *Cf.* Case of *Gudiel Álvarez et al. (Diario Militar) v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012. Series C No. 253, para. 40, and *Case of Liakat Ali Alibux v. Suriname*, para. 28.

[55] This book was the result of the "collection and dissemination of eleven conference papers by national and international academics and experts, State authorities, and members of civil society" who took part in a seminar on terrorism and human rights standards organized by "the National Institute of Human Rights of Chile and the Regional Office of the United Nations High Commissioner for Human Rights, and held on November 15, 2011."

[56] UN Doc. CERD/C/CHL/CO/19-21, Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile*, adopted by the Committee at its eighty-third session (12-30 August 2013), para.5.

the State's opposition, which will not be admitted because they were not requested by the President and are not contemplated in the Court's Rules of Procedure.

64. Subsequently, on May 9, 2014, the FIDH asked the Court, based on Article 57(2) of the Rules of Procedure, to "incorporate into the body of evidence the Report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism […] on his mission to Chile [in July 2013], published on April 14, 2014." In its observations, CEJIL stated that it "had no objection to the inclusion [of this report] in the body of evidence, because […] the situation is in keeping with the requirement indicated in Article [57(2) of the Court's Rules of Procedure." In its observations, Chile asked the Court not to incorporate the said document, because the FIDH had not justified the incorporation of the document and, "of itself, it does not constitute evidence […] because it does not refer to the events that are the subject of these proceedings." The State also indicated that, if the Court found it pertinent and useful to incorporate this document, it considered it "extremely relevant that it should also incorporate the missing elements of the constructive dialogue relating to the visit of Special Rapporteur Emmerson, which were: Chile's response to this report, and the oral intervention when the report was adopted."

65. The two reports issued by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his visit to Chile from July 17 to 30, 2013, are official documents issued following the presentation by the common interveners of the representatives of their motions and arguments briefs. The document issued on July 30, 2013, contains the Special Rapporteur's "preliminary evaluation" of this visit and, subsequently, in April 2014, the corresponding final report was issued.[57] Consequently, this documentary evidence meets the formal requirements for its admissibility as evidence concerning a supervening fact, in accordance with Article 57(2) of the Rules of Procedure, and it will be incorporated into the body of evidence for assessment in keeping with the rules of sound judicial discretion and taking into consideration the observations made by Chile.[58] Regarding these observations, it should be noted that the Court can take into account this report owing to the probative elements that it may provide for the necessary understanding of the context in order to analyze this case, even though its purpose was not to refer to the application of the Counter-terrorism Act in the criminal proceedings against the eight presumed victims in the case, but rather it had a broader and more general purpose related to "the use of anti-terrorism legislation in connection with protests by Mapuche activists aimed at reclaiming their ancestral lands and asserting their right to collective recognition as an indigenous people and respect for their culture and traditions."[59] The Court considers that the State's request to incorporate its

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[57] *"Preliminary report" of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism on the visit he made to Chile from 17 to 30 July 2013,* 30 July 2003, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/134/89/PDF/G1413489.pdf?OpenElement. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson,* Addendum, Mission to Chile (merits file, tome V, folios 2566 to 2587). This was presented to the Human Rights Council of the United Nations on March 10, 2014, at the twenty-fifth session. This visit to Chile of the Special Rapporteur focused on "the use of anti-terrorism legislation in connection with protests by Mapuche activists aimed at reclaiming their ancestral lands and asserting their right to collective recognition as an indigenous peoples and respect for their culture and traditions."

[58] *Cf. Case of the "Five Pensioners" v. Peru*, para. 84, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2013. Series C No. 270, para. 49.

[59] UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*. Addendum, Mission to Chile, para. 9 (merits file, tome V, folios 2566 to 2587).

answer to this report into the body of evidence is appropriate, and will do this in application of Article 58(a) of its Rules of Procedure.[60]

66. Regarding the request to incorporate the Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee on the Elimination of Racial Discrimination, at its eighty-third session held from August 12 to 30, 2013 (*supra* para. 19), the Court has verified that these are observations adopted following the presentation of the motions and arguments briefs by the common interveners of the representatives. Therefore this document complied with the formal requirements for its admissibility as evidence concerning a supervening fact, in accordance with Article 57(2) of the Rules of Procedure, and it will be incorporated into the body of evidence for assessment in keeping with the rules of sound judicial discretion and taking into consideration the observations made by Chile.[61] It should be added that, although the Committee on the Elimination of Racial Discrimination asked the State to "present information on the follow up to the recommendations" made in the said concluding observations, the latter, as their name indicates, are not of a preliminary nature, but make a conclusive analysis of the combined nineteenth to twenty-first periodic reports that Chile presented to this Committee.

g) *Briefs presented directly by representative Ylenia Hartog*

67. With regard to the briefs presented to the Court directly by representative Ylenia Hartog on May 29 and July 2, 2013, and the attachments to the former (*supra* footnotes 18 and 24), the Court reiterates that it is for CEJIL and the FIDH, the two common interveners authorized to intervene in this case, to receive and channel the motions, arguments and evidence that the other representatives wish to forward to the Court. Consequently, since they were not presented through the common interveners and had not been requested as helpful evidence by the Court or its President, the Court will not consider these briefs and attachments in its decision.

h) *Documents obtained* ex officio *by the Court*

68. Under Article 58(a) of the Rules of Procedure, "[t]he Court may, at any stage of the proceedings: (a) obtain, on its own motion, any evidence it considers helpful and necessary." The Court considers that the following documents are helpful and necessary for the analysis of this case, and therefore incorporates them *ex officio* into the body of evidence of this case in application of the said regulatory provision: (a) "*Síntesis de resultados del XVII Censo de Población y VI de Vivienda*" [Summary of the results of the XVII Population Census and VI Housing Census], carried out in Chile in 2002;[62] (b) Study of the Problem of Discrimination Against Indigenous Populations, by José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Third Part, Conclusions, proposals and recommendations;[63] (c) report presented by the Government of Chile to the Human Rights Committee in 2008 concerning the observations made on Law No.

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[60] UN Doc. A/HRC/25/59/Add.3, 11 March 2014, Human Rights Council, Comments of the State of Chile on the *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*. Addendum, Mission to Chile.

[61] *Cf. Case of "Five Pensioners" v. Peru*, para. 84, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 49.

[62] Available at the website of the National Institute of Statistics (INE), XVII National Population and Housing Census carried out in April 2002, "*Síntesis de Resultados*," Santiago of Chile, March 2003, p. 23, at the following link: http://www.ine.cl/cd2002/sintesiscensal.pdf.

[63] José R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, Third Part, Conclusions, proposals and recommendations (UN Doc. E/CN.4.Sub.2/1983/21/Add.8).

18,314,[64] and (d) comments of the State of Chile on the report on his July 2013 visit by the Special Rapporteur for the promotion and protection of human rights while countering terrorism.[65]

2. Admission of the statements of presumed victims, and testimonial and expert evidence

69. As regards the statements of the presumed victims and the witnesses and the expert opinions provided at the public hearing and by affidavit, the Court finds them pertinent only insofar as they are in keeping with the purpose defined by the President of the Court in the order requiring them (*supra* para. 13).

70. Pursuant to the Court's case law, the statements made by presumed victims cannot be assessed in isolation, but must be evaluated in the context of all the evidence in the proceedings, because they are useful to the extent that they can provide further information on the presumed violations and their consequences.[66] On this basis, the Court admits the said statements, and they will be assessed in keeping with the criteria indicated.

71. Based on the above, the Court admits the expert opinions indicated, to the extent that they are in keeping with the purpose required, and will assess them together with the rest of the evidence and pursuant to the rules of sound judicial discretion.[67]

72. After the public hearing had been held, expert witness Claudio Fuentes Maureira forwarded a written version of the opinion he gave during this hearing, and the common interveners were given the opportunity to present their respective observations in their final written arguments if they deemed this pertinent. The Court notes that the said document relates to the purpose defined by its President for this expert opinion (*supra* para. 13), and admits it because it finds it useful for these proceedings; moreover, it was not contested, and no questions were raised as to its authenticity or truth.

VI – FACTS

73. In this chapter, the Court, based on the body of evidence in these proceedings, will establish the main facts that it finds proved. Furthermore, in the chapters on merits it will examine the facts in further detail as necessary to assess the alleged violations.

A) The presumed victims in this case

74. The eight presumed victims in this case are: Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia and Patricia Roxana Troncoso Robles. They are all Chilean nationals. Seven of them are, or were at the time of the events of the case, traditional authorities or members of the Mapuche indigenous people, and the other is an activist working to defend the rights of this people. Criminal proceedings were held against them for events that occurred in 2001 and 2002 in

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[64] UN Doc. CCPR/C/CHL/CO/5/Add.1, 22 January 2009, Human Rights Committee, Consideration of reports presented by States Parties under Article 40 of the Covenant. *Chile. Information provided by the Government of Chile on the implementation of the concluding observations of the Human Rights Committee*, 21 October 2008, p. 7.

[65] UN Doc. A/HRC/25/59/Add.3, 11 March 2014, Human Rights Council, Comments of the State of Chile on the *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson. Addendum, Mission to Chile*.

[66] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Liakat Ali Alibux v. Suriname*, para. 31.

[67] *Cf. Case of Loayza Tamayo v. Peru. Merits*, para. 43, and *Case of J. v. Peru*, para. 49.

Chile's Regions VIII and IX (*infra* paras. 81 and 106 to 151), as a result of which they were convicted as perpetrators of offenses that were categorized as terrorism (*infra* paras. 116 to 118, 126, 128, 146 and 151) in application of Law 18,314 – known as the "Counter-terrorism Act" – that "[d]efines acts of terrorism and establishes the corresponding punishments." None of the acts for which they were tried (relating to setting fire to a wooded property, threat of arson, and setting fire to a private company's truck) affected anyone's physical integrity or life.

B) Context

1. The Mapuche indigenous people

75. Socially, the Mapuche indigenous people is organized in communities called *Lof* composed of family groups, assembled in different territorial areas.[68] Geographically, the Mapuche are concentrated in the south of the country, especially in Regions VIII (Biobío), IX (Araucanía) and X (Los Lagos, from which the province of Valdivia was separated in 2007 in order to form the actual Region XIV of Los Ríos),[69] and a sizeable contingent also lives in the metropolitan area of Santiago. Nowadays, Region VIII (Biobío) is divided into the provinces of Arauco, Biobío, Concepción and Ñuble and the capital is Concepción; and Region IX (Araucanía) is divided into the provinces of Cautín and Malleco and the capital is Temuco. According to data from the 2002 census,[70] it was considered that 4.6% of the total population of Chile belonged to an ethnic group and, of this percentage, 87.31% (or slightly more than 4% of the total population) corresponded to the Mapuche indigenous people.[71]

76. At the time of the events, the socio-economic situation of the Mapuche was below the national average and also below that of Chile's non-indigenous population, with a poverty level that was also revealed by difficulties in access to services such as education and health care.[72]

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[68] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile* (file of annexes to the Merits Report 176/10, annex 5, folios 250 and 252 to 254), and Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, p. 717 (file of helpful evidence presented by the State on July 10, August 16, September 17, 23 and 27, 17, and October 23, 2013, folio 766).

[69] Region VIII: Biobío (provinces of Arauco, Biobío, Concepción and Ñuble; capital: Concepción); Region IX: Araucanía (provinces of Cautín and Malleco; capital: Temuco); Region X: Los Lagos (provinces of Chiloé, Llanquihue, Osorno and Palena; capital: Puerto Montt). Up until October 2, 2007, Region X: Los Lagos also included the province of Valdivia, which was segregated to form the actual Region XIV: Los Ríos.

[70] *Cf.* National Institute of Statistics (INE), XVII National Population and Housing Census carried out in April 2002, "*Síntesis de Resultados*," Santiago of Chile, March 2003, p. 23. Available at: http://www.ine.cl/cd2002/sintesiscensal.pdf.

[71] Data from the 2012 census reveal a strong increase (approximately 150%) in the number of persons who consider themselves of indigenous origin. 11.1% of Chileans over 5 years of age (1,714,677) consider that they are part of one of the 11 ethnic groups included on the questionnaire, and most of these (84.11%, in other words, approximately 1,442,215) stated that they are Mapuche. At the present time, this information does not appear on the official page of the National Institute of Statistics (http://www.censo.cl/), which includes a "public statement" indicating that "since March 27, 2014, […] it has proceeded to disable access to information from the 2012 Population and Housing Census," because, owing to certain questions that had been raised, it had decided to carry out a "technical audit of the census database."

[72] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile* (file of annexes to the Merits Report 176/10, annex 5, folios 247 and 248); UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *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*, paras. 7 and 8 (file of annexes to the Merits Report 176/10, annex 12, folios 429 and 430), and Report of the Constitutional, Legislative and Justice Committee on the Senate's mandate "regarding the Mapuche conflict in relation to public order and security in certain regions," Bulletin No. S-680-12, July 9, 2003, p. 144 (file of annexes to the Merits Report 176/10, annex 4, folio 226).

In his 2009 report,[73] James Anaya, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, indicated that although at that time there had been some "progress in the socio-economic situation of the indigenous peoples," in Chile, "serious inequality […] still persisted in the enjoyment of economic rights, and the rights to health care and education of [these] peoples," as well as "significant discrimination between the income of indigenous and non-indigenous persons."

77. Regarding "[t]he current problems facing indigenous peoples," Rodolfo Stavenhagen, in his report as United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, emphasized that these "cannot be understood without reference to the history of their relations with Chilean society," because "[t]he present situation of indigenous people in Chile is the outcome of a long history of marginalization, discrimination and exclusion, mostly linked to various oppressive forms of exploitation and plundering of their land and resources that date back to the sixteenth century and continue to this day."[74]

78. The leadership of the Mapuche communities is exercised by *"Lonkos"* and *"Werken,"* traditional authorities elected to represent one or several communities. The *Lonkos* are the foremost leaders of their respective communities for both administrative and spiritual matters; they are considered to be the depositaries of ancestral wisdom and head the decision-making processes as well as presiding important religious ceremonies. The *Werken*, whose name signifies "messenger," assist the *Lonkos* and play a complementary leadership role; they are spokespersons on diverse issues, such as political and cultural matters, before other Mapuche communities and before non-Mapuche society.[75] The presumed victims Aniceto Norín Catrimán and Pascual Pichún were *Lonkos* and the presumed victim Víctor Ancalaf was a *Werken*.

2. The social protest of the Mapuche indigenous people

79. At the beginning of the decade of 2000, when the events occurred for which the presumed victims in this case were convicted, a social situation existed in the south of Chile (Regions VIII, IX and X), above all in Region IX (Araucanía), in which members of the Mapuche

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[73] UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *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*, paras. 7 and 8 (file of annexes to the Merits Report 176/10, annex 12, folios 429 and 430).

[74] The said Special Rapporteur explained, among other matters, that at the time of the Spanish conquest agreements were reached "respecting their territorial sovereignty south of the Biobío river," and that, although "[t]he Chilean Republic maintained the same relationship with the Mapuche nation during the first half of the nineteenth century, […] forays into the region gradually weakened indigenous sovereignty and led to several conflicts." He indicated that "[f]inally, in 1888, Chile embarked upon the military conquest of Araucanía in what became known in the official history books as the 'pacification of Araucanía'"; the main outcome of this "was the gradual loss of their territories and resources, as well as their sovereignty, and an accelerated process of assimilation imposed by the country's policies and institutions, which refused to recognize the separate identities of indigenous cultures and languages." He added that "Chilean society as a whole, and the political classes in particular, ignored, if not denied, the existence of native peoples within the Chilean nation[, … which] became more pronounced with the construction of a highly centralized State and lasted, with a few exceptions, until the late 1980s." *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile,* paras. 8 to 10 (file of annexes to the Merits Report 176/10, annex 5, folio 251 and 252).

[75] *Cf.* Statements made by presumed victim Víctor Manuel Ancalaf Llaupe and by witness Juan Pichún Collonao before the Inter-American Court during the public hearing held on May 29 and 30, 2013; affidavit prepared on May 17, 2013, by expert witness Fabien Le Bonniec, and written statement made on May 26, 2013, by expert witness Rodolfo Stavenhagen (file of statements of presumed victims, witnesses and expert witnesses, folios 321 and 698), and Mella Seguel, Eduardo and Le Bonniec, Fabien, *"Movimiento mapuche y justicia chilena en la actualidad: reflexiones acerca de la judicialización de las reivindicaciones mapuche en Chile*" in Aylwin, José (Editor), "*Derechos Humanos y Pueblos Indígenas: Tendencias Internacionales y Contexto Chileno,*" Institute for Indigenous Studies, Universidad de la Frontera, Temuco, 2004 (file of annexes to the CEJIL motions and arguments brief, annex C 10, folio 2356).

indigenous people, its leaders and organizations, were involved in numerous demands, demonstrations, and social protests seeking attention to and settlement of their claims, relating above all to the recovery of their ancestral lands, and to respect for the use and enjoyment of these lands and their natural resources.[76]

80. The social protest in the area increased because, towards the end of the twentieth century, permission had been granted for increased exploitation by forestry companies and the construction of development projects on some of the lands that the Mapuche communities considered part of their traditional lands.[77] As a result, "[c]ommunal lands have gradually been getting smaller and have been cut off in the middle of private properties, [affecting] access to the woods, and thus to the Mapuche people's traditional means of sustenance."[78] In addition, the construction of "major development projects" in the first decade of the twenty-first century, such as hydroelectric projects and highways, has given rise to "a number of social conflicts [...] in connection with the impact on the human rights of indigenous people."[79] The construction of the Ralco hydroelectric plant in the province of Bío Bío, Region VIII, had a special impact on the indigenous communities and aroused their particular opposition because thousands of hectares of land would be flooded and the communities moved.[80]

81. In the context of this social protest, the level of unrest in these regions increased. Apart from the social movements and other types of pressure such as the occupation of disputed land, additional actions and violent acts occurred which were classified as "serious," such as the occupation of land that was not the object of any ongoing legal claim, the setting of fires to forest plantations, crops, buildings, and the owners' homes, the destruction of equipment, machinery and fences, or the blocking of communication routes and clashes with the police.[81] It

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[76] *Cf.* Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II: *Territorio y Tierras Mapuche* (file of helpful evidence presented by the State, folios 999 and 1000); affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of the presumed victims, witnesses and expert witnesses, folios 337-338); acquittal issued on November 9, 2004, by the Second Chamber of the Temuco Oral Criminal Trial Court (file of annexes to the FIDH motions and arguments brief, annex 50, folio 1839 and 1840); written statement made on May 27, 2013, by expert witness Rodolfo Stavenhagen (file of statements of the presumed victims, witnesses and expert witnesses, folio 697); Milla Seguel, Eduardo, *"Los mapuche ante la justicia. La criminalización de la protesta indígena en Chile"*, Chile, Santiago. LOM Ediciones, 2007, p. 145 (file of annexes to the CEJIL motions and arguments brief, annex D5, folios 3286-3288); UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Addendum, Mission to Chile,* paras. 27 and 49 (merits file, tome V, folios 2566 to 2587), and UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile* (file of annexes to the Merits Report 176/10, annex 5, folio 260).

[77] *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *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* (file of annexes to the Merits Report 176/10, annex 12, folio 437), and affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of presumed victims, witnesses and expert witnesses, folio 338).

[78] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile*, para. 22 (file of annexes to the Merits Report 176/10, annex 5, folio 255).

[79] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile*, para. 22 (file of annexes to the Merits Report 176/10, annex 5, folio 255); Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, p. 950 and 951 (file of helpful evidence presented by the State, folios 999 and 1000), and affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of presumed victims, witnesses and expert witnesses, folios 337 to 339).

[80] *Cf.* Affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of presumed victims, witnesses and expert witnesses, folio 338, and Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, pp. 950 and 951 (file of helpful evidence presented by the State, folios 999 and 1000).

[81] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission*

was in this context that the acts occurred for which the eight presumed victims in this case were criminally prosecuted:

a) A fire in the Nancahue forest plantation and in the house of the administrator of the plantation on December 12, 2001, of which the *Lonkos* Segundo Aniceto Norín Catrimán and Pascual Pichún Paillalao were acquitted (*infra* paras. 106, 112 and 116);

b) "Threats" to set fire to the San Gregorio plantation that "occurred during 2001" for which *Lonko* Segundo Aniceto Norín Catrimán was convicted (*infra* paras. 106, 116 and 118);

c) A fire that occurred on December 16, 2001, in the San Gregorio forestry plantation, of which the *Lonkos* Segundo Aniceto Norín Catrimán and Pascual Pichún Paillalao were acquitted (*infra* paras. 106, 112 and 116);

d) "Threats" to set fire to the Nancahue forest farm that "occurred during 2001" for which *Lonko* Pascual Pichún Paillalao was convicted (*infra* paras. 106, 112 and 116);

e) A fire that occurred on December 19, 2001, at the Poluco and Pidenco farms, owned by the forestry company, Mininco S.A., for which Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José-Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles were convicted (*infra* paras. 120, 126 and 128);

f) The setting fire to three trucks and a backhoe owned by the Fe Grande company (that worked on the construction of the Ralco dam) on September 29, 2001, and March 3, 2002, in the Alto Bío Bío sector, of which *Werken* Víctor Ancalaf Llaupe was acquitted (*infra* paras. 133 and 147), and

g) The setting fire to a truck owned by the construction company, Brotec S.A. (that worked on the construction of the Ralco dam), on March 17, 2002, in the Alto Bío Bío sector, of which *Werken* Víctor Ancalaf Llaupe was convicted (*infra* paras. 133, 147, 150 and 151).

82. In this regard, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, indicated, in relation to his visit to Chile in 2003, that around that time there had been a "growing number of conflicts in the Mapuche area, including Regions VIII, IX and X." He stated that:

> Most of the conflicts reported stem from Mapuche land claims and generally involve one of three types of protest:
>
> (a) The organization of pressure groups acting on behalf of those who have unsuccessfully applied for additional land or for the restitution of their land;
>
> (b) The occupation of disputed land, as a means of applying direct pressure and gaining publicity;
>
> (c) The occupation of land that is not the object of any ongoing legal claim, involving actions that are serious by definition (such as setting fire to forest plantations or buildings, destroying equipment and fences or blocking communication routes) and clashes with the police.

He added that:

> [T]he distinctions between these three types of protest are not clear-cut and in some cases a transition from one to another can be observed, depending on whether there are delays or problems in finding solutions to the demands for additional land and for restitution of land. It should also be pointed out that the third, and most serious, type of conflict occurs mostly in the provinces which have higher

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resolution 2003/56, Addendum, Mission to Chile, para. 28 (file of annexes to the Merits Report 176/10, annex 5, folio 257), and UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *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*, para. 57 (file of annexes to the Merits Report, Annex 12, folio 443).

concentrations of indigenous people and higher poverty rates and which were adversely affected between 1973 and 1990 by the reversal of the measures taken to implement land reform.[82]

83. As of 2001, the number of leaders and members of Mapuche communities investigated and tried for committing ordinary offenses in relation to violent acts associated with the above-mentioned social protest increased significantly. In a few cases they have been investigated and/or convicted of offenses of a terrorist nature in application of Law 18,314 (Counter-terrorism Act) (*infra* paras. 98 and 99).[83] In his final report on his visit to Chile in July 2013, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism emphasized that "political opinion" in Chile agreed that the use of the anti-terrorism legislation against the Mapuche in this context of social protest is "unsatisfactory and inconsistent."[84] Also, between 2000 and 2013, the Public Prosecution Service held a total of 19 proceedings under the Counter-terrorism Act, 12 of which were related to the land claims of the Mapuche indigenous people (*infra* para. 217).

84. In 2003, the Constitutional, Legislative and Justice Committee, mandated by the Chilean Senate, drew up a report on "public order and security, above all in Regions VIII and IX, in

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[82] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile,* para. 28 (file of annexes to the Merits Report 176/10, annex 5, folio 257). The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, also referred to the issue and said, among other matters, that he "disapproves of resorting to acts of violence as a means of protest, even in situations related to legitimate claims of the indigenous peoples and communities," but that "the perpetration of eventual acts of violence does not in any way justify the violation of human rights of the indigenous population by the State's police agents." *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *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*, para. 40 (file of annexes to the Merits Report 176/10, annex 12, folio 439).

[83] *Cf.* UN Doc. CCPR/C/CHL/C0/5, 17 April 2007, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee, Chile*, para. 7 (file of annexes to the Merits Report 176/10, annex 8, folio 312); UN Doc. A/HRC/6/17/Add.1, 28 November 2007, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Communications with Governments*, para. 9 (file of annexes to the Merits Report 176/10, annex 10, folio 370); UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *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*, para. 46 (file of annexes to the Merits Report 176/10, annex 12, folio 441); UN Doc. CERD/C/CHL/C0/15-18, 7 September 2009, 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 the Elimination of Racial Discrimination, Chile*, para. 15 (file of annexes to the Merits Report 176/10, annex 14, folio 502); Aylwin Oyarzún, José Antonio, Law report, "*La aplicación de Ley No. 18.314 que 'determina conductas terroristas y fija su penalidad' a las causas que involucran a integrantes del pueblo mapuche por hechos relacionados con sus demandas por tierras y sus implicaciones desde la perspectiva de los derechos humanos"* [The application of Law No. 18,314 which 'defines terrorist acts and establishes the corresponding punishments' in proceedings that involve members of the Mapuche people for acts related to their demands for lands and the implications from the perspective of human rights], August 2010 (file of annexes to the CEJIL motions and arguments brief, annex C 2, folios 2080 to 2086); Statement made by expert witness Jorge Contesse before the Inter-American Court during the public hearing held on May 29 and 30, 2013; document provided by the State indicating that it is a "List with a historical record of those indicted under the Counter-terrorism Act between 2000 and 2013 throughout Chile" (file of helpful evidence presented by the State, folios 52 to 55); and Article by Víctor Toledo Llancaqueo, "*Prima ratio Movilización mapuche y política penal. Los marcos de la política indígena en Chile 1990-2007,*" in the journal *Observatorio Social de América Latina*, Year VIII, No. 22, September 2007, Buenos Aires (Annex No. 9 of the FIDH brief with motions, arguments and evidence), page 263 of the journal includes a "Table" entitled "Regions VIII and IX. Complaints filed by the Government owing to Mapuche acts of protest, 1997-2003" indicating that the source of the information is a "Note of the Ministry of the Interior based on a report of the Senate (2003) and INE judicial statistics."

[84] *Cf.* UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Addendum, Mission to Chile,* paras. 20 and 22 (merits file, tome V, folios 2566 a 2587).

relation to the reiterated acts of violence committed by some Mapuche organizations." Among its conclusions, the Committee stated that:

> In spite of the difficulties of their situation, the immense majority of Mapuche communities are composed of peaceful honest hardworking citizens, who respect the law, democracy and the elected authorities and, despite the serious social problems and deficiencies they endure and their legitimate right to demand respect for their traditions, culture and identity, they reject violence as a way of making known or realizing their aspirations, the achievement of which they demand vehemently at times, but without violence.[85]

85. The actions of the State's law enforcement agents (members of the *Carabineros de Chile* and of the Police Investigation Unit) in this context of social protest have resulted in allegation of abuse, violence (physical and verbal) and mistreatment against the members of the Mapuche indigenous people (including children, women and the elderly) when they conduct searches or raids, or execute arrest warrants against suspects. Deaths and injuries have occurred, even including of children. In this regard, the United Nations Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism stated that "it is an undeniable fact that some members of the *Carabineros* […] employ an excessive and potentially lethal use of force during the operations carried out in the Mapuche communities," which he considered to be a "usual and even systematic practice," added to "the almost total absence of accountability for the crimes supposedly committed by law enforcement agents."[86]

86. On January 18, 2001, by Supreme Decree of the President of the Republic Ricardo Lagos Escobar, the Commission for the Historical Truth and New Deal with the Indigenous Peoples was created, mandated "to advise the President […] on the vision of the indigenous peoples [of Chile] with regard to the historical events of the country, and to make recommendations for a new State policy that paves the way to progress towards a new treatment of Chilean society and its rapprochement with the indigenous peoples"[87] (*infra* para. 87). To carry out its task, the Commission organized "thematic and territorial working groups," including the "Autonomous Mapuche Commission." The research conducted by the latter reveals that, at the start of the twenty-first century, "in Regions VIII and IX a significant number of land disputes and demands of the Mapuche communities from different communes in [certain] provinces had been resolved, […] by the purchase of land," but that there remained "different conflicts and demands for land that had not been resolved." These were related to "the history of usurpation and loss of lands to which the communities had been subject […]." The Commission also affirmed that, "among the demands for lands," "the recovery of those that formed part of the

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[85] *Cf.* Report of the Constitutional, Legislative and Justice Committee on the Senate's mandate "regarding the Mapuche conflict in relation to public order and security in certain regions," Bulletin No. S-680-12, July 9, 2003, p. 144 (file of annexes to the Merits Report 176/10, annex 4, folios 225 and 226).

[86] *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *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*, paras. 42, 43 and 62 (file of annexes to the Merits Report 176/10, annex 12, folios 440 and 444); UN Doc. CERD/C/CHL/C0/15-18, 7 September 2009, 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 the Elimination of Racial Discrimination, Chile,* para. 19 (file of annexes to the Merits Report 176/10, annex 14, folio 503), and UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Addendum, Mission to Chile,* paras. 69 to 79 (merits file, tome V, folios 2566 to 2587).

[87] Articles 2 and 3 of this decree set out the tasks and composition of the Commission for the Historical Truth and New Deal for the Indigenous Peoples. *Cf.* Supreme Decree No. 19, of January 18, 2001, creating the Historical Truth and New Deal Commission, contained in the Report of the Commission for the Historical Truth and New Deal for the Indigenous Peoples handed to Ricardo Lagos Escobar, President of the Republic at the time, on October 28, 2003, published by the Presidential Commissioner for Indigenous Affairs, first edition, Santiago of Chile, October 2008, pp. 16 to 18. Available at: http://www.corteidh.or.cr/tablas/27374.pdf.

Mapuche communities during the agrarian reform and those that are claimed as part of the ancestral lands prior to the reduction process" stood out.[88]

87. In its 2003 Report, the Commission for the Historical Truth and New Deal with the Indigenous Peoples made various "proposals and recommendations" related to the claims of the Mapuche people, among which it indicated that "reparation mechanisms should be created and, insofar as possible, for restitution of the Mapuche lands when, based on the background information, this is justified," and also that "[i]t is the duty of the State […] to institute mechanisms for evaluating these demands and meeting them when they are justified," and "[s]ettling the claims of the indigenous peoples while respecting the integrity of the personal assets of the actual owners." In this regard, the Commission insisted that "the land claims of the indigenous peoples and communities" must be dealt with promptly; to the contrary, "frequent and permanent conflict would be encouraged."[89]

88. At the beginning of the decade of 2000, Law No. 19,253, the so-called "Indigenous Peoples Act" was in force; it had been enacted in 1993 and established norms "for the protection, promotion and development of the indigenous peoples." Matters relating to property, culture, education, political participation and development, as well as mechanisms for access to indigenous lands and waters were regulated by this law, as well as the creation of the National Development Corporation (CONADI), responsible for the administration of the indigenous peoples' land and water fund. The fund "operates through two mechanisms […]: (a) subsidizing the purchase of lands in order to extend them, and (b) the direct purchase of "disputed lands.'"[90]

89. On September 15, 2008, Chile ratified Convention 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries. According to the report of James Anaya, as United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, the ratification and entry into force of this Convention "help[ed] to strengthen the legal framework to guarantee rights and guide the State's public policies concerning the indigenous peoples."[91]

90. Despite the existence of this legal framework and of the actions that the State undertook within it such as purchasing land and delivering it to Mapuche communities, several bodies and special procedures of the United Nations and the above-mentioned Commission for the Historical Truth and New Deal for the Indigenous Peoples, as well as different types of evidence have all indicated that the State's response to the Mapuche indigenous people's land claims has been slow and lacks an effective mechanism.[92] In this regard, in his final report on his visit to

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[88] *Cf.* Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, p. 717 (file of helpful evidence presented by the State, folio 958).

[89] *Cf.* Report of the Historical Truth and New Deal Commission delivered to Ricardo Lagos Escobar, President of the Republic at the time, on October 28, 2003, pp. 575, 576 and 578.

[90] *Cf.* Report of the Constitutional, Legislative and Justice Committee on the Senate's mandate "regarding the Mapuche conflict in relation to public order and security in certain regions," Bulletin No. S-680-12, July 9, 2003, p. 144 (file of annexes to the Merits Report 176/10, annex 4, folios 226 and 227), and UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, 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,* para. 24 (file of annexes to the Merits Report 176/10, annex 12, folio 434).

[91] *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, 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,* para. 6 (file of annexes to the Merits Report 176/10, annex 12, folio 429).

[92] *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *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,* para. 24 (file of annexes to the Merits Report 176/10, annex 12, folios 434 and 435); UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special*

Chile in July 2013, the United Nations Special Rapporteur for the promotion and protection of human rights while countering terrorism underlined that it was urgent for the State to find a solution to the manifestations of violence in the region of Araucanía, and also its causes. He stressed that "[s]ince the restoration of democracy in Chile, no Government of either political hue has given the issue the priority it deserves," and that the State "has a duty to promote a peaceful and just solution to the Mapuche questions." According to the Special Rapporteur, representatives of commercial interests in the region have complained about the lack of political will within central Government to seek and deliver a lasting solution to the problem.[93]

91. In December 2011, CONADI paid the price agreed for the acquisition of approximately 2,500 hectares, which were divided between three indigenous communities: the Ricardo Nahuelpi Ñu Choyun community, the Antonio Ñirripil community and the Didaico community. Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, respectively, were *Lonkos* of the last two of these communities, and they were present in the ceremony of the "handing over of the land."[94]

92. In addition to the criminal proceedings relating to the instant case before the Inter-American Court, the presumed victims Patricia Troncoso Robles, Pascual Pichún Paillalao and Segundo Aniceto Norín Catrimán and another five persons were tried for the offense of "conspiracy to commit a terrorist act." They were accused of having formed an organization to carry out terrorist offenses acting "under the aegis" of the indigenous organization, "*Coordinadora Arauco-Malleco*" (CAM). The Temuco Criminal Trial Court acquitted them on November 9, 2004, and in its judgment, among other matters, it concluded that:

> […] In this case there has never been a body or organization, with its own exclusive features, characteristics and particularities that differentiate it from the *Coordinadora Arauco-Malleco* regarding which it can be affirmed that it operated under the latter's aegis. To the contrary, all the evidence provided by the plaintiffs reveals that it refers a single and unique entity, which is only the oft-named *Coordinadora Arauco-Malleco,* which has been operating in both Regions XVIII and IX of the country as of 1998, and whose ideology, procedures and actions are those that it has disclosed on its web page, in its publication Weftun, and through social media. […].[95]

Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile (file of annexes to the Merits Report 176/10, annex 5, folio 247); UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council*, Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, *Addendum, Mission to Chile*, paras. 10, 25 and 16; UN Doc. CCPR/C/CHL/C0/5, 17 April 2007, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee, Chile,* para. 19 (file of annexes to the Merits Report 176/10, annex 8, folios 310 to 315); UN Doc. CERD/C/CHL/CO/19-21, Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee at its eighty-third session (12-30 August 2013*), paras. 12 to 14; Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, pp. 950 to 954 (file of helpful evidence presented by the State, folios 999 to 1003); Aylwin Oyarzún, José Antonio, Law Report, *"La aplicación de Law No. 18.314 que 'determina conductas terroristas y fija su penalidad' a las causas que involucran a integrantes del pueblo mapuche por hechos relacionados con sus demandas por tierras y sus implicaciones desde la perspectiva de los derechos humanos,"* August 2010 (file of annexes to the CEJIL motions and arguments brief, annex C 2, folio 2080), and affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of the presumed victims, witnesses and expert witnesses, folio 337).

93 *Cf.* UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, Addendum, Mission to Chile, paras. 24 to 28 (merits file, tome V, folios 2566 to 2587).

94 *Cf.* Ownership titles issued on January 25, 2012, by the Notary and Real Estate Registrar José Apolonio Peña Meza in relation to the contracts for the purchase of land in favor of the Antonio Ñirripil, Didaico, and Ricardo Nahuelpi Ñi Po Choyún Indigenous Communities drawn up by the same notary in deeds dated December 23, 2011 (file of annexes to the answering brief, folios 137 to 157). The State also provided photographs of the delivery of land to the indigenous communities and plans of the land handed over (file of annexes to the answering brief, folios 125 to 136).

95 *Cf.* Judgment delivered on November 9, 2004, by the Second Chamber of the Temuco Criminal Trial Court, nineteenth *considerandum* (file of annexes to the FIDH motions and arguments brief, annex 50, folios 1721 to 1852).

93. The Court received expert,[96] testimonial[97] and documentary[98] evidence, as well as reports of United Nations experts,[99] which reveal the existence in social media and in parts of Chilean society of unfavorable stereotypes and the concept of what is called "the Mapuche question," the "Mapuche problem," or the "Mapuche conflict," which delegitimize the claims concerning the territorial rights of the Mapuche indigenous people or, in general, describe their social protest as violent or present it as creating conflict between this people and the other inhabitants of the area.[100]

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[96] *Cf.* Statement made by expert witness Jorge Contesse before the Inter-American Court during the public hearing held on May 29 and 30, 2013; affidavits prepared on May 17, 2013, by expert witness Carlos del Valle Rojas; on May 17, 2013, by expert witness Fabien Le Bonniec; on May 15, 2013, by expert witness Ruth Vargas Forman, and written statement prepared on May 26, 2013, by expert witness Rodolfo Stavenhagen, (file of statements of the presumed victims, witnesses and expert witnesses, folios 288 to 298, 327, 328, 400, 407, 697 and 698).

[97] *Cf.* Statement made by presumed victim Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013; affidavits prepared on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán; on May 24, 2013, by witness Luis Rodríguez Piñero; on May 17, 2013, by Matías Ancalaf Prado; on May 14, 2013, by presumed victim Juan Patricio Marileo Saravia; on May 14, 2013, by presumed victim Juan Ciriaco Millacheo Licán; on May 16, 2013, by Carlos Pichún; on May 17, 2013, by Pascual Alejandro Pichún Collonao; on May 20, 2013, by Claudia Ximena Espinoza Gallardo; on May 24, 2013, by Freddy Jonathan Marileo Marileo, and written statements prepared on May 27, 2013, by presumed victims Patricia Roxana Troncoso Robles and Segundo Aniceto Norín Catrimán (file of statements of the presumed victims, witnesses and expert witnesses, folios 35, 183, 196, 204, 221, 235, 238, 256, 339, 430, 638 and 642).

[98] *Cf.* Eduardo Milla Seguel, *"Los mapuche ante la justicia. La criminalización de la protesta indígena en Chile"*, Chile, Santiago. LOM Ediciones, 2007, p. 145 (file of annexes to the CEJIL motions and arguments brief, annex D5, folio 3359); Pablo A. Segovia Lacoste, *"Semántica de la guerra en el conflicto mapuche"* (file of annexes to the FIDH motions and arguments brief, annex 12, folios 443 to 455); Myrna Villegas Díaz, *"El Mapuche como enemigo en el Derecho (Penal). Consideraciones desde la biopolítica y el derecho penal del enemigo"*, Portal Iberoamericano de las Ciencias Penales (file of annexes to the CEJIL motions and arguments brief, annex C 6, folios 2181, 2182 and 2187); Eduardo Mella Seguel and Le Bonniec, *"Movimiento mapuche y justicia chilena en la actualidad: reflexiones acerca de la judicialización de las reivindicaciones mapuche en Chile"* in Aylwin, José (editor), *Derechos Humanos y Pueblos Indígenas: Tendencias Internacionales y Contexto Chileno*, Temuco, Institute for Indigenous Studies and Universidad de la Frontera, 2004 (file of annexes to the CEJIL motions and arguments brief, annex C 10, folios 2357-2361), and Human Rights Watch. *"Undue Process: Terrorism trials, military courts, and the Mapuche in Southern Chile,"* October 2004 (file of annexes to the FIDH motions and arguments brief, annex 14, folios 528 and 529); Newspaper article published in "*El Mercurio*," digital edition on March 2, 2000, entitled "*Conflicto Mapuche Bordea el Terrorismo"*; Newspaper article published in "Emol.Chile" on January 23, 2001, entitled "*Piden aplicar la ley antiterrorista en la Aracucanía*"; Newspaper article published in "Emol.Chile" on February 2, 2001, entitled *"Pérez Walker: Gobierno no se impone ante conflicto mapuche";* Newspaper article published in "*El Mercurio*," digital edition on December 14, 2000, entitled *"Atentados de grupos armados: Zaldívar, partidario de la ley antiterrorista"*; Newspaper article published in "*El Mercurio*," digital edition on July 15, 2002, entitled *"Sólo un mapuche cumple presidio"*; Newspaper article published in "*El Mercurio*," digital edition on December 6, 2002, entitled "*Conflicto en la IX Región: Ejecutivo pide la ley antiterrorista contra mapuches*"; Newspaper article published in "*El Mercurio*" digital edition on July 30, 2005, entitled *"Juicio a Mapuches";* Newspaper article published in "*El Mercurio,"* digital edition on November 6, 2004, entitled *"Víctimas contra fallo absolutorio de Mapuches: ellos quedan como inocentes y nosotros con casas quemadas"* (file of annexes to the FIDH motions and arguments brief, annexes 60.3, 60.4 60.5, 60.7, 60.8, 60.10, 60.19 and 60.21, folios 1968 to 1973, 1975, 1976, 1977, 1979, 1988, 1990), and Newspaper article published in "*piensaChile.com*" on March 19, 2008, entitled "*Jueza y fiscal avalan tortura y montajes en juicio por atentado contra Forestal Mininco"* (file of annexes to the Merits Report 176/10, appendix 1, folios 2822 to 2824).

[99] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56*, Addendum, Mission to Chile (file of annexes to the Merits Report 176/10, annex 5, folio 259); UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *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*, paras. 7 and 8 (file of annexes to the Merits Report 176/10, annex 12, folio 259), and UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, Addendum, Mission to Chile, paras. 27 and 49 (merits file, tome V, folios 2566 a 2587).

[100] In this regard, the book by Eduardo Milla Seguel, presented by CEJIL, states, among other matters, that "the media have established a forceful discourse, based on prejudices and in defense of the private property of the forestry companies and farmers settled on Mapuche ancestral territory, which tends to deny 'the rights of the indigenous peoples' influencing national and regional society and the judicial proceedings that, nowadays, affect members of Mapuche communities." *Cf.* Eduardo Milla Seguel, *"Los mapuche ante la justicia. La criminalización de la protesta indígena*

C) Domestic legal framework

94. During the criminal proceedings against the presumed victims in this case, norms of the Constitution, criminal law (Criminal Code and special criminal law on terrorism) and criminal procedural law (1906 Code of Criminal Procedure and 2000 Criminal Procedural Code, and Code of Military Justice) were applied, and they will be described below, before examining them in the corresponding chapters on the merits.

1. Constitution

95. Article 9 of the Constitution of the Republic of Chile[101] contains provisions for the criminal prosecution of "acts of terrorism" and penalties in addition to imprisonment. In addition, article 19(7)(e) contains regulations concerning the right to personal liberty and "preventive or pre-trial detention."

> Article 9. Terrorism, in any of its forms, is intrinsically contrary to human rights.
>
> 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. It is understood that the foregoing is without prejudice to other disqualifications or those that last longer according to the law.
>
> The offenses referred to in the preceding paragraph shall always be considered common and not political offenses for all legal effects, and a private pardon shall not be admissible, unless this is to commute the death penalty for life imprisonment.

Article 19(7)(e) and (f) establishes the following:

> Article 19. The Constitution ensures to everyone:
>
> [...]
>
> (7). The right to personal liberty and individual safety.
>
> Consequently:
>
> [...]
>
> (e) Pre-trial release shall be in order, unless the judge considers that detention or pre-trial detention is necessary for the preliminary investigations or for the safety of the victim or of society. The Law shall establish the means and requirements for obtaining this.

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en Chile", Chile, Santiago. LOM Ediciones, 2007, p. 145 (file of annexes to the CEJIL motions and arguments brief, annex D5, folio 3325). Similarly, the *amicus curiae* brief presented by Claudia Gutiérrez Olivares, Professor of Ethics and Political Philosophy of the Universidad of Chile, when referring, *inter alia*, to "the opinion" and "the discourse" of the mass media in relation to the Mapuche people, stated that "very frequently, [...] the media use a discriminatory language that marginalizes the Mapuche people," by presenting them as "small groups that obstruct development" owing to their "social mobilization" based on "opposition to production and energy projects that it is sought to develop on indigenous lands or nearby." Thus, she indicated that "[n]ewspaper coverage of the Mapuche issue usually takes the approach of the *Mapuche conflict*," dealing with news concerning this situation "clearly in favor of one of the parties," which is the "businessmen" or "owners of forestry company [or of] farms." In this regard, she referred to an article by Fresia Andrea Amolef Gallardo entitled "*La alteridad en el discurso mediático: Los Mapuches y la prensa Chilena*", indicating that, in the article, the author summarizes the treatment given to the Mapuche in a major Chilean newspaper that uses "concepts and expressions" based "almost exclusively" on "negative, pejorative and discriminatory characteristics," as well as a description of "the negative consequences" of "the actions taken by" the Mapuche. She affirmed that this author shows that "the press creates a climate that is hostile to the social demands of the Mapuche people, contributing to delegitimize them, as well as to producing distrust and fear among the population" (merits file, tome IV, folios 1854 to 1864).

[101] *Cf.* Constitution of Chile of August 8, 1980, and its amendments. The State indicated that the version of the "Constitution of Chile in force at the time of the acts for which the presumed victims of this case were prosecuted" is available at: http://www.leychile.cl/Navegar?idNorma=7129&idVersion=2001-08-25.

> The decision granting pre-trial release to the accused of the offenses referred to in article 9 must always be consulted with a higher authority. This and the appeal against the decision issued on the release shall be heard by the corresponding higher court composed exclusively of full-time members. The decision that approves or grants the release must be taken unanimously. During the pre-trial release period, the accused shall always be subject to measures of supervision by the authority established by law.
>
> (f) […] The release of the accused shall be in order unless the judge considers that pre-trial detention is necessary for the investigations or for the safety of the victim or of society. The Law shall establish the means and requirements for obtaining this.

2. Criminal law

a) Criminal Code

96. The Chilean Criminal Code (which dates from 1874 and has been amended several times) is pertinent insofar as the Counter-terrorism Act refers to various types of crime established therein, as well as the corresponding punishments.[102]

97. Among the punishments established in its article 21 are "[a]bsolute and permanent disqualification from public office and positions, and titled professions" and that of "[a]bsolute and temporary disqualification from public office and positions, and titled professions."

b) Counter-terrorism Act

98. In 1984, Law 18,314 (Counter-terrorism Act) was enacted, which "[d]efines acts of terrorism and establishes their punishments."[103] This law was amended in 1991, 2002, 2003, 2005, 2010 and 2011.[104] The 2010 amendment eliminated the part of the text of article 1

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[102] *Cf.* Criminal Code of Chile of November 12, 1874, and its amendments. The State indicated that the "Criminal Code in force at the time of the acts for which the presumed victims in this case were tried" is available at: http://www.leychile.cl/Navegar?idNorma=1984&idVersion=2001-06-05

[103] *Cf.* Law No. 18,314 that "defines terrorist acts and establishes the corresponding punishments," published in the official gazette on May 17, 1984 (file of annexes to the Merits Report 176/10, annex 1, folios 5 to 11, file of annexes to the CEJIL motions and arguments brief, annex B 1.1, folios 1740 to 1746, file of annexes to the FIDH motions and arguments brief, annex 27, folios 817 to 823, and annexes to the State's answering brief, annex 3, folios 84 to 87). This law is also available at: http://www.leychile.cl/Navegar?idNorma=29731&tipoVersion=0

[104] Law No. 18,314 was amended by the following laws:

i) **Law No. 19,027** of January 24, 1991, which "[a]mends Law No.18,314 that que defines terrorist acts and establishes the corresponding punishments" (file of annexes to the FIDH motions and arguments brief, annex 29, folios 825 to 827).

ii) **Law No. 19,806** of May 31, 2002, on "[n]orms to adapt the Chilean legal system to the reform of criminal procedure," which regulates witness anonymity (file of annexes to the CEJIL motions and arguments brief, annex B.2, folios 1776 to 1829 and file of annexes to the FIDH motions and arguments brief, annex 30, folios 828 to 881);

iii) **Law No. 19,906** of November 13, 2003, which "[a]mends Law No.18,314, on terrorist acts, in order to sanction the financing of terrorism more effectively in keeping with the provisions of the International Convention for the Suppression of the Financing of Terrorism" (file of annexes to the FIDH motions and arguments brief, annex 31, folio 882);

iv) **Law No. 20,074** of November 14, 2005, which "[a]mends the Code of Criminal Procedure and the Criminal Code" (file of annexes to the CEJIL motions and arguments brief, annex B.1.2, folios 1747 to 1758);

v) **Law No. 20,467** of October 8, 2010, which "[a]mends provisions of Law No.18,314 that defines terrorist acts and establishes the corresponding punishments." This law, *inter alia*, eliminates the presumption of terrorist motives owing to the use of certain methods ,and expressly establishes "the exclusion of minors from the application of the Counter-terrorism Act" by stipulating that "[i]f the acts were executed by persons under 18 years of age, based on the speciality principle the proceedings and the reduced penalties established in Law No. 20,084 which creates a system of adolescent criminal responsibility, shall always be applied" (file of annexes to the Merits Report 176/10, annex 2, folios 12 to 15, file of annexes to the CEJIL motions and arguments brief, annex B.1.3, folios 1759 to 1774, file of annexes to the FIDH motions and arguments brief, annex 32, folios 883 to 1309 and file of annexes to the answering brief of the State, annex 4, folios 84 to 87), and

vi) **Law No. 20,519** of June 21, 2011, which "[a]mends provisions of Law No.18,314 and other laws, excluding from their application acts executed by minors." As indicated by the State in its answering brief, "in order to avoid certain

which established a presumption of "the objective of producing […] fear in the general population." At the time of the acts for which the presumed victims in this case were tried, and in relation to criminal matters, articles of the law applied in this case stipulated the following:

> Article 1. The offenses listed in article 2 shall constitute terrorist offenses when any of the following circumstances exist:
>
> 1. That the offense is committed in order to produce in the population, or in part of it, the justified fear of being a victim of offenses of the same type, due either to the nature and effects of the means used, or to the evidence that it is part of a premeditated plan to attack a specific category or group of persons.
>
> Unless the contrary is verified, the intent of causing fear among the general population shall be presumed when the offense is committed using explosive or incendiary devices, weapons of great destructive power, toxic, corrosive or infectious substances or others that can cause major devastation, or by sending letters, packages or similar objects with explosive or toxic effects.
>
> 2. That the offense is committed to force decisions from the authorities or to impose demands.
>
> Article 2. The following shall constitute terrorist offenses when they comply with any of the characteristics indicated in the preceding article:
>
> 1. Homicides penalized in Articles 390 and 391; injuries penalized in Articles 395, 396, 397 and 399; abductions, either in the form of detention or confinement, or holding someone as a hostage, and the kidnapping of minors, penalized in Articles 141 and 142; mailing of explosive devices established in Article 403 bis; arson and destruction penalized in Articles 474, 475, 476 and 480; infringements of public health of Articles 313(d), 315 and 316, and derailments established in Articles 323, 324, 325 and 326, all of the Criminal Code.
>
> 2. Attacking or hijacking a ship, aircraft, train, bus or other means of public transport in service, or carrying out acts that endanger the life, physical integrity or health of their passengers or crew.
>
> 3. An attempt on the life and physical integrity of the Head of State or another political, judicial, military, police or religious authority, or persons under international protection, owing to their function.
>
> 4. Placing, throwing or firing bombs or explosive or incendiary devices of any type that affect or can affect the physical integrity of persons or cause harm.

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interpretations of the norm [on the exclusion of minors from the application of the Counter-terrorism Act included in Law No. 20,467,] that are not necessarily consistent with its spirit," it had to issue this new law which establishes this exclusion and adapts the Counter-terrorism Act to "the principles of special criminal law for adolescents" (file of annexes to the CEJIL motions and arguments brief, annex B.1.11, folio 1775, file of annexes to the FIDH motions and arguments brief, annex 33, folio 1310 and file of annexes to the answering brief of the State, annex 5, folios 88 to 112).

These laws are also available at: http://www.leychile.cl/Navegar?idNorma=29731&tipoVersion=0

Regarding the amendments to the Counter-terrorism Act, see also: affidavits prepared on May 21, 2013, by expert witness Manuel Cancio Meliá, and on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folios 115 to 166 and 601 to 624).

The hunger strikes carried out between 2002 and 2007 by Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles for different reasons related to their detention and prosecution and to the application of the Counter-terrorism Act influenced the presentation of a bill to amend this law, which was adopted in October 2010, with the promulgation of Law No. 20,467, which eliminated the presumption of a terrorist objective due to the use of certain methods. *Cf.* Note 09.01.03.55/02 of August 7, 2002, signed by the Head of the Traiguén Preventive Detention Center and addressed to the Head of the Security Department of Genchi, Santiago; Note 09.01.01-223/02 of February 16, 2002, signed by the Head of the Angol Preventive Detention Center and addressed to the judge of the Traiguén Guarantees Court; Note 09.01.03.23/02 of March 20, 2002, signed by Head of the Traiguén Preventive Detention Center and addressed to the Head of the Security Department of Genchi, Santiago; Note 08 of October 13, 2003, signed by the Head of the Victoria Prison Sentences Center (file of annexes to the Merits Report 176/10, appendix 1, folios 4391, 4438, 4541, 9196); affidavits prepared on May 14, 2013, by presumed victim Juan Patricio Marileo Saravia, and on May 24, 2013, by witness Luis Rodríguez-Piñero Royo; written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 191, 342 650 to 652), and statement made by presumed victim Florencio Jaime Marileo Saravia before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

5. Unlawful association when its purpose is to commit offenses that should be classified as terrorist offenses in accordance with the preceding paragraphs and with article 1.

Article 3. The offenses indicated in paragraphs 1 and 3 of article 2 shall be penalized with the punishments established for them in the Criminal Code, or in Law No. 12,927, as appropriate, increased by one, two or three levels.
The offenses established in Article 2(2) shall be penalized with long-term rigorous imprisonment at any of its levels. If, as a result of such offenses, any of the crew or passengers of any of the means of transport mentioned in that paragraph should die or be seriously injured, the offense shall be considered as one of destruction and shall be penalized pursuant to Articles 474 and 475 of the Criminal Code, as appropriate, and the first paragraph of this article.
The offenses indicated in article 2(4) shall be penalized with long-term rigorous imprisonment at any of its levels.
The offense of unlawful association to commit acts of terrorism shall be penalized pursuant to articles 293 and 294 of the Criminal Code, and the punishments established therein shall be increased by two levels, in the cases of article 293 and by one level in those of Article 294. The provisions of article 294 bis of this Code shall also be applicable.

Article 3 bis. In order to increase the punishments established in the preceding article, the court shall first determine the punishment that would have corresponded to the authors in the circumstances of the case if terrorist offenses had not been involved, and shall then increase it by the corresponding number of levels.
Within the limits of the punishments that may be imposed, in addition to the general rules of the Criminal Code, the court shall give special consideration when making a final decision on the punishment, to any unnecessary cruelty used in the perpetration of the offense and the greater or lesser probability of the perpetration of other similar offenses by the accused, based on his record and personality, and the information arising from the proceedings on the circumstances and motives of the offense.

[…]

Article 5. Notwithstanding the ancillary penalties that are in order under the general norms for those convicted of any of the offenses established in articles 1 and 2, they shall be subject to the disqualifications referred to in article 9 of the Constitution of the State.
[…]

Article 7. The attempt to commit one of the terrorist offenses established in this law shall be penalized with the minimum punishment indicated by the law for the offense if it had been perpetrated. If that punishment has only one level, the provisions of article 67 of the Criminal Code shall be applied and the minimum level shall be imposed on the attempt.
The genuine and serious threat of committing any of the above-mentioned offenses shall be punished as an attempt to commit it.
Conspiracy to commit any of these offenses shall be penalized with the punishment corresponding to the perpetration of the offense, reduced by one or two levels.

99. In addition, article 10 established that investigations into acts classified as terrorist acts "shall be opened *ex officio* by the courts of justice or based on a report or a complaint, in accordance with the general norms, [or] can be opened by a request or complaint of the Minister of the Interior, of the Regional Prefects, the Provincial Governors, and the Garrison Commanders." This article made certain provisions of Law 12,927 on State Security applicable, which referred back to procedural norms of the Code of Military Justice.[105]

100. The presumed victims in this case were convicted as perpetrators of terrorist offenses in application of Law 18,314 in force at the time of the acts for which there were tried (*infra* paras. 116, 118, 126, 128, 147, 150 and 151).

[105] *Cf.* Decree 890 which "establishes the updated and rewritten text of Law 12,927, on State security" of August 26, 1975 (file of annexes to the CEJIL motions and arguments brief, annex B.4., folio 1845 to 1857).

3. Criminal procedural laws

101. Chile modernized its criminal procedural laws in 2000. On September 29 that year, Congress promulgated Law No. 19,696, which established the Criminal Procedural Code to replace the 1906 Code of Criminal Procedure.[106]

102. According to the evidence in the case file, the new Code meant passing from a criminal procedural system of an inquisitorial nature to one of an adversarial nature.[107] This system is characterized by the central role of the oral public trial before oral criminal trial courts.[108] The principles of the oral and public nature of trials are regulated in articles 291 and 289 of this Code respectively. In addition, the evidentiary activity is governed by the principle of immediacy, which means that, as a general rule, it must be submitted during the hearing of the oral trial, save for the exceptions established by law.

103. The new Code gradually entered into force in the different regions of Chile. Its article 484 established the dates as of which it would enter into force for each region. The criminal proceedings held against Víctor Ancalaf Llaupe were processed under the 1906 Code of Criminal Procedure (Law No. 1853), because the acts for which he was tried occurred in the Region of Bío Bío before the entry into force of the new Criminal Procedural Code in that region. In contrast, the criminal proceedings held against the other seven presumed victims in this case were governed by the 2000 Criminal Procedural Code (Law No. 19,696), because the acts for which they were tried occurred in the Region of Araucanía following the entry into force of the said code in that region.

104. Article 78 of the 1906 Code of Criminal Procedure[109] established the confidentiality of the preliminary proceedings, and its article 189 contained provisions on the confidentiality of the identity of witnesses "with regard to third parties" and "special measures designed to protect the safety of the witness" (*infra* para. 235). Article 182 of the 2000 Criminal Procedural Code established the confidentiality of "certain actions, records or documents […] with regard to the accused or others who intervene in the proceedings." In addition, articles 307 and 308 regulate, respectively, the authority of the "court" to order the "prohibition" "to disclose" the "identity" of the witness and "to order special measures designed to protect the safety of the witness" who requests this (*infra* para. 232.a). Article 15 of Law No. 18,314 in force at the time of the events of this case regulated the authority of the Public Prosecution Service to order "special measures of protection [… t]o protect the identity of those who intervene in the proceedings," which can be reviewed by the judge responsible for ensuring that the rights of the accused are respected (*juez de garantía*) at the request of those who intervene in the proceedings; and article 16 regulated the authority of the court "to decree the prohibition to reveal […] the identity of protected witnesses or expert witnesses" (*infra* para. 232.b).

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[106] *Cf.* Law No. 19,696 which "[e]stablishes the Criminal Procedural Code," published in the official gazette on October 12, 2000 (file of helpful evidence presented by the State, folio 1067), available at: http://www.leychile.cl/Navegar?idNorma=176595&buscar=19696, and Law No. 1853 "Code of Criminal Procedure," published on February 19, 1906 (file of annexes to the CEJIL motions and arguments brief, annex B.5., folios 1858 to 2006), available at: http://www.leychile.cl/Navegar?idNorma=22960&buscar=ley+1853

[107] *Cf.* Statement made by expert witness Claudio Fuentes Maureira before the Inter-American Court during the public hearing held on May 29 and 30, 2013, and affidavit prepared on May 17, 2013, by expert witness Claudio Alejandro Fierro Morales (file of statements of presumed victims, witnesses and expert witnesses, folio 3). Similarly: *Case of Palamara Iribarne v. Chile*. *Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 122.

[108] These are collegiate courts where decisions are taken by three judges. *Cf.* Judgments delivered on September 27, 2003, April 14, 2003, and August 22, 2004, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annexes 15, 16 and 18, folios 508 to 554, 555 to 574 and 607 to 687), and statement made by expert witness Claudio Fuentes Maureira before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[109] Code of Criminal Procedure promulgated on February 13, 1906 (file of annexes to the CEJIL brief with motions, arguments and evidence, annex B5, folios 1858 to 2006).

105. Regarding the appeal against the criminal judgment, Title IV of the 2000 Criminal Procedural Code establishes the "appeal for annulment" "to invalidate the oral trial and the final judgment, or only the latter, for the causes expressly indicated" in the code (*infra* paras. 271-273).

D) The criminal proceedings held against the presumed victims

1. The criminal proceedings against Lonkos Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, and against Patricia Roxana Troncoso Robles

Accusation

106. Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, *Lonkos* of the communities of "Lorenzo Norín" of Didaico and "Antonio Ñirripil" of Telememu, respectively, and Ms. Troncoso Robles were subjected to criminal proceedings in which they were accused of committing the following offenses:[110]

a) The offense of "terrorist arson" based on fire that occurred on December 12, 2001, in the house of the administrator of the Nancahue forest farm;

b) The offense of "threats of terrorist arson" based on threats to set fire to the Nancahue plantation "during 2001" to the detriment of the owners and administrators of this plantation;

c) The offense of "terrorist arson" based on the fire that occurred on December 16, 2001, in the San Gregorio forestry plantation;

d) The offense of "threats of terrorist arson" based on threats to set fire to the San Gregorio plantation "during 2001" to the detriment of the owners and administrators of this plantation.

Investigation, confidentiality of proceedings and identities

107. An investigation was conducted during which the Public Prosecution Service decreed the confidentiality of some of the proceedings under article 182 of the Criminal Procedural Code and dictated measures to ensure the anonymity of witnesses pursuant to articles 15 and 16 of Law No. 18,314. This investigation was closed on August 24, 2002.[111]

Pre-trial detention and preceding detention

108. Mr. Norín Catrimán was detained on January 3, 2002, and subjected to pre-trial detention from January 11 that year until April 9, 2003. Mr. Pichún Paillalao was detained from December 21 to 24, 2001, and subjected to pre-trial detention from March 4, 2002, to April 9, 2003. Patricia Troncoso Robles was subjected to pre-trial detention from September 13, 2002, to February 21, 2003.[112]

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[110] *Cf.* Charges brought by the chief prosecutor of the local Prosecutor's Office of Traiguén against Pascual Huentequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán; charges brought by the chief prosecutor of the local Prosecutor's Office of Traiguén against Patricia Roxana Troncoso Robles (file of helpful evidence presented by the State, folios 357 to 424); judgments handed down on April 14 and September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annexes 15 and 16, folios 509 to 511 and 556 to 558).

[111] *Cf.* Decisions issued on February 15, August 29, and September 3, 2002, by the Traiguén guarantees judge (file of annexes to the Merits Report 176/10, appendix 1, folios 4427 to 4434, 4408 to 4414 and 4424), and Note of August 24, 2002, issued by the Traiguén chief prosecutor in relation to the closure of investigation Ruc 0100083503-6 (file of annexes to the Merits Report 176/10, appendix 1, folios 4406 and 4407).

[112] *Cf.* Certification issued on April 17, 2008, by the Traiguén Guarantees Court regarding the duration of the pre-trial detention of Patricia Roxana Troncoso Robles; Decision issued on March 4, 2002, by the Traiguén Guarantees Court "ordering the pre-trial detention" of Pascual Huentequeo Pichún Paillalao; Arrest warrant for Pascual Huentequeo Pichún Paillalao of December 21, 2001, signed by the Chilean Police Investigations Unit and addressed to the Traiguén Guarantees

Charges

109. The Public Prosecution Service brought charges[113] against Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Patricia Roxana Troncoso Robles, requesting the following punishments: for Mr. Norín Catrimán, ten years and one day of mid-level rigorous imprisonment, with the legal ancillary penalties and costs for the offense of terrorist arson of the San Gregorio plantation, plus five years and one day of rigorous imprisonment at the lowest level, with the legal ancillary penalties and costs for the offense of threat of terrorist attack against the owners and administrators of the San Gregorio plantation. With regard to Mr. Pichún Paillalao, it requested the punishment of ten years and one day of mid-level rigorous imprisonment, with the legal ancillary penalties and costs for the offense of terrorist arson of the house of the administrator of the Nancahue forest farm, plus five years and one day of rigorous imprisonment at the lowest level, with the legal ancillary penalties and costs for the offense of threat of terrorist attack against the owners and administrators of the Nancahue forest farm, and with regard to Ms. Troncoso Robles, it requested the same punishments for the same offenses as for the other two accused, but not for the offense of threats of terrorist attack against the owners and administrators of the San Gregorio plantation and the corresponding penalty.

Oral trial

110. The oral trial began on March 31, 2003, and continued on April 2 and 9. The Public Prosecution Service, and the complainants the Office of the Regional Prefect for the Region XI (Araucanía), the Malleco Provincial Governor's Office, and Juan Agustín Figueroa Elgueta, administrator of the Nancahue forest farm, appeared for the prosecution.[114] The defense counsel of the defendants stated that the charges lacked factual grounds and were imprecise about the acts attributed to each of the accused; moreover, it was unclear in what capacity they took part in the acts. The defense also argued that the acts did not meet the necessary legal requirements to be classified as terrorist offenses under Law No. 18,314.

111. During the proceedings the evidence offered by the prosecution was submitted and authenticated. The defense counsel abstained from offering evidence during the proceedings.[115]

Court; Decision issued on December 21, 2001, by the Traiguén Guarantees Court regarding the detention of Pascual Huentequeo Pichún Paillalao; Decision issued el December 24, 2001, by the Traiguén Guarantees Court ordering the release of Pascual Huentequeo Pichún Paillalao because charges had not been brought against him; Arrest warrant for Segundo Aniceto Norín Catrimán of January 3, 2003, signed by the Chilean Police Investigations Unit addressed to the Traiguén Guarantees Court; Decision issued on January 3, 2002, by the Traiguén Guarantees Court regarding the detention of Segundo Aniceto Norín Catrimán; Decision issued on January 11, 2002, by the Traiguén Guarantees Court "maintaining the pre-trial detention" of Segundo Aniceto Norín Catrimán (file of annexes to the Merits Report 176/10, appendix 1, folios 4853, 4469 to 4481, 5037, 5038, 5040 to 5044, 5047 to 5053, 5071, 5072, 5075 to 5080, 5105 to 5127), and Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folio 553).

[113] *Cf.* Charges brought by the head prosecutor of the Traiguén Local Prosecutor's Office against Pascual Huentequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán; Charges brought by the head prosecutor of the Traiguén Local Prosecutor's Office against Patricia Roxana Troncoso Robles (file of helpful evidence presented by the State, folios 357 to 424), and Judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 16, folios 558 and 559).

[114] *Cf.* Judgment of April 14, 2003, delivered by the Angol Oral Criminal Trial Court, third *considerandum* (file of annexes to the Merits Report 176/10, Appendix 1, folios 262 to 265).

[115] *Cf.* Summary of recordings of the hearings in the oral trial held between March 31 and April 8, 2001, before the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 425 to 444), and Judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, seventh *considerandum* (file of annexes to the Merits Report 176/10, annex 16, folio 566).

a) Acquittal issued by the Angol Oral Criminal Trial Court on April 14, 2003[116]

112. On April 14, 2003, the Angol Oral Criminal Trial Court[117] delivered an acquittal with regard to three of the accused in relation to all the charges. The court declared that, based on the evidence, it could conclude that the criminal acts had occurred and that they had a terrorist objective, indicating, *inter alia*, that:

> […] the action that resulted in these wrongful acts reveals that the form, methods and strategies used had the criminal purpose of causing a generalized state of fear in the region; […] they relate to a serious dispute between part of the Mapuche ethnic group and the rest of the population [and these wrongful acts] are inserted in a process of recovery of lands of the Mapuche people […] that has been carried out by acts of violence, without respecting the legal and institutional order, resorting to previously planned acts of violence, coordinated and prepared by radicalized groups that seek to create a climate of insecurity, instability and fear in different sectors of Regions XIII and IX.

113. The court then examined the possible participation of Messrs. Pichún Paillalao and Norín Catrimán and of Ms. Troncoso Robles in the facts and concluded that the evidence "did not meet the necessary evidentiary standards in relation to its degree of quality, certainty and sufficiency, to affect the constitutional and legal presumption of innocence that protects the accused, a circumstance that allows these judges to reach the peremptory conviction that the participation of the aforementioned Pichún, Troncoso and Norín as perpetrators of the offenses of which they were accused has not been proved, in accordance with […] the charges brought against them."

b) The appeal for annulment before the Supreme Court of Justice

114. On April 23 and 24, 2003, the complainants and the assistant prosecutor of the Public Prosecution Service of Traiguén, respectively, filed appeals for annulment against the acquittal decided by the Angol Oral Criminal Trial Court (*supra* paras. 112 and 113). Among other matters, they alleged the failure to weigh the evidence proving the participation of the accused in the events, and the existence of contradictions and inconsistencies in the appealed judgment. In addition, they argued that "the final judgment rejected or concluded that the testimony of anonymous witness No. 1 was 'entirely unreliable,' without indicating its reason or reasons for reaching this conclusion." In the three appeals the Supreme Court was asked to annul the oral trial and the acquittal and to order that a new oral trial be held. By a decision of June 3, 2003, the appeals were declared admissible and they were examined during a public hearing on June 11 and 12, 2003.[118]

115. On July 2, 2003, the Second Chamber of the Supreme Court of Justice delivered judgment, and, by a majority vote, admitted the appeals for annulment based on the grounds for absolute nullity defined in article 374(e) of the Criminal Procedural Code, decreed the nullity of the judgment of April 14, 2003 (*supra* paras. 112 and 113), and established the admissibility of a new trial. The Chamber considered that the decision of the Angol Oral Criminal Trial Court had not complied "even remotely" with the requirements of analyzing the evidence and providing grounds for the decision that are required of judges under articles 297 and 36 of the

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116 Angol is a city and commune, capital of the province of Malleco in the Region of Araucanía, Chile.

117 *Cf.* Judgment delivered by the Angol Oral Criminal Trial Court on April 14, 2003, tenth and eleventh *consideranda* and first operative paragraph (file of annexes to the Merits Report 176/10, annex 16, folios 569, 571 and 574).

118 *Cf.* Appeal for annulment filed on April 23, 2003, by the complainant Juan Agustín Figueroa Elgueta against the acquittal issued on April 14, 2003, by the Angol Oral Criminal Trial Court; Appeal for annulment filed on April 24, 2003, by the Office of the Regional Prefect and the Office of the Provincial Governor of Malleco against the acquittal issued on April 14, 2003, by the Angol Oral Criminal Trial Court; Appeal for annulment filed on April 24, 2003, by the assistant prosecutor of the Public Prosecution Service of Traiguén against the acquittal issued on April 14, 2003, by the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 445 to 515), and Judgment delivered on July 2, 2003, by the Second Chamber of the Supreme Court of Justice (file of annexes to the Merits Report 176/10, annex 17, folios 575 to 606).

Criminal Procedural Code, and had examined some pertinent probative elements superficially.[119]

c) Partial conviction issued on September 27, 2003, by the Angol Oral Criminal Trial Court

116. The Angol Oral Criminal Trial Court heard the proceedings against Messrs. Norín Catrimán and Pichún Paillalao and Ms. Troncoso in a new trial. The court was composed of three different judges from those who decided the acquittal of April 14, 2003 (*supra* paras. 112 and 113). On September 27, 2003, the court delivered judgment.[120] Regarding Patricia Troncoso, it declared that the presumption of her innocence had not been invalidated, that "there was no direct evidence that connected her with possible authorship of the offenses of which she was accused" and, consequently, acquitted her of the offenses she was charged with. The court reached the same conclusion with regard to the alleged criminal responsibility of Messrs. Pichún Paillalao and Norín Catrimán for the offenses of "terrorist arson," but convicted them as perpetrators "of the offenses of threat of terrorist [arson]" applying the legal presumption of intent to instill fear.[121] It convicted Mr. Pichún Paillalao "as perpetrator of the offense of terrorist threats against the administrator and owners of the Nancahue forest farm," and Mr. Norín Catrimán "as perpetrator of the offense of terrorist threats against the owners of the San Gregorio plantation," "both acts having occurred during 2001 and thereafter in the Traiguén commune."

117. The court imposed the following punishments on each of them:

a) Five years and one day of long-term rigorous imprisonment (*presidio*) at the lowest level;[122]

b) The ancillary penalties of "[a]bsolute and permanent disqualification from public office and positions, and absolute disqualification from titled professions for the duration of the sentence";

c) The ancillary penalties of "disqualification 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

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[119] *Cf.* Judgment delivered on July 2, 2003, by the Second Chamber of the Supreme Court of Justice (file of annexes to the Merits Report 176/10, annex 17, folios 575 to 606).

[120] *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folios 508 to 554).

[121] In its thirteenth *considerandum*, the Angol Oral Criminal Trial Court indicated that "[t]he foregoing is substantiated by the legal presumption established in the second subparagraph of Article 1(1) of Law 18,314, currently amended by the new principles on the assessment of evidence indicated in articles 295 and *ff.* of the Criminal Procedural Code. Thus, today, and based on the principle of logic, the justified fear of the population or part of it of being victims of offenses of the same type is proved by the fact that the latter has been threatened of being harmed by the perpetration of an offense by means of incendiary devices." *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, thirteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 15, folio 540).

[122] According to article 32 of the Chilean Criminal Code, the punishment of imprisonment (*presidio*) differs from the punishments of confinement (*reclusión*) and incarceration (*prisión*), because the former signifies that the prisoner must perform tasks established in the rules of the respective detention center.

organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time,"[123] and

d) In addition, the court condemned them to pay the trial costs and dismissed the civil complaint filed by the complainant Juan Agustín Figueroa Elgueta.[124]

118. The appeals for annulment filed against this judgment were denied by the Second Chamber of the Supreme Court of Justice in a ruling of December 15, 2003 (*infra* paras. 276 and 277), which maintained the judgment delivering a partial conviction against Messrs. Norín Catrimán and Pichún Paillalao.[125]

d) Serving of the prison sentences

119. Mr. Pichún Paillalao began to serve his prison sentence on January 14, 2004, and was granted an allowance for time served in pre-trial detention. Mr. Norín Catrimán began to serve his sentence on January 16, 2004,[126] and was granted an allowance for time served in pre-trial detention. In June, September and November 2006, they were granted the following prison benefits: "Sunday release," "weekend release," and "supervised release." Decree No. 132 of January 9, 2007, of the Ministry of Justice granted Mr. Norín Catrimán a nine-month reduction of his initial sentence, so that he was released on January 13, 2007. Decree No. 648 of February 15, 2007, of the Ministry of Justice granted Pichún Paillalao a nine-month reduction of his initial sentence, so that he was released on March 4, 2007.[127]

2. The criminal proceedings against Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles

Accusation

120. Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán, all members of the Mapuche people, and Patricia

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123 *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folios 217 and 218), and statement made por Juan Pichún Collonao before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

124 "[T]he complainant […] filed a civil complaint against Pascual Pichún Paillalao and Patricia Roxana Troncoso Robles and […] asked that they each be sentenced to pay $10,000,000 based on their responsibility for the losses suffered as a result of their participation in the offenses that were the grounds for [the said] trial." *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folio 513).

125 Messrs. Norín Catrimán and Pichún Paillalao filed an appeal for annulment against the judgment of September 27, 2003, that partially convicted them, requesting the annulment of the trial with regard to the offenses of which they had been convicted and that a new trial be held. In addition, they made the following requests: for annulment of the judgment and the delivery of a replacement judgment acquitting them; that the court declare that the offenses were not of a terrorist nature, and that the punishment be amended. *Cf.* Appeals for annulment filed on October 8, 2003, by Pascual Huentequeo Pichún Paillao and Aniceto Segundo Norín Catrimán against the judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 543 to 601), and Judgment delivered el December 15, 2003, by the Second Chamber of the Supreme Court of Justice (file of annexes to the Merits Report 176/10, folios 58 to 68 and file of helpful evidence presented by the State, folios 602 to 609).

126 *Cf.* Copy of record of technical committee session No. 19 held on November 24, 2006; Copy of record of special technical committee session No. 9 held on June 21, 2006; Copy of record of technical committee session No. 15 held on September 15, 2006, and Decree 132 of January 9, 2007, issued by the Chilean Ministry of Justice (file of helpful evidence presented by the State, folios 1203 to 1222).

127 *Cf.* Copy of record of special technical committee session No. 9 held on June 21, 2006; Copy of record of technical committee session No.15 held on September 15, 2006; Copy of record of technical committee session No.19 held on November 24, 2006; Decree No. 132 of January 9, 2007, issued by the Chilean Ministry of Justice; Decree No. 648 of February 15, 2007, issued by the Chilean Ministry of Justice; Report on prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66, 1203 to 1222, 1422 and 1423), and Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, third operative paragraph (file of annexes to the Merits Report 176/10, annex 15, folio 553).

Roxana Troncoso Robles, activist, were tried by the Angol Oral Criminal Trial Court. They were accused of perpetrating the offense of terrorist arson owing to the fire that occurred on December 19, 2001, in the Poluco Pidenco property, owned by the private forestry company, Mininco S.A., and located in the commune of Ercilla, Region IX,[128] which affected 107 hectares "covered by pine forest, eucalyptus nitens, undergrowth and protected areas."[129]

Investigation, pre-trial detention and preceding detention

121. On January 28, 2003, a hearing was held to open the investigation into José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles and, at that time, their pre-trial detention was ordered (*infra* para. 328). With regard to Juan Patricio Marileo Saravia, the hearing to control his detention and to open the investigation was held on March 16, 2003, and, at that time, his pre-trial detention was ordered (*infra* para. 329).[130]

Charges

122. On June 23, 2003, the Public Prosecution Service brought charges against Juan Patricio and Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, as perpetrators of the offense of arson established in Law No. 18,314 (offense of terrorist arson) in relation to the events that occurred on December 19, 2001 (*supra* para. 120), pursuant to article 476.3 of the Criminal Code and articles 1.1 and 2.1 of Law No. 18,314, and asked that they be sentenced to ten years and one day of mid-level rigorous imprisonment. The Office of the Malleco-Angol Provincial Governor endorsed the charges brought by the Public Prosecution Service. Forestal Mininco S.A. filed a private complaint.[131]

123. Regarding the events that occurred on December 19, 2001, in the Poluco Pidenco property (*supra* para. 120), charges were also brought against persons other than the presumed victims in this case, and their trials concluded with separate judgments.[132] Juan Carlos Huenulao Lielmil was convicted in May 2005 as perpetrator of the offense of terrorist arson. José Belisario Llanquileo Antileo was convicted in 2007 as perpetrator of the offense of arson, without reference to its terrorist nature, because "[i]n the opinion of the judges, the proven facts do not fall within any of the hypotheses of terrorism established by law."[133]

Oral trial

124. The order to open an oral trial was issued on May 28, 2004. The oral public hearing was held on July 29 and 30, 2004, before the Angol Oral Criminal Trial Court in the proceedings

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[128] *Cf.* Decision to hold the oral trial issued on May 28, 2004, by the guarantees judge (file of helpful evidence presented by the State, folios 67 to 127).

[129] *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, fourteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 18, 608 to 610).

[130] *Cf.* Decision on "hearing to open the investigation" issued on January 28, 2008, by the Collipulli judge, and Decision on "hearing on the control of the detention and to open the investigation" issued on March 16, 2003, by the Collipulli judge (file of annexes to the Merits Report 176/10, appendix 1, folios 8652 to 8677 and 7804 to 7808).

[131] *Cf.* Decision to hold an oral trial issued on May 28, 2004, by the guarantees judge (file of helpful evidence presented by the State, folios 67 to 127), and Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, second and third *consideranda* (file of annexes to the Merits Report 176/10, annex 18, 608 to 611).

[132] *Cf.* Decision to hold an oral trial issued on May 28, 2004, by the guarantees judge (file of helpful evidence presented by the State, folios 67 to 127).

[133] *Cf.* Judgment delivered on May 3, 2005, by the Angol Oral Criminal Trial Court, first operative paragraph, and Judgment delivered on February 14, 2007, by the Angol Oral Criminal Trial Court, first operative paragraph, and seventeenth *considerandum* (file of annexes to the FIDH motions and arguments brief, annexes 41 and 42, folios 1467 to 1596).

against Juan Patricio and Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles. The Public Prosecution Service, the complainant Forestal Mininco S.A., owner of the Poluco Pidenco plantation, and the complainant Office of the Malleco Provincial Governor, intervened as plaintiffs. Public defenders and private lawyers participated for the defense of the accused and, among other matters, denied the participation of the accused in the events. The parties offered testimonial, documentary and expert evidence.[134]

125. The accused had been held in pre-trial detention from January 28, 2003, to February 13, 2004, with the exception of Juan Patricio Marileo, whose pre-trial detention had been ordered on March 16, 2003 (*supra* para. 121), and José Huenchunao Mariñán who, despite having benefited from an "order for immediate release" as of February 13, 2004 (*infra* para. 332), was detained until February 20, 2004. In addition, Ms. Troncoso Robles and the Marileo Saravia brothers were detained from August 17 to 22, 2004, the date on which execution of the judgment commenced. The time they had already served was deducted from the prison sentence.[135]

a) Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court

126. On August 22, 2004, the Angol Oral Criminal Trial Court delivered judgment,[136] in which it convicted the accused as "perpetrators of the offense of terrorist arson" for the "act committed on December 19, 2001, on the Poluco Pidenco property, in the Ercilla commune."[137] The court imposed the punishment of 10 years and one day of medium-level rigorous imprisonment and the ancillary penalties of "[a]bsolute and permanent disqualification from public office and positions, and absolute disqualification from titled professions for the duration of the sentence." It also admitted the civil complaint and sentenced the accused jointly to pay Forestal Mininco S.A. the sum of $424,964,798 Chilean pesos for pecuniary damage.

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134 *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, first, second and fifth *considerandum* (file of annexes to the Merits Report 176/10, annex 18, folios 607 to 687).

135 *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, third operative paragraph (file of annexes to the Merits Report 176/10, annex 18, folios 607 to 687); Decision on "hearing to open the investigation" issued on January 28, 2008, by the Collipulli judge; Decision on "hearing on the control of the detention and to open the investigation" issued on March 16, 2003, by the Collipulli judge; Release order issued on February 13, 2004, by the guarantees judge of the Combined Court of Collipulli; Note No. 179 issued on February 17, 2004, by the judge of the Combined Court of Alcazar, Collipulli, addressed to the Head of the Angol Preventive Detention Center advising that he "had been mandated to inform him that José Benicio Huenchunao Mariñán […] must remain in the center"; Decision issued on February 20, 2004, by the Collipulli judge in relation to the urgent request of the defense counsel of José Benicio Huenchunao Mariñán, and Note No. 201 issued on February 20, 2004, by the judge of the Combined Court of Collipulli addressed to the Head of the Angol Preventive Detention Center informing him of the " annulment of Note 179 of February 17, 2004" concerning José Benicio Huenchunao Mariñán (file of annexes to the Merits Report 176/10, appendix 1, folios 8652 to 8677, 7804 to 7808, 9671 to 9677, 9681, 9697 to 9699, and 9733 to 9736).

136 *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, first and fifth operative paragraphs (file of annexes to the Merits Report 176/10, annex 18, folios 607 to 687).

137 The court found it had been proved that "on December 19, 2001, a group composed of around 50 persons from the Mapuche communities of Tricauco, San Ramón and Chequenco, entered the Poluco Pidenco property […] and proceeded to light more than 80 small fires in two sectors of the plantation." This resulted in "two major fires in this plantation," one of which affected an area of approximately 18 hectares of […] pine and eucalyptus nitens forest, undergrowth and protected areas," and the other "an area of approximately 89 hectares composed of pine and eucalyptus nitens forest, and protected areas. In addition, the court found it proved that the firefighters and members of the police who arrived at the plantation to extinguish the fire were obstructed and attacked, and that the accused had been seen starting some of the said small fires and, specifically, that José Benicio Huenchunao Mariñán "directed and indicated how to start the fires and where do so this." *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, fourteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 18, folios 673 and 674).

b) Judgment delivered on October 13, 2004, by the Temuco Court of Appeal

127. The five condemned men filed individual appeals for annulment against the judgment declaring them guilty of the offense of terrorist arson on the Poluco Pidenco property.[138] They asked that the trial be annulled and a new trial ordered or else, that the judgment be annulled and another one delivered declaring that the offense of arson is not of a terrorist nature, and applying a punishment of five years and one day.

128. On October 13, 2004, the Temuco Court of Appeal delivered judgment in which it denied the appeals for annulment and maintained all the provisions of the judgment convicting them. Regarding the terrorist intent, the guilty verdict was founded on the legal presumption of the intent to instill fear in the general population. In the judgment deciding the appeal for annulment filed by the defense based on the erroneous establishment of the terrorist nature of the acts that they were accused of, the Temuco Court of Appeal stated that the charges were brought based on the presumption of terrorist intent of article 1 of Law No. 18,314, thus explaining the absence of motivation by the oral court that delivered the judgment convicting them.[139]

c) Serving the incarceration sentences

129. Florencio Jaime and Juan Patricio Marileo Saravia began to serve their sentence on August 17, 2004,[140] receiving an allowance for time served in pre-trial detention. While serving their sentence, they were awarded certain prison benefits, such as: "Sunday release" (for Juan Patricio Marileo Saravia), "weekend release" and "supervised release" (for Florencio Jaime Marileo Saravia). On December 20, 2010, they both obtained the benefit of "parole" by Decision No. 456 of the Regional Secretariat of the Ministry of Justice of the Region of Araucanía. Lastly, by Decrees Nos. 3928 and 3929 of the Ministry of Justice of September 5, 2011, the initial sentence of the Marileo Saravia brothers was reduced by 14 months, and they were released on September 10, 2011.[141]

130. Ms. Troncoso Robles began to serve her sentence on August 17, 2004, and received an allowance for the time spent in pre-trial detention. While serving her sentence, she was

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138 *Cf.* Appeals for annulment filed by Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles against the judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 208 to 321 and 1166 to 1199), and Judgment delivered on October 13, 2004, by the Temuco Court of Appeal denying the appeal for annulment (file of annexes to the Merits Report 176/10, annex 19, folios 688 to 716).

139 *Cf.* Judgment of October 13, 2004, of the Temuco Court of Appeal (file of annexes to the Merits Report 176/10, Annex 19, folio 695).

140 *Cf.* Transcript of the minutes of the special meeting of the technical committee of the Angol Preventive Detention Center on March 14, 2008; Transcript of the minutes of the regular meeting of the technical committee of the Angol Preventive Detention Center of July 31, 2008; Decree 3928 of September 5, 2011 issued by the Chilean Ministry of Justice (file of helpful evidence presented by the State on July 10, August 16 and September 6, 2013).

141 *Cf.* Transcript of the minutes of the technical committee of the Angol Preventive Detention Center of March 14, 2008; Transcript of the minutes of the technical committee of the Angol Preventive Detention Center of July 31, 2008; Transcript of the minutes of the technical committee of the Vicún Education and Employment Center of August 30, 2007; Transcript of the minutes of the technical committee of the Vicún Education and Employment Center of December 13, 2007; Transcript of the minutes of the technical committee of the Victoria Semi-open Education and Employment Center of August 22, 2008; Decision No. 456 issued on December 20, 2010, by the Regional Secretariat of the Ministry of Justice of the Region of Araucanía; Decree No. 3928 of September 5, 2011, issued by the Chilean Ministry of Justice; Decree No. 3923 of September 5, 2011, issued by the Chilean Ministry of Justice; Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66, 1232 to 1235, 1237 to 1252, 1479 to 1484, 1485 to 1487, 1488 to 1491, 1445 to 1447, 1494,1495), and Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, third operative paragraph (file of annexes to the Merits Report 176/10, annex 18, folios 608 to 687).

awarded the prison benefits of "weekend release" and "supervised release." She was granted parole by Decision No. 379 of December 14, 2010, issued by the Regional Secretariat of the Ministry of Justice of the Region of Aucaranía; and in a communication of the same date, the Captain of Gendarmerie, Head of the Angol Education and Employment Center declared that her parole would be supervised by the Angol Pre-trial Detention Center. By Decree No. 2857 of the Ministry of Justice dated June 15, 2011, the original sentence was reduced by 14 months, and she was released on July 1, 2011.[142]

131. Mr. Huenchunao Mariñán was a fugitive from justice for approximately two years and seven months, between August 2004 and March 2007.[143] He began to serve his sentence on March 20, 2007, receiving an allowance for the time spent in pre-trial detention. On June 4, 2009, he was granted "trimestral release" as a "prison benefit." Then, on March 17, 2011, he was granted the benefit of "weekend release." By Decision No. 217 of the Regional Secretariat of the Ministry of Justice of the Region of Araucanía dated June 23, 2011, he was granted the benefit of "parole." Lastly, by Decision No. 311 of the same authority, issued on August 24, 2011, authorization was given for the weekly control of his parole to be carried out by the *Carabineros* of the commune of Tirúa and in the Los Dominicos *Carabineros* Sub-Station of the commune of Las Condes, Santiago, where his family lives. His sentence is supposed to end on March 4, 2016.[144]

132. Juan Ciriaco Millacheo Licán was a fugitive from justice for approximately nine years, from February 2004 to February 2013, when he was arrested in Argentina and transferred to Chile to serve the sentence imposed on him in these proceedings.[145] In a hearing held on February 27, 2013, the Judge of the Collipulli First Instance Court of Guarantees decided, based on articles 103 and 100 of the Criminal Code, that in the case of Mr. Millacheo Licán "half the statute of limitations would be applied to the sentence, since the time frame for the case had

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142 *Cf.* Transcript of the minutes of the technical committee of the Angol Education and Employment Center of March 13, 2008; Transcript of the minutes of the technical committee of the Angol Education and Employment Center of April 23, 2009; Decision No. 379 issued on December 14, 2010, by the Regional Secretariat of the Ministry of Justice of the Region of Araucanía; Communication of December 14, 2010, signed by the Head of the Angol Education and Employment Center addressed to the Regional Director of the Chilean Prison Service, Region of Araucanía; Decree No. 2857 of June 15, 2011, issued by the Chilean Ministry of Justice; Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66 and 1505 to 1521), and Judgment of the Angol Oral Criminal Trial Court of August 22, 2004, third operative paragraph (file of annexes to the Merits Report 176/10, annex 18, folios 608 to 687).

143 Mr. Huenchunao Mariñán testified: "[i]n August 2004, after the oral trial, during which he had attended all the hearings as one of the accused, [he] decided not to attend the reading of the judgment. [He] always thought that the highest court of Chile would decide in [their] favor annulling the trial and that [he] would not be in hiding for very long, but unfortunately, this was not the case; so [he] had to remain illegal and in hiding for a long time. […] In March 2007, he was caught in order to serve his sentence […]." *Cf.* Affidavit prepared on May 17, 2013, by José Benicio Huenchunao Mariñán (file of statements of presumed victims, witnesses and expert witnesses, folios 201 to 211).

144 *Cf.* Minutes of the meeting of the technical committee of the Angol Education and Employment Center of June 4, 2009; Minutes of the meeting of the technical committee of the Angol Education and Employment Center of March 17, 2011; Decision No. 217 issued on June 23, 2011, by the Regional Secretariat of the Ministry of Justice of the Region of Araucanía; Decision No. 311/2011 issued on August 24, 2011, by the Regional Secretariat of the Ministry of Justice of the Region of Araucanía; Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66 and 1256 to 1284), and Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, third operative paragraph (file of annexes to the Merits Report 176/10, annex 18, folios 608 to 687).

145 Mr. Millacheo Licán testified that he "left before the judgment, because [he] had not taken part in the fire and […] thought that [he] would be sentenced to imprisonment; [he] therefore left the proceedings. [… He] spent 10 years in hiding [and] was arrested again in Argentina. Following the arrest in Argentina, [they took him] quickly to Chile, to the court and to prison. 20 days later there was another hearing and [his] defense counsel explained why the sentence should be reduced. Consequently, they released [him] and ordered him to go and sign in […] once a month." *Cf.* Affidavit prepared on May 14, 2013, by Juan Ciriaco Millacheo Licán (file of statements of presumed victims, witnesses and expert witnesses, folios 194 to 200).

expired"; this modified the punishment imposed and granted him the benefit of a conditional sentence that involved appearing monthly to sign in before the prison authorities during the time that remained of the sentence.[146]

3. The criminal proceedings against Víctor Manuel Ancalaf Llaupe[147]

Accusation

133. Víctor Ancalaf Llaupe was a *Werken* of several Mapuche indigenous communities at the time of the events for which he was tried. Mr. Ancalaf Llaupe was accused of the following offenses:[148]

a) Perpetrator of the "terrorist offense established in article 2.4 of Law No. 18,314, in relation to article 1 of this law" for setting fire to two trucks owned by the Fe Grande Company (that worked on the construction of the Ralco dam) on September 29, 2001, in the Las Juntas sector, Alto Bío Bío;

b) Perpetrator of the "terrorist offense established in article 2.4 of Law No. 18,314, in relation to article 1 of this law" for setting fire to a truck owned by the Fe Grande company on March 3, 2002, in the Las Juntas sector, Alto Bío Bío, and

c) Perpetrator of the "terrorist offense established in article 2.4 of Law No. 18,314, in relation to article 1 of this law" for setting fire to a truck owned by Brotec S.A. on March 17, 2002, in the Las Juntas sector, Alto Bío Bío.[149]

134. On November 19, 2001, the alternate judge of the Santa Bárbara Criminal Court issued the first order to investigate Víctor Manuel Ancalaf Llaupe and also issued a summons for him to make a statement in the investigation that was being conducted into the events of September 29, 2001. On February 26, 2002, Mr. Ancalaf Llaupe appeared before the Santa Bárbara First Instance Court to make a statement, indicating that he was "unaware of the reason why [he had] been summoned to [that] court, [and that he had] played no part in the events that [the court was] informing [him] about."

135. On March 19, 2002, the Provincial Governor of Bío Bío filed a complaint before the Concepción Court of Appeal based on "violation of Law 18,314 on acts of terrorism" against "those who are found responsible as either perpetrators, accomplices or accessories after the fact of the events [that occurred on March 3, 5 and 17, 2002,] and considering that "during September 2001, an attack similar to those [that occurred in March 2002] had been executed." On March 22, 2002, case number No. 1-2002 was assigned to the proceedings, which were heard by the investigating judge of the Concepción Court of Appeal, and "case file No. 3466-2 together with the joindered cases of the Santa Bárbara Criminal Court were added [to these proceedings]."

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146 *Cf.* Transcript of part of the hearing held on February 27, 201, before the judge of the Collipulli First Instance Court of Guarantees; Order for the release of Juan Ciriaco Millacheo Licán issued on February 27, 2013, by the judge of the Collipulli First Instance Court of Guarantees, and Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66 and 1497 to 1502).

147 The evidence concerning the facts relating to the criminal proceedings against Víctor Manuel Ancalaf Llaupe, established in paragraphs 133 to 151 can be found in the judicial case file of the domestic criminal proceedings against Mr. Ancalaf Llaupe, copy of which was provided to these proceedings as annexes to Merits Report 176/10 (appendix 1), to the CEJIL motions, arguments and evidence brief, as well as among the helpful evidence presented by the State.

148 *Cf.* Indictment (file of helpful evidence presented by the State, folios 2617 to 2621).

149 Regarding the events that occurred on March 17, 2002, the criminal court established that the truck owned by Brotec S.A. had been intercepted by a group of hooded individuals, one of whom carried a firearm, and that by firing into the air, they obliged the driver of the truck to leave the area, and proceeded to shatter the truck's headlights with sticks and then to throw a lighted rag into the cabin, causing a fire that destroyed it. *Cf.* Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, fourteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 20, folios 718 to 759).

136. In June 2002, Víctor Ancalaf Llaupe was summoned to make a statement before the Concepción Court of Appeal. On July 5, 2002, he made a statement before that court.

Indictment and confidentiality of the proceedings

137. On October 17, 2002 the investigating judge of the Concepción Court of Appeal issued an indictment against Víctor Manuel Ancalaf Llaupe and "issue[d] an arrest warrant against" him for the events that had occurred on September 29, 2001, and March 3 and 17, 2002. Mr. Ancalaf Llaupe was arrested on November 6, 2002, and entered the "El Manzano" Prison in Concepción.

138. On January 8, 2003, before the preliminary stage had concluded, Víctor Ancalaf Llaupe's defense counsel asked to examine the case file. On the same date, the investigating judge denied this request considering that "at this time it is essential to keep the preliminary proceedings confidential to ensure the success of the investigation, because important steps remain pending." On January 13, 2003, the defense counsel appealed that decision. On February 5, 2003, the Concepción Court of Appeal confirmed the decision denying examination of the file of the preliminary proceedings.

139. In a brief dated January 21, 2003, Karina Prado, Mr. Ancalaf Llaupe's wife, requested his transfer to the Temuco prison, indicating, among other matters, that the duration and cost of transport to the prison where he was in Concepción "[…] entailed a physical and financial burden, because [they did] not have any income, as the family's only support was provided by [her] husband working […] and both [she] and [her] children were in a critical financial situation." On January 24 that year, the investigating judge of the Concepción Court of Appeal issued an order in which he denied the request indicating merely "[n]ot admissible at this time." Mr. Ancalaf Llaupe was transferred to a prison nearer his home just one month before he had served his sentence.[150]

140. On April 17, 2003, the preliminary stage concluded. On April 24 that year the defense again asked to examine the case file and also requested Mr. Ancalaf Llaupe's release on parole. That same day, the investigating judge of the Concepción Court of Appeal refused the request to examine the case file of the preliminary proceedings and, the following day, declared that release on parole was not admissible. On April 30, 2003, an appeal was filed against the decision refusing release on parole, but this was confirmed by the Concepción Court of Appeal by a decision of May 5, 2003.

141. On May 15, 2003, Mr. Ancalaf Llaupe reiterated his wife's request (*supra* para. 139) for a transfer to the Temuco Detention Center, because his "family [was] experiencing a very difficult social and financial situation," and if he was transferred he "could receive more frequent visits," because the Temuco Prison was very near his place of residence. On the same day, the Head of the Concepción Detention Center forwarded this request to the Regional Director of the Chilean Prison Service, Bío Bío Region, Concepción, indicating that "there [were] no obstacles to the transfer of the inmate to the Temuco Prison, because […] he lives and has family support in that city." The petition was denied by a decision of the investigating judge of the Concepción Court of Appeal of May 23, 2003, indicating that "for the time being the transfer request made by the prisoner is inadmissible."

142. On May 23, 2003, the prosecutor of the First Prosecutor's Office filed formal charges before the Concepción Court of Appeal against Mr. Ancalaf Llaupe "as perpetrator of the terrorist offenses committed on September 29, 2001, and March 3 and 17, 2002, established in article 2.4 of Law 18,314 in relation to article 1 of this law." The indictment was notified to Mr. Ancalaf

[150] In addition to the judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe see: Statement made by presumed victim Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

Llaupe's defense on June 9, 2003. On June 12, 2003, Mr. Ancalaf Llaupe's defense again requested copies of all the proceedings in the case file, a petition that was granted, handing over copies of the case file, with the exception of the "confidential records" that contained the statements made by anonymous witnesses.

143. On July 7, 2003 Mr. Ancalaf Llaupe's defense submitted the answer to the indictment, requesting an "acquittal of all the offenses attributed to him" and again requesting parole for the accused considering that the "investigation had concluded." By a decision of July 8, 2003, the investigating judge of the Concepción Court of Appeal declared that "the parole requested was inadmissible."

a) Judgment issued on December 30, 2003, by the investigating judge of the Concepción Court of Appeal

144. On December 30, 2003, the investigating judge of the Concepción Court of Appeal issued a judgment convicting Mr. Ancalaf Llaupe "as perpetrator of terrorist offenses" pursuant to the provisions of article 2.4 of Law No. 18,314, in relation to Article 1 of this law (*supra* para. 98), based on the incidents that occurred on September 29, 2001, and March 3 and 17, 2002. He imposed the punishment of "ten years and one day of medium-level rigorous imprisonment," payment of trial costs, and the following ancillary penalties:[151]

> […] permanent and absolute disqualification from public office or positions and political rights, and absolute disqualification from titled professions for the duration of the sentence […].
>
> Also under article 9 of the Constitution of the Republic, the condemned man, Ancalaf Llaupe is 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.

b) Judgment deciding a partial annulment delivered on June 4, 2004, by the Concepción Court of Appeal

145. Víctor Ancalaf Llaupe and his lawyer filed separate appeals against the judgment convicting him (*supra* para. 144). On December 30, 2003, during the procedure of personal notification of the judgment, Mr. Ancalaf Llaupe "indicated that he was filing an appeal against […] the Judgment." His defense filed the appeal on January 3, 2004. In a decision of January 2, 2004, the alternate investigating judge granted the appeal filed by Mr. Ancalaf Llaupe. On January 5, 2004, the alternate investigating judge issued an order in which he rejected the appeal filed by the defense counsel on the grounds that "[p]ursuant to the provisions of article 27(g) of Law 12,927, the appeal against the final judgment was inadmissible […] owing to the statute of limitations."

146. On January 6, 2004, Karina Prado, Mr. Ancalaf Llaupe's wife, reiterated the request for a complete copy of the case file. The same day, the investigating judge of the Concepción Court of Appeal granted a copy of the case file, but did not allow access to the "confidential records."

147. On June 4, 2004, the Concepción Court of Appeal delivered the judgment in second instance, in which it:[152]

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[151] *Cf.* Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, thirteenth and fourteenth *consideranda* (file of annexes to the Merits Report 176/10, annex 20, folios 718 to 759).

[152] *Cf.* Judgment delivered on June 4, 2004, by the Third Chamber of the Concepción Court of Appeal (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1723 to 1733).

a) Annulled the part of the Judgment of December 30, 2003, that sentenced Mr. Ancalaf Llaupe to ten years and one day of medium-level rigorous imprisonment, as perpetrator of the terrorist offenses committed on September 29, 2001, and March 3, 2002, and, instead, acquitted him "of the said charges made in the indictment," and

b) Confirmed the conviction of Mr. Ancalaf Llaupe "only as perpetrator of the terrorist offense established in article 2.4 of Law 18,314 in relation to article 1 of this law, committed on March 17, 2002," and sentenced him to the punishment of five years and one day of minimum-level rigorous imprisonment," and to the other ancillary penalties established in the first instance judgment (*supra* para. 144).

148. Regarding the ancillary penalties, it should be mentioned that the State provided, as part of the helpful evidence, a report issued by the Regional Director of the Chilean Prison Service, Araucanía Region, which contains a table describing the ancillary penalties imposed on the presumed victims in this case. In this table, Víctor Manuel Ancalaf Llaupe appears without ancillary penalties. This does not concur with the judgments or with the statement made by Mr. Ancalaf Llaupe during the public hearing held before the Inter-American Court on May 29, 2013, in which he stated as follows: "For example, I will never be able to hold public office; I have not been able to exercise the civil right to head any board in any company, or […] to assume positions in any municipality or in any other State entity." He also testified that he is unable to vote ("even though one would like to take part in the elections, one cannot do this either").[153] Therefore, the Court understands that the judgment of the Concepción Court of Appeal confirmed the ancillary penalties established in the first instance judgment (*supra* paras. 144 and 147 *in fine*).

149. Regarding terrorist intent, the sentence convicting Mr. Ancalaf Llaupe was founded on the legal presumption of intent to instill fear in the general population. Although the wording of the decisions issued by the investigating judge of the Concepción Court of Appeal, in first instance, and by the Concepción Court of Appeal, in second instance, does not appear to indicate expressly that the presumption of terrorist intent has been applied, it can be inferred from the references to article 1 of Law No. 18,314 and the context in which that provision was adopted, that the subjective element of terrorism was presumed owing to the means used to commit the act.

c) *The remedies of cassation and complaint before the Supreme Court of Justice*

150. On June 22, 2004, Mr. Ancalaf Llaupe's defense filed "an appeal for annulment" against the judgment delivered by the Third Chamber of the Supreme Court of Justice on June 4, 2004 (*supra* para. 147).[154] On August 2, 2004, the Second Chamber of that court declared the appeal for annulment inadmissible, concluding that it was "inadmissible pursuant to the reference made in article 10 of Law 18,314 to article 27(j) of Law 12,927, in force at the time of the proceedings [held against Mr. Ancalaf Llaupe], pursuant to the provisions of the transitory article of Law 19806."

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[153] *Cf.* Note of the Regional Director of the Chilean Prison Service, Araucanía Region addressed to the Deputy Technical Director of the National Directorate, forwarding the procedural and prison records (pre-trial detention, total time of the sentence and ancillary penalties) of the presumed victims in this case (file of helpful evidence presented by the State, folios 1376 to 1381), and statement made the presumed victim Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[154] In the appeal, Mr. Ancalaf Llaupe's defense affirmed that "the judgment appealed contain[ed] errors of law," because, "[i]n violation of the norms that regulate evidence, it ha[d] determined the supposed participation of [Mr.] Ancalaf Llaupe in the wrongful acts committed, in circumstances in which he played no part in them, and […] also in violation of the norms that regulate evidence, an ordinary offense was classified, with full awareness, as a special offense, with a harsher punishment and subject to special proceedings that were more restrictive to the rights of the defense."

151. On August 19, 2004, the parties were informed that Mr. Ancalaf Llaupe's defense had filed a remedy of complaint before the Supreme Court of Justice requesting the invalidation of the sentence convicting him owing to serious error or abuse when adopting the decision. On November 22, 2004, the Supreme Court of Justice rejected the appeal on the grounds that "the judges ha[d] not incurred in the serious errors or abuses that were alleged and that could be rectified by […] [a remedy of complaint]."

d) Prison sentence served

152. Mr. Ancalaf Llaupe began to serve his sentence on November 16, 2002; he was granted an allowance for the time spent in pre-trial detention, from November 6, 2002, until the judgment of June 4, 2004. While serving his sentence, he was granted the prison benefits of "weekend release" and "supervised release." On February 15, 2007, the Ministry of Justice issued Decree No. 633, reducing Mr. Ancalaf Llaupe's intimal sentence by eight months, which meant that he was released on March 7, 2007.[155]

VII – MERITS

153. The instant case refers to alleged violations suffered by the eight presumed victims related to their criminal prosecution and conviction for offenses of a terrorist nature. The presumed victims were leaders, members or an activist of the Mapuche indigenous people. The Court must decide whether the criminal law applied to them (the Counter-terrorism Act) violated the principle of legality and must also rule on whether, during the criminal proceedings, various judicial guarantees were violated, and whether the pre-trial detention ordered violated their right to personal liberty. The Court must also rule on the allegations made by the Inter-American Commission and the common interveners that the ethnic origin of the presumed victims was supposedly taken into consideration in order to apply the said criminal law to them in a discriminatory manner within the context of an alleged pattern of "selective application of the anti-terrorist law to members of the Mapuche indigenous people," as a result of which the social protest of members of this indigenous people was allegedly criminalized.[156]

154. The analysis of the presumed violations of the American Convention will be divided into the following four parts, related to the articles indicated in each case:

VII.1: Principle of legality and presumption of innocence (Articles 9 and 8(2) of the Convention),

VII.2: Equality before the law (Article 24 of the Convention) and judicial guarantees (Article 8(1), 8(2)(f) and 8(2)(h) of the Convention);

VII.3: Right to personal liberty in relation to the pre-trial detention (Articles 7(1), 7(3), 7(5) and 8(2) of the American Convention), and

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[155] *Cf.* Minutes of the meeting of the technical committee of the Victoria Prison held on December 22, 2006; Minutes of the meeting of the technical committee of the Victoria Prison held on January 17, 2007; Decree No. 633 of February 15, 2007, issued by the Chilean Ministry of Justice; Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66 and 1523 to 1531), and judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, thirteenth and fourteenth *consideranda* (file of annexes to the Merits Report 176/10, annex 20, folios 718 to 759).

[156] Merits Report 176/10, paras. 1, 5, 211 and 289; CEJIL brief with motions, arguments and evidence, and FIDH brief with motions, arguments and evidence (merits file, Tome I, folios 2, 10, 11, 67, 76, 97, 269, 270, 351, 352, 401, 425, 507, and 515).

VII.4: Freedom of thought and expression, political rights, right to personal integrity and right to the protection of the family (Articles 13, 23, 5(1) and 17 of the American Convention).

When appropriate, the said rights will be related to the obligation to respect and ensure rights, as well as to the obligation to adopt domestic legal provisions (Articles 1(1) and 2 of the American Convention).

155. The Court underlines that, in this case against Chile, the alleged violation of the right to communal property in relation to Article 21 of the American Convention has not been submitted to its consideration. However, the Court recalls the importance of the criteria it has developed in its case law in judgments in cases against Nicaragua,[157] Paraguay,[158] Suriname[159] and Ecuador[160] concerning the content and scope of the right to communal property, taking into account the close relationship of the indigenous peoples with their land. The Court has ruled on the State obligations to ensure this right, such as the official recognition of ownership by land delimitation, demarcation and titling, the return of indigenous lands, and the establishment of an effective remedy to decide the corresponding claims.[161] The Court has also indicated that "the obligation to consult [the indigenous and tribal communities and peoples], in addition to constituting a treaty-based norm, is also a general principle of international law" and has emphasized the importance of the recognition of that right as "one of the fundamental guarantees to ensure the participation of the indigenous communities and peoples in the decisions concerning measures that affect their rights and, in particular, their right to communal property."[162] These are criteria that States must observe when respecting and ensuring the rights of the indigenous peoples and their members in the domestic sphere.

VII.1 – PRINCIPLE OF LEGALITY (ARTICLE 9 OF THE AMERICAN CONVENTION) AND RIGHT TO THE PRESUMPTION OF INNOCENCE (ARTICLE 8(2)) OF THE AMERICAN CONVENTION, IN RELATION TO THE OBLIGATION TO RESPECT AND ENSURE RIGHTS AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL PROVISIONS

A) Arguments of the Commission and of the parties

156. The Commission affirmed that criminal laws must be worded in precise and unambiguous language that narrowly defines the wrongful offense and exactly determines its elements and the factors that distinguish it from other acts that do not constitute wrongful

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157 This began, above all, with the 2001 judgment in the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, in which, using an evolutive interpretation of Article 21 of the American Convention, the Court affirmed that this article protects the right to communal property of the members of indigenous communities. *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001. Series C No. 79.

158 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 125 and 137; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. *Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, paras. 118 and 121, and *Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010 Series C No. 214, paras. 85 to 87.

159 *Cf. Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C No. 124, para. 131, and *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007. Series C No. 172, paras. 87 to 91.

160 *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. *Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, paras. 145 to 147.

161 *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs,* para. 153; *Case of the Moiwana Community v. Suriname,* para. 209; *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 95 and 96; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 108, and *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, para. 131.

162 *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* paras. 160 and 164.

offenses or that are may be penalized as other crimes. It indicated that the lack of precision in the definition of crimes creates the opportunity for "abuse of authority," and may "restrict due process guarantees, as depending on which category of crime is charged, the effect may be to change the penalty imposed." Article 1 of the Counter-terrorism Act "does not explain what means employed may have the effect of transforming a common crime into a terrorist crime," and that "it cannot be considered that this imprecision is rectified [by the list of …] some means that entail a presumption [of terrorist intent]." It asserted that there is no exact definition of terrorism under international law; but there is a consensus about "some basic elements" that States should use in order to define such offenses. The Commission included some considerations on the impossibility of determining when an act constitutes a terrorist or an ordinary offense based on the special subjective elements of terrorism and also referred to the incompatibility of the presumption of terrorist intent with the principle of legality and other guarantees such as the presumption of innocence. It considered that "the use of presumptions in the definition of offenses was not only incompatible with the principle of strict legality, but also with […] the presumption of innocence." It stated that Law No. 18,314 defines acts that would not be considered of a terrorist nature and seriousness under international law and indicated that all the foregoing considerations extend to the "description of the crimes of 'attempting' or 'threatening' to commit terrorist offenses" and that the imprecision of the latter had an impact in the case of Messrs. Norín Catrimán and Pichún Paillalao. The Commission also indicated that the 2010 amendment of the Counter-terrorism Act did not involve a substantial modification that made it compatible with the principle of legality, that it was a structural change which kept the same wording as the previous version, and that the changes were merely in the phrases and connecting words used to combine the three hypotheses that would lead to the "presumption of terrorist intent." It also affirmed that article 1 of the Counter-terrorism Act, which was applied to the presumed victims, established, along with the purpose of instilling fear, another intent consisting in "to pressure the authorities to take a certain decision or to make demands on them." It asserted that this intent could "stand on its own," "irrespective of the means used or their effects," and this could result in including "a multiplicity of hypotheticals that are not necessarily associated with terrorist violence *per se*" and make it difficult to differentiate it from offenses "that come under the heading of extortion or are aggravated by [that] purpose." It also stated that the offenses and acts established in article 2 of this law are not necessarily the most serious and that include offenses that exclusively affect property, which runs counter to the international consensus that terrorist "violence is mainly an attack upon human life." In addition, the Commission stated that there had been a violation of the principle of individual responsibility because in the three judgments convicting the presumed victims, "the courts made reference to acts committed by third parties before or at the same time as the offenses with which the [presumed] victims were charged," and because during the criminal proceedings held against them "a series of witnesses were summoned to testify who described […] facts unrelated to the [presumed] victims," which "were decisive factors in the conclusions reached by the judges with respect to the subjective element of the offense of terrorism," even though the "only link between these third party acts and the [presumed] victims [was] the ethnic origin of those who reportedly committed them."

157. The two common *interveners* stated that Law No. 18,314, which was applied to the presumed victims, violates the principle of legality protected by Article 9 of the Convention. They also raised objections concerning the imprecision of the definition of the offense and the consequent possibility that it include events in which the special terrorist intent had not existed.

a) The FIDH affirmed that articles 1, 2, 3 and 7 of the Counter-terrorism Act are "vague and imprecise, which [leaves] room for the use of discretion and the introduction of factual presumptions that do not emerge from the legal description," and considered that certain terms used in this law were indeterminate and did not allow the acts that are penalized under the law to be distinguished from ordinary criminal law; hence, the Counter-terrorism Act did not offer legal certainty to the individual. In addition, it

affirmed that all its considerations also related to the offense of terrorist threats. Furthermore, it indicated that "the existence of an imprecise definition of a criminal offense […] is confirmed by the existence of at least three subsequent trials for the same fire as in the Poluco Pidenco case," citing other offenses. It considered that the wording of article 1 "does not refer [to its] content," and that "what is involved are criminal offenses that are open to the use of judicial discretion over and above […] the proper exercise of interpretation." It explained that any ordinary offense can instill fear so that, by not differentiating that intent from one of "producing terror or intimidating a population or similar wording," the intent established in article 1 of the Counter-terrorism Act does not allow ordinary offenses to be distinguished from those of a terrorist nature, because the law should have established the level of fear required for an offense to be of a terrorist nature. It asserted that the definition of the offense did not establish "the [means] that should be punished," and that "the law does not clarify the level of premeditation and planning that converts an ordinary offense into a terrorist offense." It also indicated that "only the intent to cause death or severe bodily injury should be included as intent in terrorist offenses." Furthermore, the FIDH argued that, since the convictions were based "on contextual presumptions about terrorist intent," they were incompatible with the principle of individual criminal responsibility, because the presumed victims were held responsible "for acts carried out by unknown persons, and [their] guilt was inferred because they belonged […] to the Mapuche people."

b) CEJIL affirmed that definitions of terrorist offenses should be worded "so as to avoid arbitrary and subjective interpretations." It stated that international law does not include a definition of terrorism, but rather "basic elements" that allow "certain acts related to different dimensions of this international crime to be described," which, based on the "necessary technical precision, will exclude the possibility of a distorted application of the term "terrorism," using it, for example, as a response to social demands or movements." It also included some considerations on the incompatibility with the principle of legality of the offense of "[t]o place, throw or fire bombs, or explosive or incendiary devices of any type that affect or may affect the physical integrity of persons or cause damage" and its relationship to the presumption of a terrorist intent of article 1 of Law 18,314. It affirmed that the presumption of intent to instill fear had the effect of inverting the burden of proof "and freed the Chilean State from its obligation to prove […] the guilt of the accused," and that this "does not ensure […] legal certainty." It stated that linking "the nature and effects of the means used" leaves to the "criterion of the prosecutor the *ad hoc* determination of the means [that are terrorist means]." It also indicated that "the definition in article 2 of the law of the other circumstances that determine that an offense is terrorist in nature […] is not consistent with the principle of legality either." CEJIL also included specific considerations on the act described in article 2.4 of Law No. 18,314, the criminal act of which Víctor Ancalaf Llaupe was convicted, and affirmed that the expression "incendiary devices of any type" is imprecise, and that it is not consistent with the model wording proposed by the United Nations Special Rapporteur which "focuses on the protection of life and personal integrity." It stated that, insofar as any fire causes damage "however limited," if the presumption under article 1 of the Counter-terrorism Act is applied, the effect of this article is that "any fire would necessarily constitute a terrorist offense."

158. The State affirmed that the Counter-terrorism Act complies with the principle of legality and that, under its article 1, a "terrorist criminal intent" is required, expressed by a "special purpose" of the perpetrator "to instill justified fear in the population or part of it that it may fall victim to offenses of the same type," and that it is this subjective terrorist element, added to the perpetration of any of the criminal acts described in article 2 of the law, that constitutes a terrorist offense. It indicated that, even though there is no "consensus in legal doctrine or in international law on a definition of […] terrorism," the one most accepted is that

of Resolution 1566 of the United Nations Security Council. It considered that it was an accepted fact that offenses defined in the ordinary criminal law, when committed concurrently with other elements or circumstances, constitute "a different and more serious offense, called terrorism." It included considerations on the rights protected by the offense of terrorist arson, as well as on the wording "nature of the means and their effects," and the "premeditated plan" used in the definition, and the difference from the definition of other criminal offenses. Chile affirmed that "[t]he principle of legality and the legal definition of an offense […] recognize that there are concepts that are subject to judicial interpretation, because it is impossible to legislate purely on a case-by-case basis," but that this did not imply arbitrariness. It asserted that the "actual text" of article 1 of Law No. 18,314 "meets the requirements of international law as regards the legal definition of the acts and the punishment; thus, respecting the principle of legality." In this regard, the State referred to the amendments made to the Counter-terrorism Act in 2010 concerning the presumption of terrorist intent and the applicability of the law to minors, and indicated that the elimination of the presumption of intent to instill fear was done in order "to protect the principle of the presumption of innocence […] so that […] any accusation of terrorism must be proved by whoever makes it and not, as before the legal amendment, that those accused of such offenses had to disprove the presumption of terrorist intent." It added that the actual definition of terrorism in Chile respects the principle of legality and is more restrictive that in other countries and that the 2010 amendment of the Counter-terrorism Act entailed changes in punishments and the "elimination of presumptions," but that the amendment was not due to failure to comply with international standards. It also indicated that "Chilean case law has progressed towards an interpretation of the Counter-terrorism Act that is completely in line with international standards [and that] the 2010 amendment merely reinforced [this]." It asserted also that the offense of terrorist arson "involves several offenses," which means that the law protects "various rights, one of them the right to property, [in addition to] life and personal integrity."

B) Considerations of the Court

159. Before making a ruling, the Court recalls that, with regard to the criminal laws applied to the presumed victims in this case in the criminal proceedings to which they were subjected, Chile has defined terrorist offenses in a special law (Law No. 18,314 that "[d]efines terrorist acts and establishes their punishment") (*supra* paras. 98 and 99). At the time of the acts they were accused of, this law included the following definitions:

a) Article 1 of the law established aspects relating to the subjective element of the offense; in other words, the special terrorist intent (*supra* para. 98), and included a presumption of the intention of instilling fear in the general population when the act had been committed, *inter alia*, "by means of explosive or incendiary devices";

b) Article 2 established the objective element of the offense; that is the criminal acts or actions that, when perpetrated together with the said special intent or purpose, would be considered terrorist offenses (*supra* para. 98). In order to establish this objective element, article 2 contained:

b.i) On the one hand, the first paragraph (article 2.1) established a specific list of ordinary offenses defined in the Criminal Code,[163] including the offense of

[163] "1. Acts of homicide penalized in articles 390 and 391; injury penalized in articles 395, 396, 397 and 399; abduction, either in the form of confinement or detention, or retention of a person as a hostage, and of the kidnapping of minors, penalized in articles 141 and 142; sending explosive devices penalized under article 403 bis; arson and destruction, penalized in articles 474, 475, 476 and 480; offenses against public health in articles 313(d), 315 and 316, and derailment established in articles 323, 324, 325 and 326, all of the Criminal Code".

arson codified in article 476.3 of the Criminal Code,[164] which defines the act of "to set fire to […] forests, standing crops, pastures, woodland, hedges or plantations." Juan Patricio and Florencio Jaime Marileo Saravia, Messrs. Huenchunao Mariñán and Millacheo Licán and Ms. Troncoso Robles were convicted as perpetrators of the offense of terrorist arson based on a fire on the Poluco Pidenco property (*supra* paras. 126 and 128). The *Lonkos* Norín Catrimán and Pichún Paillalao were convicted of the "threat"[165] to commit arson ("threat of terrorist arson") (*supra* paras. 116 and 118), and

b.ii) On the other hand, paragraphs 2 to 5 of article 2 (article 2.2 to 2.5) codified a series of acts or conducts as offenses without referring to pre-existing offenses defined in the Criminal Code (*supra* para. 98). Mr. Ancalaf Llaupe was considered to be responsible for the criminal acts described in paragraph 4 ("To place, throw or fire bombs or explosive or incendiary devices of any type that affect or may affect the physical integrity of persons or cause damage").

160. The Court will make some considerations on the content of the principle of legality, with special emphasis on the necessary distinction between ordinary offenses and terrorist offenses, and will then rule on the allegations of the violation of this principle owing to the definitions contained in the Counter-terrorism Act, as most relevant in order to decide this case.

1. The principle of legality in general and in relation to the codification of terrorist acts

161. The principle of legality according to which "[n]o 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" (Article 9 of the American Convention) constitutes a central element of criminal prosecution in a democratic society.[166] The classification of an act as illegal and the establishment of its legal effects must pre-exist the action of the person who is considered the wrongdoer because, otherwise, the individual would be unable to adapt their actions to a legal order in force and certain that expresses social condemnation and the consequences of this.[167]

162. The classification of offenses requires a clear definition of the criminalized act that establishes its elements and allows it to be distinguished from acts that are not penalized or illegal acts that may be punished by non-criminal measures.[168] The sphere of application of

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[164] Article 476 of the Criminal Code in force at the time of the acts for which the presumed victims in this case were prosecuted established that: "The following shall be punished with long-term rigorous imprisonment at any of its levels:

1. Anyone who shall set fire to a building destined to serve as a home that was not inhabited at the time.

2. Anyone who, in a village, shall set fire to any building or premises, even though this was not ordinarily destined to serve as a dwelling.

3. Anyone who shall set fire to woods, standing crops, pastures, woodlands, hedges or plantations."

[165] The pertinent part of Article 7 of the Counter-terrorism Act established that "the serious and credible threat of the perpetration of one of the said offenses shall be punished as an attempt to commit it."

[166] *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 107, and *Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 23, 2012 Series C No. 255, para. 130.

[167] *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*, para. 106, and *Case of Mohamed v. Argentina*, para. 131.

[168] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52, para. 121, *and Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of April 27, 2012 Series C No. 241, para. 105.

each offense must previously be delimited as clearly and precisely as possible,[169] in an explicit, precise, and taxative manner.[170]

163. When defining offenses of a terrorist nature, the principle of legality requires that a necessary distinction be made between such offenses and ordinary offenses, so that every individual and also the criminal judge have sufficient legal elements to know whether an action is penalized under one or the other offense. This is especially important with regard to terrorist offenses because they merit harsher prison sentences, and ancillary penalties and disqualifications with major effects on the exercise of other fundamental rights are usually established – as in Law No. 18, 314. In addition, the investigation of terrorist offenses has procedural consequences that, in the case of Chile, may include the restriction of certain rights during the investigation and prosecution stages.[171]

164. Consensus exists at the international level and, in particular, in the Americas about "the threat that terrorism poses to democratic values and international peace and security, [as well as for …] the enjoyment of human rights and fundamental freedoms."[172] Terrorism is a phenomenon that jeopardizes the rights and freedoms of the persons subject to the jurisdiction of the States Parties to the American Convention. Consequently, Articles 1(1) and 2 of this Convention oblige the States Parties to take all those measures that are adequate, necessary and proportionate to prevent and, as appropriate, to investigate, prosecute and punish these types of acts. According to the Inter-American Convention against Terrorism, "the fight against terrorism must be undertaken with full respect for national and international law, human rights, and democratic institutions, in order to preserve the rule of law, liberties, and democratic values in the Hemisphere."[173]

165. In particular, when States take the necessary measures to prevent and punish terrorism by defining acts of this nature as offenses, they are obliged to respect the principle of legality in the terms mentioned above (*supra* paras. 161 to 164). Different United Nations bodies and experts have underlined that domestic codification and definitions relating to terrorism should not be formulated in an imprecise way that facilitates broad interpretations under which conduct is punished that does not have either the nature or the gravity of that type of offense.[174]

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[169] *Cf. Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs.* Judgment of June 20, 2005. Series C No. 126, para. 90, and *Case of Liakat Ali Alibux v. Suriname*, para. 61.

[170] *Cf. Case of Kimel v. Argentina*, para. 63, and *Case of Liakat Ali Alibux v. Suriname*, para. 61.

[171] Articles 3, 3 bis, 5, 11, 13, 15, 16 and 21 of Law No. 18,314 which "define terrorist acts and establish their punishment." *Cf.* Law No. 18,314, which defines terrorist acts and establishes their punishment, published in the official gazette on May 17, 1984 (file of annexes to the Merits Report 176/10, annex 1, folios 5 to 11, file of annexes to the CEJIL motions and arguments brief, annex B 1.1, folios 1740 to 1746, file of annexes to the FIDH motions and arguments brief, annex 27, folios 817 to 823, and annexes to the State's answering brief, annex 3, folios 84 to 87); Law No. 19,027 of January 24, 1991, which "[a]mends Law No.18,314, which defines terrorist acts and establishes the corresponding punishments" (file of annexes to the FIDH motions and arguments brief, annex 29, folios 825 to 827); affidavits prepared on May 21, 2013, by expert witness Manuel Cancio Meliá, and on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folios 158 to 165, and 621 to 624).

[172] *Cf.* Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02), adopted at the second plenary session held on June 3, 2002, second and sixth paragraphs of the preamble. Available at: http://www.oas.org/juridico/english/ga02/agres_1840.htm.

[173] *Cf.* Inter-American Convention against Terrorism, *supra*, eighth paragraph of the preamble.

[174] *Cf.* UN Doc. CCPR/C/CHL/C0/5, 17 April 2007, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee*, Chile, para. 7 (file of annexes to the Merits Report 176/10, annex 8, folios 310 to 315), and UN Doc. A/HRC/6/17/Add.1, 28 November 2007, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin,* Addendum, para. 20 (file of annexes to the Merits Report 176/10, annex 10, folios 369 to 373).

166. When providing their expert opinions before this Court, expert witnesses Scheinin and Andreu-Guzmán referred to Resolution 1566(2004) of the United Nations Security Council[175] and the "model definition of terrorism" developed in 2010 by Martin Scheinin as Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism and maintained by Ben Emmerson, the following Special Rapporteur for this issue.[176] Both experts considered it necessary to develop relevant standards to evaluate national definitions of terrorist offenses, because this would allow identifying basic or characteristic elements that determine egregious conduct of a terrorist nature.[177]

167. However, these expert witnesses and expert witness Cancio Meliá[178] agreed that international law does not contain a definition of terrorism that is complete, concise and accepted universally.[179]

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[175] Resolution 1566 (2004) of the United Nations Security Council of 8 October 2004, paragraph 3:

> *Recalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

Cf. UN Doc. S/RES/1566 (2004), Security Council, Resolution 1566 (2004), adopted by the Security Council at its 5053rd meeting on 8 October 2004.

[176] In his report on "*Ten areas of best practices in countering terrorism*", the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while combatting terrorism, Martin Scheinin gave the following "model definition" as "a best practice in the fight against terrorism." He indicated that "[t]errorism means an action or attempted action where:

> 1. The action:
>
> (a) Constituted the intentional taking of hostages; or
>
> (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
>
> (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
>
> 2. The action is done or attempted with the intention of:
>
> (a) Provoking a state of terror in the general public or a segment of it; or
>
> (b) Compelling a Government or international organization to do or abstain from doing something; and
>
> (3) The action corresponds to:
>
> (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
>
> (b) All elements of a serious crime defined by national law."

He also emphasized that: "laws and policies must be limited to the countering of offences that correspond to the characteristics of conduct to be suppressed in the fight against international terrorism, as identified by the Security Council in its resolution 1566 (2004), paragraph 3," and stated that: "individual States affected by purely domestic forms of terrorism may also legitimately include in their terrorism definitions conduct that corresponds to all elements of a serious crime as defined by the national law, when combined with the other cumulative characteristics of resolution 1566 (2004)." *Cf.* UN Doc. A/HRC/16/51, December 21, 2010, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism,* paras. 23, 27 and 28.

[177] *Cf.* Affidavit prepared on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folios 601 to 624), and statement made by expert witness Martin Scheinin before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[178] *Cf.* Affidavits prepared on May 21, 2013, by expert witness Manuel Cancio Meliá, and on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folios 114 to

2. Application to this specific case

168. In order to decide the dispute in this case as to whether a law (Law No. 18,314) was applied to the eight presumed victims that was incompatible with Article 9 of the Convention, the Court finds it essential to rule on the arguments relating to whether the presumption of the intent "to instill […] fear in the general population" stipulated in article 1 of this law entails a violation of both the principle of legality and the presumption of innocence.

169. As indicated previously (*supra* para. 98), article 1 of Law No. 18,314 regulated the subjective elements of the offense as follows:

> Article 1. The offenses listed in article 2 shall constitute terrorist offenses when any of the following circumstances exist:
>
> 1. That the offense is committed in order to produce in the population, or in part of it, the justified fear of being a victim of offenses of the same type, due either to the nature and effects of the means used, or to the evidence that it is part of a premediated plan to attack a specific category or group of persons.
>
> **Unless the contrary is verified, the intent of causing fear to the general population shall be presumed when the offense is committed using explosive or incendiary devices**, weapons of great destructive power, toxic, corrosive or infectious substances or others that can cause major devastation, or by sending letters, packages or similar objects with explosive or toxic effects.
>
> 2. That the offense is committed to force decisions from the authorities or to impose demands. *[Bold added]*

170. The Court must decide whether the legal presumption of the subjective element of the definition emphasized in the said article 1, which establishes that, "unless the contrary is

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166, and 601 to 624); statement made by expert witness Martin Scheinin before the Inter-American Court during the public hearing held on May 29 and 30, 2013, and UN Doc. A/HRC/16/51, December 21, 2010, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism,* para. 27.

[179] Nevertheless, numerous international instruments classify certain conducts as terrorist acts. This is the case of the Inter-American Convention against Terrorism, adopted on June 3, 2002, by the OAS General Assembly, which does not define terrorism, but considers as terrorist offenses those contained in ten international conventions on this matter. Article 2(1) (Applicable international instruments) of this Convention that: "For the purposes of this Convention, "offenses" means the offenses 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.

j. International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999.

Cf. Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02), adopted at the first plenary session on June 3, 2002.

verified, the intent of causing fear to the general population shall be presumed" when the offense is committed by using the means or devices indicated (including "explosive or incendiary devices") entails a violation of the principle of legality and the principle of the presumption of innocence.

171. The Court reiterates that the codification of offenses means that the criminalized conduct is delimited as clearly and precisely as possible (*supra* para. 162). In this definition, the special intent or purpose of instilling "fear in the general population" is a fundamental element to distinguish conduct of a terrorist nature from conduct that is not, and without which the conduct would not meet the definition. The Court considers that the said presumption that this intent exists when certain objective elements exist (including "the fact of committing an offense with explosive or incendiary devices") violates the principle of legality established in Article 9 of the Convention, and also the presumption of innocence established in Article 8(2) of this instrument. The principle of the presumption of innocence that, as the Court has determined, constitutes a cornerstone for judicial guarantees,[180] signifies that judges should not commence the proceedings with a preconceived idea that the accused has committed the offense that he is charged with, so that the burden of proof rests on the accuser and not on the accused, and any doubt must be used to the benefit of the accused.[181] The authoritative demonstration of guilt is an essential requirement for criminal punishment.[182]

172. In this regard, the State indicated that, with the 2010 amendment of Law No. 18,314, "the presumption of the intent to instill fear was eliminated" in order "to protect the principle of the presumption of innocence [...,] so that [...] any accusation of terrorism must be proved by the accuser and not, as before the amendment of the law, when those charged with such offenses had to disprove the presumption of terrorist intent." Witness Acosta Sánchez, proposed by Chile, explained this amendment similarly, indicating during the public hearing that this presumption "to a great extent, infringed the principle of innocent until proved guilty."[183] Expert witness Scheinin,[184] proposed by the Commission, the FIDH and CEJIL, gave a similar opinion, indicating that, in definitions of offenses, presumptions work to the detriment of the accused and invert the court's reasoning that all the elements of the offense must be proved beyond a reasonable doubt. Expert witness Cancio Meliá, proposed by CEJIL, considered that this presumption "extend[ed] the scope of terrorism without any restriction, by [...] inverting the burden of proof and establishing the [...] principle that any act carried out with an incendiary device [...] was, in principle, considered a terrorist act," which, in his opinion, was "absolutely incompatible not only with the principle of legality, (because it makes [...] it unpredictable to know when it would be considered that 'the contrary has been proved' – in other words, the absence of the intent [of instilling fear]), but also with the most elementary principles of due process of law."[185] Furthermore, expert witness Andreu-Guzmán, proposed by the FIDH,

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[180] *Cf. Case of Suárez Rosero v. Ecuador*. *Merits*. Judgment of November 12, 1997. Series C No. 35, para. 77, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 128.

[181] *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 184, and *Case of López Mendoza v. Venezuela*, para. 128.

[182] *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 204, *and Case of López Mendoza v. Venezuela*, para. 128.

[183] The said witness testified about "his participation" in the amendments to the Counter-terrorism Act in Chile and the process of adapting it to international standards. *Cf.* Statement made by witness Juan Domingo Acosta Sánchez before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[184] *Cf.* Statement made by expert witness Martin Scheinin before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[185] *Cf.* Affidavit prepared on May 21, 2013, by expert witness Manuel Cancio Meliá (file of statements of presumed victims, witnesses and expert witnesses, folio 161).

indicated that the presumption of article 1 of Law No. 18,314 "runs counter to the principle of the presumption of innocence, because it considers proved *prima facie* the specific criminal intent based merely on the use of certain means or weapons," and that it is "a clear and deeply-rooted principle of contemporary criminal law that criminal intent, and *a fortiori,* specific criminal intent, is an element of the illegal conduct that must be proved and cannot be presumed." In addition, he clarified that "the wording of article 1, by establishing presumptions of the intentionality (specific criminal intent), places the burden of proof on the accused to prove that he did not have the said intention."[186]

173. The legal recognition of this presumption may have influenced the criteria used by the domestic courts to analyze and confirm the existence of intent during the criminal proceedings. This Court finds that it has been proved that the said presumption of the subjective element of the terrorist offense was applied in the judgments that decided the criminal responsibility of the eight presumed victims in this case: (a) to convict Messrs. Norín Catrimán and Pichún as perpetrators of the offense of threat of terrorist arson (*supra* para. 116); (b) to convict Messrs. Millacheo Licán and Huenchunao Mariñán, the Marileo Saravia brothers, and Ms. Troncoso Robles as perpetrators of the offense of terrorist arson (*supra* para. 128), and (c) to convict Mr. Ancalaf Llaupe as perpetrator of the terrorist act consisting in "[t]o place, send, activate, throw, detonate or fire bombs or explosive or incendiary devices of any type, weapons or devices of great destructive power, or with toxic, corrosive or infectious effects," for acts during which, after forcing the driver to get out of his truck, a "lighted rag" was thrown at this vehicle (*supra* para. 149).

174. Consequently, *the Court concludes that the application of the presumption of terrorist intent with regard to Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe violated the principle of legality and the right to the presumption of innocence, established in Articles 9 and 8(2) of the American Convention, in relation to the obligation to respect and ensure rights, established in Article 1(1) of this instrument.*

3. *Obligation to adopt domestic legal provisions (Article 2 of the American Convention), in relation to the principle of legality (Article 9 of the Convention) and the right to the presumption of innocence (Article 8(2))*

175. Article 2 of the American Convention establishes the general obligation of States Parties to adapt their domestic law to the provisions of the Convention in order to ensure the rights recognized therein. The Court has established that this obligation entails the adoption of two types of measure. On the one hand, the elimination of laws and practices of any nature that result in a violation of the guarantees established in the Convention; on the other, the enactment of laws and the implementation of practices leading to the effective observance of those guarantees.[187]

176. The Court has concluded that, at the time of the events, a criminal norm included in the Counter-terrorism Act was in force that was contrary to the principle of legality and to the right to the presumption of innocence, as indicated in paragraphs 169 to 174. This norm was applied to the victims in this case in order to determine their criminal responsibility as perpetrators of offenses of a terrorist nature.

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[186] *Cf.* Affidavit prepared on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folio 622).

[187] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*, para. 207, and *Case of Mendoza et al. v. Argentina. Preliminary objections, Merits and reparations.* Judgment of May 14, 2013 Series C No. 260, para. 293.

177. Therefore, *the Court concludes that Chile violated the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention, in relation to Articles 9 (principle of legality) and 8(2) (right to the presumption of innocence) of this instrument, to the detriment of Víctor Manuel Ancalaf Llaupe, Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles*.

178. The Court does not find it necessary in this case to rule on the other alleged violations related to the subjective element of the offense,[188] or on the arguments relating to the objective element of the definition of a terrorist offense,[189] because it has already concluded that the presumption of the intention of instilling fear in the general population is incompatible with the Convention, and that this presumption was applied in the proceedings against the presumed victims in this case.

179. However, the Court emphasizes that the acts for which the victims in this case were tried and convicted did not entail harm to anyone's physical integrity or life. The Court finds it relevant to point out that the offense of arson or threat of arson of which seven of the victims were convicted relates to conduct defined in article 476.3 of the Criminal Code (*supra* para. 159.b.i). In the Chilean Criminal Code, the definition of arson offenses to which the Counter-terrorism Act refers (*supra* footnotes 163 and 164) includes different situations, ranked in order of importance according to the severity of the effects on different rights,[190] and the one included in the said article 476.3 is among the least severe.[191] Similarly, Víctor Manuel Ancalaf Llaupe was convicted as perpetrator of the offense established in article 2.4 of the Counter-

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[188] Regarding the alleged scope and lack of precision of the subjective element of the offense, and also the alternative text of the elements of the subjective aspect of the offense.

[189] Regarding the insufficient gravity of the conducts considered criminal in article 2 of Law 18,314, and the lack of precision in the description of the actions defined as offenses of which the presumed victims were convicted (the offense of "terrorist arson" defined in article 2.1 of the Counter-terrorism Act in relation to article 476.3 of the Criminal Code, and the action described in article 2.4 of Law 18,314 – the relationship with the presumption of terrorist intent, on the one hand, and the alleged "imprecision" of the expression "incendiary devices," on the other).

[190] Art. 474. Anyone who sets fire to a building, railway train, boat or any other type of place, causing the death of one or more persons whose presence there could be anticipated, shall be punished with long-term rigorous imprisonment at the highest level to life imprisonment.

The same penalty shall be imposed when the fire does not result in death but rather in mutilation of a major limb or serious injuries of those included in article 397.1.

The penalties under this article shall be applied, respectively, at their lowest level if, as a result of explosions due to the fire, death or serious injuries are caused to persons who were at any distance from the place of the incident

Art. 475. The arsonist shall be punished with medium-level long-term rigorous imprisonment to life imprisonment.

1. When the fire is set in inhabited buildings, train, boat or place or in which, at the time, there were one or more persons, provided that the accused could have anticipated this circumstance.

2. When the fire is set in merchant vessels loaded with explosive or inflammable objects, in warships, dockyards, shipyards, warehouses, factories or storage places for gunpowder or other explosive or inflammable substances, arsenals, repair shops, museums, libraries, archives, public offices or monuments or places similar to those listed.

Art. 476. The punishment shall be long-term rigorous imprisonment at any of its levels:

1. For anyone who sets fire to a building destined to serve as a dwelling which was not inhabited at the time.

2. For anyone who, within a village, sets fire to any building or place, even if this was not normally destined to serve as a dwelling.

3. For anyone who sets fire to woods, standing crops, pastures, undergrowth, fences or plantations.

[191] The conduct described in article 476.3 is differentiated from the other actions criminalized as arson by the Criminal Code owing to its subject matter and by not including the requirement that the fire produce a specific result.

terrorism Act for the conduct consisting in throwing "a lighted rag" into a truck of a private company after forcing the driver to abandon it.

180. The Court reiterates the importance that the special criminal offense of terrorism is not used in the investigation, prosecution and punishment of criminal offenses when the wrongful act could be investigated and tried as an ordinary offense because it is a less serious conduct (*supra* para. 163).

181. In addition, several probative elements provided to the Court relate to inconsistency in the application of the Counter-terrorism Act in Chile. As already indicated (*supra* para. 83), the Special Rapporteur for the promotion and protection of human rights while countering terrorism has stated that "political opinion" in Chile is in agreement that the application of this criminal law to the Mapuche in the context of their social protest is "unsatisfactory and inconsistent." In addition, in her "Law Report" presented as documentary evidence by both common interveners, Cecilia Medina Quiroga made a comparative analysis of similar criminal cases that she considered had been decided by the Chilean courts "in a totally different way," even though "the underlying events, the import of the accusations and the context in which both cases took place had numerous similarities." She indicated that these cases occurred "in the context of social conflict arising from the unresolved demands of the Mapuche communities concerning their ancestral lands," in which individuals who were members and leaders of these communities were charged with committing terrorist acts linked to setting fire to property.[192] Likewise, the Court has noted that, in another criminal trial held for the fire on the Poluco Pidenco property on December 19, 2001, for which five of the victims in this case were convicted as perpetrators of the offense of terrorist arson, the Angol Oral Court Oral applied the ordinary offense of arson established in article 476.3 and not the offense of terrorist arson (*supra* para. 123).

182. The Court notes that several international bodies and experts have stated that Chile has not dealt effectively with the causes of the Mapuche social protest in the regions of Bío Bío and Araucanía (*supra* para. 90). In this regard, Ben Emmerson, Special Rapporteur for the promotion and protection of human rights while countering terrorism stated that when the State raises expectations that it will resolve the Mapuche indigenous land claims "that then remain unfulfilled, […] there is an ever-present risk that the protests will escalate."[193] In this regard, it is essential that the State guarantee adequate and effective attention to and resolution of these claims in order to protect and ensure the rights of both the indigenous people and the other members of society in those regions.

VII.2 – RIGHT TO EQUAL PROTECTION (ARTICLE 24 OF THE AMERICAN CONVENTION) AND JUDICIAL GUARANTEES (ARTICLE 8(1), 8(2)(F) AND 8(2)(H) OF THE AMERICAN CONVENTION), IN RELATION TO ARTICLE 1(1)

183. The pertinent provisions of Article 8 of the Convention establish the following:

> **Article 8**
> **Right to a Fair Trial**
>
> 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

[192] *Cf.* Law report prepared by Cecilia Medina Quiroga at the request of the Chilean Ombudsman, in order "to analyze the adaptation to international human rights treaties of Law No. 18,314, which punishes terrorist actions, and its application in the context of the so-called 'Mapuche conflict'" (annexes to the CEJIL motions and arguments brief, annex C, folios 2007 to 2061, and annexes to the FIDH motions and arguments brief, annex 13, folios 456 to 510).

[193] *Cf.* UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, Addendum, Mission to Chile, para. 25 (merits file, tome V, folios 2566 to 2587).

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.

184. Article 1(1) of the Convention stipulates 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.

185. Article 24 (Right to Equal Protection) 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.

186. The elucidation of whether or not the State has violated its international obligations owing to the actions of its judicial organs may make it necessary for the Court to examine the respective domestic proceedings[194] to establish their compatibility with the American Convention;[195] but this does not convert it into a court for the review of judgments delivered in domestic proceedings,[196] nor does it make it act as a criminal court in which the criminal responsibility of the individual can be examined. Its function is to determine the compatibility of the actions of the above-mentioned proceedings with the American Convention[197] and, in particular, to analyze the acts and omissions of the judicial organs in light of the guarantees protected in Article 8 of this treaty.[198]

187. To ensure real respect for the judicial guarantees protected in Article 8 of the Convention during a trial, all the requirements that "serve to protect, ensure or assert the ownership or exercise of a right" must be observed;[199] in other words, the "prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination."[200] The said Article 8 includes a system of guarantees that condition the exercise

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194 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Mohamed v. Argentina*, para. 79.

195 *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 146, and *Case of Mohamed v. Argentina*, para. 79.

196 *Cf. Case of Fermín Ramírez v. Guatemala*, para. 62, and *Case of Mohamed v. Argentina*, para. 81.

197 *Cf. Case of Castillo Petruzzi et al. v. Peru. Preliminary objections*, para. 83; *Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*, para. 90, and *Case of Mohamed v. Argentina*, para. 81.

198 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, para. 220, and *Case of Mohamed v. Argentina*, para. 81.

199 *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 147, and *Case of Mohamed v. Argentina*, para. 80.

200 *Cf. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 28, and *Case of Mohamed v. Argentina*, para. 80.

of the State's *ius puniendi* and seek to ensure that the accused or the defendant is not submitted to arbitrary decisions.[201]

188. The examination of the alleged violations of judicial guarantees will be divided into three parts:

a) Right to equal protection and right to be tried by an impartial court, in relation to the alleged violations to the detriment of the eight presumed victims

b) Right of the defense to examine witnesses, in relation to the alleged violations to the detriment of Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe;

c) Right to appeal the judgment before a higher court, in relation to the alleged violations to the detriment of seven of the presumed victims.

A) Right to equal protection (Article 24 of the Convention) and right to be tried by an impartial court (Article 8(1) of the Convention), in relation to Article 1(1) of the Convention

1. Arguments of the Commission and of the parties

189. The Commission affirmed that Chile had violated Articles 8(1) and 24 and of the Convention, in relation to Article 1(1) thereof, based on the following reasons:

a) It considered that there had been a selective application of the criminal law against the members of the Mapuche indigenous people. In its Merits Report it stated that "a number of international human rights organizations ha[d] expressed concern over the existence of a pattern of selective enforcement of Chile's anti-terrorism laws to members of the Mapuche indigenous people" and referred to those concerns. It affirmed that "this was the context at the time the [presumed] victims were prosecuted and convicted" and emphasized that "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 the criminal law." It stated that "a difference in treatment based on their ethnic origin and/or link to the Mapuche people [had been proved], inasmuch as the consideration of these elements had the effect of influencing the decision," without the State having justified this difference in treatment;

b) In addition, in particular in its final written arguments (in which it indicated that, in this case, "the methodology used to determine whether or not discrimination existed should focus on the analysis of the reasoning of the judgment in question"), it affirmed that, in this case, the discrimination "occurred in the judgments" and asked the Court to analyze the reasoning given in them. It stated that there had been a violation of the right to an impartial court, protected in Article 8(1) of the Convention, because the courts "assessed and classified the acts based on pre-conceived ideas relating to the context in which they took place, and […] adopted their decision to convict the accused applying these prejudices." It asserted that Chile had incurred in "direct […] discrimination because this was explicitly present in the judgments convicting the victims." It indicated that, in itself, Law No. 18,314 was not discriminatory, and that there was no need to analyze "whether it had been applied to other persons who were not members of the Mapuche indigenous people." When analyzing "whether the prosecution and conviction of the [presumed] victims under the Counter-terrorism Act was discriminatory," the Commission affirmed that the three judgments convicting the

[201] *Cf. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights).* Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 28, and *Case of Mohamed v. Argentina*, para. 80.

victims contain "explicit and direct" discriminatory references and referred to each of them. It underscored, among other matters, that "the motivation [of the judgments] incorporates elements relating to ethnic origin, traditional leadership and links with the Mapuche indigenous people" in the domestic court's analysis of the subjective element or the terrorist intent, and

c) There had been a violation of impartiality, because the judges who delivered the judgments convicting the eight presumed victims "assessed and classified the acts based on pre-conceived ideas concerning the context in which they took place, and by adopting their decision to convict the accused applying these prejudices." According to the Commission, "the judges of the Oral Criminal Court held preconceived ideas about the situation of public order associated with the so-called 'Mapuche conflict,' a bias that caused the judges to consider it proved that Region IX was the scene of violent activities, which included the acts investigated in the case; it also caused them to copy, almost verbatim, the very same reasoning used in assessing individual conduct in an earlier criminal proceeding."

190. The FIDH argued that Chile had "violated the right to equal protection of the law and non-discrimination established in Article 24 of the American Convention, in relation to Article 1(1) of this instrument, 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 Licán." It also asserted that Chile had "violated the right to an impartial judge established in Article 8(1) of the Convention in relation to Article 1(1) of this instrument," to the detriment of these presumed victims.

a) In relation to the principle of equality and non-discrimination, it referred to the prosecution of these presumed victims and stressed that the judgments against them "were based on reasoning of a discriminatory nature owing to their ethnic affiliation," referring to several considerations in the said reasoning. Regarding the alleged selective application of Law No. 18,314, the FIDH indicated that "[t]he evidence of the difference in treatment" arose from "the application of harsher and inappropriate punishments." It affirmed that "all the powers of the Chilean State were involved in the decision not to apply ordinary law but rather emergency law […] to members of the Mapuche people" without an objective and reasonable justification. It indicated that "criminal justice statistics, the disproportion between the offense and the punishment, failure to respect the presumption of innocence, the biased assessments by the judges, the discourse of the Prosecution Service and the Ministry of the Interior, reveal a clear pattern of ethnic discrimination." Regarding the "statistical data" on the application of the said law between 2000 and 2005, it asked that this be "interpreted together with the effect of the undue application of terrorism offenses to the persons [it] represented." It also argued that "even nowadays the Counter-terrorism Act continues to be applied in a discriminatory manner to the Mapuche" and that "although this regime is applied in the investigation and trial stage, the judge then delivers a conviction for offenses under ordinary law."

b) Regarding the alleged violation of the right to an impartial court, it argued that "there was a subjective impartiality *(sic*) in the judgments convicting the victims in the case of the *Lonkos* and in the Poluco Pidenco case" and that it endorsed the Commission's conclusion in its Merits Report. It also affirmed that "the application of an inappropriate punishment to the *Lonkos* also reveals the bias." It argued also that the reference in the sentences to concepts such as "notorious public fact" and "it is public knowledge" shows that the domestic courts "approached the case with a bias or stereotype" and that the domestic court had copied the part relating to the classification of the acts as terrorist actions of the acquittal judgment in the case of Messrs. Norín

Catrimán and Pichún Paillalao in the judgment with the guilty verdict in the Poluco Pidenco case.

191. *CEJIL* alleged the violation of the "right to equal protection […] in relation to the general obligation to respect rights" (Articles 24 and 1(1) of the Convention), and of judicial guarantees (Articles 8(1), 8(2)(c), 8(2)(d) and 8(5) of the Convention), to the detriment of Víctor Manuel Ancalaf Llaupe:

a) Regarding the principles of equality and non-discrimination, it indicated that it "endorsed" the observations made in this regard by the Commission. Referring to the criminal proceedings against Mr. Ancalaf, it argued that "the existence of a discriminatory bias was evident during its processing," and that his case "illustrated the State's practice" of "selectively applying […] the anti-terrorist legislation against the members of the Mapuche people." It argued that "[t]he stereotype of the Mapuche was revealed not only during the investigation [in the case of Mr. Ancalaf], but was also reflected in the judgments delivered by the domestic courts as a decisive element for convicting the *Lonkos*, the *Werken* and, in general, the Mapuche leaders and activists." It affirmed that "[t]aking into account a person's membership in an ethnic group and, on this basis, classifying an act as a terrorist action" without the "difference in treatment" being justified, constitutes "an act of racial discrimination." It indicated that it was "the application of the Counter-terrorism Act that produced the discrimination and not the law in itself." It argued that its application in Mr. Ancalaf's case should "necessarily be understood in a context of the criminalization of the Mapuche people's claims," and that "different national and international bodies have recognized the existence of this context of discrimination." It affirmed that the State "has used 'ethnic origin' as a criterion to establish differences between individuals, inasmuch as the selective application was addressed at the members of a specific ethnic group" without justification;

b) With regard to these judicial guarantees, CEJIL argued that the criminal proceedings against Víctor Ancalaf Llaupe violated his guarantees contained in Article 8(1) (right to be heard by an impartial court and obligation to substantiate the accusation), 8(2)(c) (adequate means for the preparation of his defense), 8(2)(d) (right to be assisted by legal counsel of his own choosing) and 8(5) (the public nature of the proceedings) of the Convention, as well as the obligation established in Article 2 of this instrument. It set out the reasons why it considered that "the trial and subsequent conviction of Mr. Ancalaf Llaupe under a regime with inquisitorial characteristics – such as the one that was in force at the time of the events – resulted in a series of violations of the guarantees of due process." Regarding the alleged violation of Article 8(1), in relation to Articles 1(1) and 2 of the Convention, it argued that, under this regime, "[t]he structure and regulation" of this inquisitorial criminal system did not guarantee his right to be heard by an impartial judge or court, because "the charges were brought by a judicial decision of the judge who had headed the preliminary investigation and who then delivered the judgment." It affirmed that, in the criminal proceedings against Mr. Ancalaf Llaupe, the judge who conducted the investigation, then presided the trial, and delivered the judgment convicting him. It also indicated that the Concepción Court of Appeal "failed to comply […] with the obligation to provide sufficient reasoning to safeguard the right [of Víctor Ancalaf] to due process," because it decided that he had taken part in the facts and established his criminal responsibility for them "based above all on the testimony of anonymous witnesses." The arguments of CEJIL with regard to the alleged violation of Article 8(2)(c) and 8(5), in relation to Articles 1(1) and 2 of the Convention, refer to the confidentiality of the preliminary proceedings established in the former Code of Criminal Procedure and to the fact that all the proceedings in the trial were in writing. Regarding the alleged violation of Article 8(2)(d) in relation to Article 1(1) of the Convention, CEJIL stated that on the two occasion on which Mr. Ancalaf Llaupe made a statement before

the order to prosecute him was issued, he was never advised "in what capacity he had been summoned to appear before the court or made to appear accompanied by defense counsel, even though, at that time, procedural steps were being taken to investigate him."

192. The State, when contesting the alleged "selective application" of the Counter-terrorism Act, affirmed that "to acknowledged an error, *ex post*, in a judgment, or in the application of a procedural norm does not signify assigning to this error a certain hidden motivation shared not only by the person who has committed the error (a judge, prosecutor or lawyer) but by all the powers of the State." It also indicated that "[i] has been sought to assert, based on the judgments handed down in these cases and their negative impact on those who were directly prejudiced by them – natural and to be expected for anyone who is a victim of a judicial or administrative error – that the State of Chile has incurred in the said errors (if they exist) in a voluntary and planned manner." It affirmed that "[n]o State apparatus exists that is focused on repressing and convicting members of the Mapuche communities under the Counter-terrorism Act, in order to criminalize and stifle their ancestral claims," and that "[i]f this was true, each time that the organs responsible for criminal prosecution open proceedings under this law, the accused would be convicted," which was not the case. It affirmed that "seeking social peace, the Ministry [of the Interior and Public Safety] has ceased to prosecute acts of violence committed in the area of Araucanía as terrorist offenses." It maintained that "confronted with acts that have the characteristics of ordinary offenses or offenses under the Counter-terrorism Act […], whether committed by members of Mapuche communes or any other citizen, it is not feasible to require the State […] not to file criminal proceedings based on the argument that such acts could be inspired by an 'ancestral claim.'" It indicated that this law is not "an anti-Mapuche law" and that, "therefore, [t]he reasons for applying it do not respond to a desire to prosecute or to prejudice a specific group of the population, but to the conviction of the criminal prosecutor" that the characteristics of the acts indicate a terrorist intent. The State did not submit arguments on the alleged violation of the right to an impartial judge or court.

2. Considerations of the Court

193. The impartiality of the courts that intervened in the different cases has been questioned by two types or arguments. The first refers exclusively to the proceedings against Víctor Manuel Ancalaf Llaupe, the only one in which the former 1906 Code of Criminal Procedure was applied. The Court does not find it necessary to make a special ruling on these arguments and those relating to Article 8(2)(c), 8(2)(d) and 8(5) (*supra* para. 191.b), but will take them into account, as pertinent, when ruling on the right to defend oneself (Article 8(2)(f) of the Convention) (*infra* paras. 253 to 260) and on the alleged violation of personal liberty in relation to the pre-trial detention to which Mr. Ancalaf Llaupe was subjected (Article 7 of the Convention) (*infra* paras. 313 to 327).

194. The second group of arguments relates to the alleged discrimination based on ethnic origin against the presumed victims, either because of the supposed existence of a "selective application of the Counter-terrorism Act" against members of the Mapuche indigenous people, or because the domestic criminal judgments contain statements that are considered to constitute or to reveal discrimination of the type indicated.

195. In order to decide the disputes in this regard, the Court will structure its considerations in the following order::

a) General considerations:
   i. The principle of equality and non-discrimination and the right to equal protection of the law;
   ii. The right to an impartial judge or court;
b) Application to this case:

i. Alleged discriminatory and selective application of the Counter-terrorism Act to members of the Mapuche indigenous people, and
ii. Alleged use of stereotypes and social prejudices in the domestic criminal judgments.

a) General considerations

a.i) The principle of equality and non-discrimination and the right to equal protection of the law

196. As already indicated, Article 1(1) of the Convention establishes that the States Parties "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." Meanwhile, Article 24 stipulates that "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law" (*supra* paras. 184 and 185).

197. Regarding the principle of equality before the law and non-discrimination, the Court has indicated that "the notion of equality springs directly from the oneness of the human family, and is linked to the essential dignity of the individual." Thus, any situation is incompatible with this concept that, by considering one group superior to another group, leads to treating it in a privileged way; or, inversely, by considering a given group to be inferior, treats it with hostility or otherwise subjects it to discrimination in the enjoyment of rights that are accorded to those who are not so classified.[202] The Court's case law has also indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the sphere of *jus cogens*. It constitutes the foundation for the legal framework of national and international public order and permeate the whole legal system.[203]

198. Regarding the concept of discrimination, the definitions contained in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination[204] and Article 1(1) of the Convention on the Elimination of All Forms of Discrimination Against Women[205] lead to the conclusion that discrimination is any distinction, exclusion, restriction or preference based on the prohibited reasons 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.[206]

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202 *Cf. Proposed Amendment to the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 79.

203 *Cf. Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101, *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, para. 269, and *Case of Atala Riffo and daughters v. Chile*, para. 79.

204 Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination establishes that: "[i]n this Convention, the term "racial discrimination" shall mean 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."

205 Article 1(1) of the Convention on the Elimination of All Forms of Discrimination Against Women establishes that: "[f]or the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

206 This definition is similar to the one established by the Human Rights Committee, which has defined discrimination as: "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose

199. Article 24 of the American Convention prohibits any discrimination, *de facto* or *de jure* not only in relation to the rights established in this treaty, but with regard to all the laws enacted by the State and their application.[207] In other words, it does not simply repeat the provisions of Article 1(1) of this instrument with regard to the obligation of States to respect and ensure the rights recognized in this treaty without discrimination, but, additionally, establishes a right that also gives rise to the State's obligation to respect and ensure the principle of equality and non-discrimination in order to safeguard other rights and in all domestic laws that it enacts,[208] because it protects the right to "equal protection of the law,"[209] so that it also prohibits discrimination resulting from any inequality derived from domestic law or its application.[210]

200. The Court has determined that a difference of treatment is discriminatory when is has no objective and reasonable justification;[211] in other words, when it does not seek a legitimate purpose and when the means used are disproportionate to the purpose sought.[212]

201. In addition, the Court has established that States must abstain from carrying out actions that are in any way directly or indirectly designed to create situations of discrimination *de jure* o *de facto.*[213] States are obliged to take affirmative action in order to reverse or change any discriminatory situations in their societies that prejudice a specific group of persons. This involves the special obligation of protection that the State must exercise with regard to the actions and practices of third parties who, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations.[214]

202. Taking into account the interpretation criteria stipulated in Article 29 of the American Convention and in the Vienna Convention on the Law of Treaties, the Court considers that ethnic origin is a one of the prohibited criteria for discrimination that is included in the expression "any other social condition" of Article 1(1) of the American Convention. The Court has indicated that, when interpreting the content of this expression, "the rule most favorable to the protection of the rights recognized in this treaty must be chosen, based on the principle of

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or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." *Cf.* UN Doc. CCPR/C/37, Human Rights Committee, *General Comment No. 18, Non-discrimination,* 10 November 1989, para. 7.

207 Cf. *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, para. 186, and *Case of Atala Riffo and daughters v. Chile*, para. 82.

208 *Cf. Case of Yatama v. Nicaragua*, para. 186.

209 *Cf.* Advisory Opinion OC-4/84 of January 19, 1984, para. 54, and *Case of Atala Riffo and daughters v. Chile*, para. 82.

210 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Atala Riffo and daughters v. Chile*, para. 82.

211 *Cf. Juridical Status and Human Rights of the Child. Advisory Opinion OC-17/02* of August 28, 2002. Series A No. 17, para. 46; *Advisory Opinion OC-18/03* of September 17, 2003, para. 84, and *Case of Yatama v. Nicaragua*, para. 185.

212 *Cf.* ECHR, *Case of D.H. and Others v. the Czech Republic*, No. 57325/00. Judgment of 13 November 2007, para. 196, and ECHR, *Case of Sejdic and Finci v. Bosnia and Herzegovina*, Nos. 27996/06 and 34836/06. Judgment of 22 December 2009, para.42.

213 *Cf.* Advisory Opinion OC-18/03 of September 17, 2003, para. 103, and Case of *Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs.* Judgment of October 24, 2012 Series C No. 251, para. 236.

214 *Cf.* Advisory Opinion OC-18/03 of September 17, 2003, para. 104, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 236. The United Nations Human Rights Committee had stated this previously in its *General Comment No. 18, Non-discrimination* of 10 November 1989, CCPR/C/37, para. 10.

the rule most favorable to the individual."[215] The specific criteria for which discrimination is prohibited in this article are not a taxative or exclusive list, but merely declarative. The wording of this article "leaves the criteria open-ended with the inclusion of the expression 'any other social condition,' to incorporate other categories that had not been explicitly indicated."[216]

203. Several international treaties expressly prohibit discrimination based on ethnic origin.[217] Moreover, other international instruments reaffirm that indigenous peoples should not be subjected to any form of discrimination.[218]

204. The Court takes into account that ethnic group refers to communities of individuals who share, among other aspects, characteristics of a socio-cultural nature, such as cultural, linguistic, spiritual affinities and historical and traditional origins. The indigenous peoples fall within this category, and the Court has recognized that they have specific characteristics that constitute their cultural identity,[219] such as their customary law, their economic and social characteristics, and their values, practices and customs.[220]

205. In Chile, the Mapuche indigenous people are recognized as an indigenous ethnic group under article 1 of Law No. 19,253 ("Indigenous Peoples' Act"), promulgated in September 1993 (*supra* para. 88), which establishes that:

> The State recognizes that the indigenous peoples of Chile are the descendants of the groups of humans who have lived on national territory since pre-Colombian times, who conserve their own cultural and ethnic characteristics and for whom the land is the bedrock of their existence and culture.
>
> The State recognizes as the main indigenous ethnic groups of Chile: **the Mapuche**, Aimará, Rapa Nui or Easter Islanders, that of the Atacaman, Quechuas and Collas communities in the northern part of the country, and the Kawashkar or Alacalufe and Yámana or Yagán communities in the austral fjords. The State values their existence, because they are an essential element of the origins of the Chilean nation, as well as their integrity and development, in accordance with their customs and values.

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[215] *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 52, and *Case of Atala Riffo and daughters v. Chile*, para. 84.

[216] *Cf.* Case of *Atala Riffo and daughters v. Chile*, para. 85.

[217] For example, article 2 of the International Convention for the Elimination of All Forms of Racial Discrimination establishes the obligation of the States parties "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions" and, in its article 1, determines that "the term 'racial discrimination' shall mean 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 2 of the Convention on the Rights of the Child establishes that States "shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status," thus including the category of "race" separately from "national, ethnic or social origin." Article 1 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families stipulates that "[t]he [said] Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status."

[218] The fifth paragraph of the preamble to the United Nations Declaration on the Rights of Indigenous Peoples reaffirms "that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind" and, in article 2, stipulates that "indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." *Cf.* UN Doc. A/RES/61/295, 13 September 2007, *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution 61/295 of the General Assembly of the United Nations.

[219] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 51, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 354.

[220] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 63, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 354.

> It is the duty of society in general and of the State in particular, through its institutions, to respect, protect and promote the development of the indigenous peoples, their cultures, families and communities, taking appropriate measures to achieve these objectives, and to protect indigenous lands, supervise their satisfactory exploitation and their ecological balance, and promote their expansion. [*Bold added*]

206. Article 1(1) of the American Convention prohibits discrimination in general, and includes categories who may not be discriminated against (*supra* para. 196). Taking into account the criteria described previously, this Court places on record that the ethnic origin of an individual is a category protected by the Convention. Hence, the American Convention prohibits any discriminatory norm, act or practice based on an individual's ethnic origin. Consequently, no norm, decision or practice of domestic law, applied by either State authorities or by private individuals, may reduce or restrict in any way the rights of an individual based on his ethnic origin.[221] This is equally applicable to the prohibition, under Article 24 of this instrument, of unequal treatment based on ethnic origin under domestic law or in its application.

a.ii) The right to an impartial judge or court

207. Article 8 of the American Convention is entitled "Right to a Fair Trial" ["Judicial Guarantees" in the Spanish version]. The first of these guarantees is that of Article 8(1), which establishes the following:

> 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.

208. In the instant case, allegations have been submitted to the Court's consideration concerning the supposed lack of impartiality of the judges or courts that handed down the judgments convicting the presumed victims in this case. In this regard, the Court has established that personal impartiality requires that a judge who intervenes in a specific dispute must approach the events of the proceedings without any subjective bias and, also, offering sufficient guarantees of objectivity that eliminate any doubt that the accused or the community may have concerning the absence of impartiality. The Court has emphasized that personal impartiality is presumed unless there is evidence to the contrary consisting, for example, in the demonstration that a member of a court or a judge has personal prejudices or biases against the litigants. The judge must appear to be acting without being subject to direct or indirect influence, incentive, pressure, threat or interference, but only and exclusively in accordance with – and inspired by – the law.[222]

209. The Court has also determined that "a violation of Article 8(1) owing to the presumed lack of judicial impartiality of the judges must be established based on specific, concrete probative elements that indicate the presence of a case in which the judges have clearly let themselves be influenced by aspects or criteria other than legal norms."[223]

210. Effective measures to combat terrorism must be complementary and not contradictory to the observance of the norms for the protection of human rights.[224] When adopting measures

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[221] The same is true with regard to the prohibition of discrimination based on sexual orientation. *Cf. Case of Atala Riffo and daughters v. Chile*, para. 91.

[222] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 56, and *Case of Atala Riffo and daughters v. Chile*, para. 189.

[223] *Cf.* Case of *Atala Riffo and daughters v. Chile*, para.190.

[224] *Cf.* UN Doc. A/HRC/16/51, December 21, 2010, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism,* paras. 12 and 13. Similarly: *Case of Loayza Tamayo v. Peru*. *Merits*, paras. 44 and 57; *Case of Cantoral Benavides v. Peru. Merits*. Judgment of August 18, 2000. Series C No. 69, para. 95; *Case of Lori Berenson Mejía v. Peru*. *Merits, reparations and costs*. Judgment of November 25, 2004. Series C No. 119, para. 91, and *Case of the Miguel Castro Castro Prison v. Peru*. *Interpretation of the judgment on merits, reparations and costs.* Judgment of August 2, 2008 Series C No. 181, paras. 76 to 80.

that seek to protect the persons subject to their jurisdiction against acts of terrorism, States have the obligation to ensure that the criminal justice system and respect for procedural guarantees abide by the principle of non-discrimination.[225] States must ensure that the objectives and effects of the measures taken in the criminal prosecution of terrorist actions are not discriminatory, allowing individuals to be subjected to ethnic stereotypes or characterizations.[226]

b) Application to this specific case

b.i) Alleged discriminatory and selective application of the Counter-terrorism Act to members of the Mapuche indigenous people

211. When the common interveners argued that there had been "selective application of the Counter-terrorism Act," they were referring to statistical data corresponding to the time of the events. In addition, the Commission and the representatives have mentioned a "context" of "selective application" of the Counter-terrorism Act "to individuals belonging to the Mapuche indigenous people" and to the "criminalization of the social protest" of this people (*supra* paras. 189 to 191).

212. Starting with the latter point, the Court understands that it is necessary to make a distinction between the attitudes towards the demonstrations in favor of the Mapuche people's claims disseminated by a major segment of the mass media (*supra* para. 93), and the ways in which the Ministry of the Interior and Public Security, and the Public Prosecution Service acted[227] when deciding in which cases to call for the application of the Counter-terrorism Act and the arguments on which this was based, and the final decisions adopted by the Chilean courts in this regard. The Court must focus its attention on the decisions of the courts, while taking into consideration the possibility that the way in which the media presented the so-called "Mapuche conflict" or the submissions of the Public Prosecution Service may have unduly influenced these decisions.

213. In particular, it should be stressed that, at the time of these trials, a legal presumption was in effect in Law No. 18,314 – that this Court has already declared incompatible with the principles of legality and presumption of innocence (*supra* paras. 168 to 177) – which established that the intention of instilling fear in the general population (special terrorist intent), would be presumed "based on the fact that the offense was committed using explosive or incendiary devices, weapons of great destructive powers, toxic, corrosive or infectious substances, or others that can cause major devastation, or by sending letters, packages or similar objects with explosive or toxic effects."

214. Regarding the second point, even though it was not, perhaps, the common interveners' intention that the Court analyze whether the alleged violations that affected the presumed victims in this case resulted from indirect discrimination arising from the disproportionate impact or indirect discriminatory effects of the said criminal law, the Court will examine, with the means available to it, the so-called "context" of "selective application" of the Counter-

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[225] *Cf.* UN Doc. A/57/18, 8 March 2001, Committee on the Elimination of Racial Discrimination, *Statement on racial discrimination and measures to combat terrorism*, adopted following the terrorist acts perpetrated in the United States of America on September 11, 2001, p. 102.

[226] *Cf.* UN Doc. HRI/GEN/1/Rev.9 (Vol.II), International Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, *General recommendation No. XXX of the Committee on the Elimination of Racial Discrimination (2005)*, para. 10.

[227] In its answering brief, the State explained that "the Ministry of the Interior and Public Security and the Public Prosecution Service are the only public bodies legitimized to file actions against persons who, in their opinion, have committed offenses defined in the Counter-terrorism Act." See also: Table of criminal proceedings in Chile presented by the State as helpful evidence (file of helpful evidence presented by the State, folio 61).

terrorism Act "to individuals belonging to the Mapuche indigenous people" and the "criminalization of the social protest."

215. It is evident that members of the Mapuche indigenous people or activists linked to their cause have been prosecuted and, at times, convicted for actions that the law presumed to be terrorist acts under the legal framework in force at the time.[228] Several trials did conclude with an acquittal and, in this regard, the acquittal of Ms. Troncoso Robles and Messrs. Pichún Paillalao and Norín Catrimán and another five persons is particularly noteworthy. They were tried for the offense of conspiracy to commit a terrorist offense and accused of having formed an organization to commit offenses of a terrorist nature that acted "under the aegis" of the indigenous organization "*Coordinadora Arauco-Malleco*" (CAM) (*supra* para. 92).

216. Both the representatives and the State used or presented evidence relating to statistics on the application of the Counter-terrorism Act that covered different geographical areas and time periods or that analyzed the data from different perspectives. For example, regarding the periods of time, one piece of evidence refers to the period 1997 to 2003,[229] another to 2000 to 2013,[230] another to 2005 to 2012,[231] another to 2008 to 2012,[232] and another to 2010 and 2011.[233] Regarding the different purposes of the analysis, the Court points out that, for example: (a) one document refers to the number of complaints filed by the Ministry of the Interior and Public Security "for Mapuche protest actions" in "Regions VIII and IX" between 1997 and 2003, and reveals the application of the Counter-terrorism Act as of 2002,[234] but does not include information on the results of these proceedings or on proceedings in which this law

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[228] As indicated by Chile in its final written arguments presented in June 2013, "[s]ince 2004, only one person has been convicted of terrorist offenses; in 2009, in a case in which the accused himself acknowledged the acts simply in order to receive a lesser punishment." Also, in the information that Chile provided to the Human Rights Committee on October 21, 2008, the State affirmed that "[n]ine individuals of indigenous origin were convicted under [Law 18,314]." *Cf.* UN Doc. CCPR/C/CHL/CO/5/Add.1, 22 January 2009, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant,* Addendum, Information provided by the Government of Chile on the implementation of the concluding observations of the Human Rights Committee, 21 October 2008, para. 22.b).

[229] *Cf.* Article by Víctor Toledo Llancaqueo, "Prima ratio *Movilización mapuche y política penal. Los marcos de la política indígena en Chile 1990-2007,*" in the journal *Observatorio Social de América Latina*, Year VIII, No. 22, September 2007, Buenos Aires (file of annexes to the FIDH motions and arguments brief, annex 9, folios 66 to 105). Page 263 of this journal includes a "Table" entitled "Regions VIII and IX. Complaints filed by the Government for Mapuche acts of protest, 1997-2003," which indicates that the source of the information is a "note of the Ministry of the Interior based on a report of the Senate (2003) and INE judicial statistics."

[230] *Cf.* Document provided by the State indicating that it is a "List with a historical record of proceedings instituted throughout Chile under the Counter-terrorism Act between 2000 and 2013." The table provided does not have a heading (file of helpful evidence presented by the State, folios 52 to 55).

[231] The document was provided by the State indicating that it is a "List of proceedings in which the Counter-terrorism Act was used" (file of annexes to the answering brief, annex 8, folios 180 to 190). The probative elements offered do not allow the source of this document to be verified conclusively.

[232] The State provided this document indicating that it was a "Document with information on the investigations in the region of Araucanía (Source: Public Prosecution Service)" (file of helpful evidence presented by the State, folios 56 to 60).

[233] During the public hearing, expert witness Jorge Contesse stated that, "the 2011 annual report of the National Human Rights Institute indicates that, between 2010 and 2011, of [the] 48 individuals who were subjected to the special regime of the law that penalizes terrorist actions [Law No. 18,314], 32 of them […] belonged to the Mapuche people or were linked to it. *Cf.* Statement made by expert witness Jorge Contesse before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[234] *Cf.* Article by Víctor Toledo Llancaqueo, "Prima ratio *Movilización mapuche y política penal. Los marcos de la política indígena en Chile 1990-2007,*" in the journal *Observatorio Social de América Latina*, Year VIII, No. 22, September 2007, Buenos Aires (file of annexes to the FIDH motions and arguments brief, annex 9, folios 66 to 105). Page 263 of the journal includes a "Table" entitled in "Regions VIII and IX. Complaints filed by the Government owing to Mapuche acts of protest, 1997-2003" indicating that the source of the information is a "Note of the Ministry of the Interior based on a report of the Senate (2003) and INE judicial statistics."

was applied in relation to acts that were not related to the said protest; (b) other information refers to the proceedings instituted by the Ministry of the Interior and Public Security from 2005 to June 2012 (without specifying whether this refers to those instituted throughout Chile), from which it is possible to determine in how many the Counter-terrorism Act was cited and also to note that it appeared to have been cited for facts that *prima facie* – based on the description in the document – would have no relation to the context of the Mapuche social protest,[235] and (c) other information consists in tables relating to the investigations conducted by the Public Prosecution Service for offenses established in the Counter-terrorism Act between 2000 and July 2013[236] and between 2000 and April 2013[237] that – contrary to the two documents mentioned above include information on the status or result of the proceedings, but do not disaggregate the information by ethnic origin.[238] Also, with regard to the geographical areas that the evidence refers to, some of it covers data only from the Region of Araucanía,[239] without comparing it with references to and application of the Counter-terrorism Act in the rest of the country; some of it covers the whole of the State of Chile without disaggregating the information by ethnic origin,[240] and some of it does not mention the geographical area covered.[241] These same differences with regard to the use of statistics are present in the reports of the Special Rapporteurs and of the international human rights bodies.

217. Nevertheless, the Court pays particular attention to the information contained in the "comments of the State of Chile on the report of the visit of the Special Rapporteur" for promotion and protection of human rights while countering terrorism,[242] according to which, between 2000 and 2013 "the Public Prosecution Service had conducted a total of 19 proceedings under the Counter-terrorism Act, 12 of which related to land claims by Mapuche groups."[243]

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235 The document was provided by the State indicating that it was a "List of proceedings in which the Counter-terrorism Act has been cited" (file of annexes to the answering brief, annex 8, folios 180 to 190).

236 Document offered by the State as a "List with a historical record of [investigations] instituted under the Counter-terrorism Act between 2000 and 2013 throughout Chile (Source: Public Prosecution Service)." The table provided does not have a heading (file of helpful evidence presented by the State, folios 52 to 55). The Court has noted the assertion made by the FIDH in its observations on this evidence presented by Chile that the information provided in this document is incomplete, because, among other matters, it does not contain information on the proceedings held against Victor Manuel Ancalaf Llaupe.

237 *Cf.* document forwarded by the Public Prosecution Service in answer to the request for access to public information made by the representative Sergio Fuenzalida on April 8, 2013 (annex provided by CEJIL with its final arguments).

238 In this regard, see footnote 243.

239 The State provided this document indicating that it is a "Document with information on the investigations in the Region of Araucanía (Source: Public Prosecution Service)" (file of helpful evidence presented by the State, folios 56 to 60).

240 Document provided by the State indicating that it was a "List with a historical record of proceedings instituted under the Counter-terrorism Act between 2000 and 2013 throughout Chile." The table provided does not have a heading (file of helpful evidence presented by the State, folios 52 to 55).

241 The document was provided by the State indicating that it was a "List of proceedings in which the Counter-terrorism Act has been used" (file of annexes to the answering brief, annex 8, folios 180 to 190).

242 *Cf.* UN Doc. A/HRC/25/59/Add.3, 11 March 2014, Human Rights Council, *Comments of the State of Chile on the Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*. Addendum, Mission to Chile, para. 12.

243 This statistic is similar to the information provided by the parties in these proceedings:

a) The document forwarded by the Public Prosecution Service in response to the request for access to public information made by the representative Sergio Fuenzalida on April 8, 2013 (annex provided by CEJIL with its final arguments), which consists in a table with information on a total of 21 proceedings instituted by the Public Prosecution Service in which the Counter-terrorism Act was used between 2000 and April 2013 throughout Chile. This document does not contain information on the defendants disaggregated by ethnic origin. However, in its brief

218. Based on this information it is possible to note that, in most proceedings this law was used against members of the Mapuche indigenous people: of the 19 proceedings in which the criminal investigation was conducted under the Counter-terrorism Act, in 12 of them, the accused were of Mapuche origin or the proceedings were related to land claims by this people. In this regard, several of the reports of the United Nations Special Rapporteurs and Committees have expressed concern owing to the application of the Counter-terrorism Act to members of the Mapuche indigenous people in relation to offenses committed in the context of the social protest[244] or have mentioned a "disproportionate" application of the said law to the Mapuche.[245]

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with final arguments, CEJIL advised the Court that it had verified directly the files of these proceedings and found that in 11 of the 21 cases the accused were "members of the Mapuche people." The State did not contest this evidence or this statement by CEJIL, but ratified the latter, indicating in its final arguments that "the cases instituted by the Public Prosecution Service for terrorist offenses that were related to the Mapuche conflict between 2000 and 2013 numbered 11 throughout Chile."

b) The document that the State provided to the Inter-American Court in response to the request for helpful evidence indicating that it was a "List with a historical record of cases filed under the Counter-terrorism Act between 2000 and 2013 throughout Chile," consists of a table with information on 17 proceedings instituted by the Public Prosecution Service in which the Counter-terrorism Act was used between 2000 and July 2013 throughout Chile, but does not contain information on the defendants disaggregated by ethnic origin (file of helpful evidence presented by the State, folios 52 to 55). The Court asked Chile to supplement the information presented in this document indicating "in which cases the defendants or those convicted were of Mapuche origin." However, the State responded that this information had not been disaggregated and it was not possible to do this within the time frame accorded by the Court. When presenting its observations on this evidence, the FIDH stated that 12 of the 17 cases "are related to the Mapuche protest." Chile did not contest this.

[244] The 2007 report of the Human Rights Committee (CCPR/C/CHL/CO/5) expressed its concern that "charges of terrorism had been brought against members of the Mapuche community in connection with social protests or demands for protection of their land rights," but did not refer to the selective application of the Counter-terrorism Act, but rather to the concern owing to the excessively broad definition of terrorism in Law No. 18,314 and to the restriction of procedural guarantees under this law.

The 2007 report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin – who also provided an expert opinion before the Court in this case – expressed concern about the sentencing and conviction of nine members of the Mapuche community between 2003 and 2005 for offenses related to acts of social protest associated with the claims for indigenous traditional lands, owing to the definition of terrorism found in Chilean legislation.

In 2009, following his visit to Chile from April 5 to 9, 2009, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, considered "a matter of some concern" the "application, especially in recent years, of the Counter-terrorism Act (Law No. 18314) to prosecute and convict members of the Mapuche community for offenses committed in the context of the social protest".

In 2009, in its concluding observations on Chile, the Committee on the Elimination of Racial Discrimination "note[d] with concern that the Counter-Terrorism Act (No. 18,314) ha[d] been mainly applied to members of the Mapuche people for acts that took place in the context of social demands relating to the defence of their rights to their ancestral lands." In this respect, this Committee recommended, *inter alia*, that Chile: "ensure that the Counter-Terrorism Act is not applied to members of the Mapuche community for acts of protest or social demands," and that it put into practice the recommendations made in this regard by the Human Rights Committee in 2007 and by the special rapporteurs on the situation of human rights and fundamental freedoms of indigenous people, following their visits to Chile in 2003 and 2009." The Committee also drew the State party's "attention to its General recommendation No. XXXI (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system (sect. B, para. 5 (e))." In its observations with regard to Chile of September 2013, the same Committee stated that "it remains concerned by reports that this law [No. 18,314] continues to be applied to a disproportionate extent to members of the Mapuche people in respect of acts that have taken place in connection with their assertion of their rights, including their rights to their ancestral lands," and again recommended to the State that it "[e]nsure that the Counter-Terrorism Act is not applied to members of the Mapuche community for acts that take place in connection with the expression of social demands," and that it "[i]mplement the recommendations made in this respect by the Human Rights Committee (2007) and by the Special Rapporteur on the rights of indigenous peoples (2003 and 2007) and take into account the preliminary recommendations made by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2013), and also "[m]onitor the application of the Counter-Terrorism Act and related practices in order to identify any discriminatory effect on indigenous peoples." *Cf.* UN Doc. CCPR/C/CHL/C0/5, 17 April 2007, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee*, Chile, para. 7 (file of annexes to the Merits Report 176/10, annex 8, folio 312); UN Doc. A/HRC/6/17/Add.1, 28 November 2007, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin,* Addendum, para. 9 (file of annexes to the Merits Report 176/10, annex 10, folio 370); UN Doc.

219. The Court considers that the fact that this criminal law codifying terrorist acts has been mostly applied to members of the Mapuche indigenous people does not, in itself, lead to the conclusion that there has been the alleged "selective" application of a discriminatory nature. Furthermore, the Court was not provided with sufficient information on the universe of violent or criminal acts of a similar nature at the time of the events of this case supposedly perpetrated by individuals who were not members of the Mapuche indigenous people, to whom, using the criteria based on which the Counter-terrorism Act was applied in the cases of Mapuche defendants, this law should also have been applied.

220. The information provided by the Government of Chile on one of the observations made by the Human Rights Committee in April 2007 should be taken into account. This referred, among other matter, to the amendment of Law No. 18,314:

> **Amendment to Law 18,314 to bring it into line with article 27 of the [International] Covenant [on Civil and Political Rights]**
>
> 22. While the content of this Act is exceptional, it is a regular law in that it applies to all citizens without distinction, and no discrimination was exercised against the Mapuche individuals prosecuted under it. Quite apart from the specific case of these individuals, it is necessary to understand the context of this situation, which in no way constitutes political persecution of the indigenous or Mapuche movements. The following background information must be taken into consideration:
>
> (a) Minority groups linked to the claims over indigenous land rights began an offensive in 1999 against forestry and agricultural companies in some provinces of regions VIII and IX (Biobío and Araucanía). They carried out illegal occupations and committed robbery and theft; set fire to forests, crops, employer's buildings and houses, agricultural and forestry machinery and vehicles; attacked workers, forestry police, *carabineros* and property owners and their families; and even assaulted and threatened members of Mapuche communities who would not accept their methods. Their action bore no resemblance to that of the vast majority of indigenous organizations, which did not resort to violence to assert their legitimate aspirations;
>
> (b) The Act has been applied in situations of the utmost seriousness in nine prosecutions since 2001. The last occasion was in July 2003, in the case of the attack on the witness Luis Federico Licán Montoya, which left him disabled for life. Nine individuals of indigenous origin were convicted under the Act;
>
> (c) The legal action taken aimed to punish the perpetrators of the crimes, not the Mapuche people; punishing those who commit crimes does not constitute "criminalizing" a social demand, and much less an entire community;

A/HRC/12/34/ Add.6, 5 October 2009, *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*, para. 46 (file of annexes to the Merits Report 176/10, annex 12, folio 441); UN Doc. CERD/C/CHL/C0/15-18, 7 September 2009, 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 the Elimination of Racial Discrimination,* Chile, para. 15 (file of annexes to the Merits Report 176/10, annex 14, folio 502), and UN Doc. CERD/C/CHL/CO/19-21, Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee at its eighty-third session (12-30 August 2013*, para. 14.

[245] In his preliminary evaluation of his visit to Chile from July 17 to 30, 2013, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stated that the protests by members of the Mapuche people related to "reclaiming their ancestral lands," "have typically been characterised by land occupation as well as arson and other forms of physical attacks directed against agricultural, logging and industrial property associated with the commercial settlement of Mapuche territory," and that "[t]he anti-terrorism legislation has been invoked by the local public prosecutors and by the Ministry of the Interior and Public Security in a relatively defined number of emblematic cases, mostly involving multiple accused. The statistics demonstrate that Mapuche protests account for the vast majority of prosecutions under the anti-terrorism legislation." In his final report on the said visit, the Special Rapporteur stated that "there can be no doubt that the anti-terrorism law has been used disproportionately against persons accused of crimes in connection with the Mapuche land protests." *Cf.* Statement by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism of 30 July 2013 on his visit to Chile from 17 to 30 July 2013, and UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson,* Addendum, Mission to Chile, para. 54 (merits file, tome V, folios 2566 to 2587).

(d) Chile has recognized the legitimacy of the indigenous peoples' claims, particularly those of the Mapuche; these claims have always been taken up by the democratic governments and channeled through the institutional machinery. Accordingly, the protection of the right to land has been enshrined in the Indigenous Peoples Act since 1993, enabling the transfer of land as detailed in paragraph 20 above.

23. Nevertheless, the President of the Republic has taken the policy decision not to apply this legislation to cases in which indigenous individuals are involved on account of their ancient demands and grievances, if it is possible to try them under ordinary law in future. It should be noted that in the specific case of the crime of arson, the penalty provided for under the Criminal Code is as high as that under the Counter-terrorism Act.[246]

221. The foregoing reveals that the Court has no evidence that would allow it to determine that the Counter-terrorism Act has been applied in a discriminatory manner against the Mapuche people or its members.

b.ii) Alleged use of stereotypes or social prejudices in the domestic criminal judgments

222. The Commission and the representatives indicated (*supra* paras. 189 to 191) that in various parts of the judgments convicting the presumed victims stereotypes and ethnic prejudices were evident, and asserted that this had constituted a violation of the principle of equality and of the right to an impartial judge or court. In its Merits Report, the Commission concluded in this regard that the State had violated the "right to equality before the law and non-discrimination established in Article 24 of the American Convention, in relation to Article 1(1) of this instrument" and "the defendants' right to an impartial judge established in Article 8(1) of the Convention in relation to Article 1(1) thereof" (*supra* para. 189).

223. Criminal law may be applied in a discriminatory manner if the judge or court convicts an individual on the basis of reasoning founded on negative stereotypes that associate an ethnic group with terrorism in order to determine any element of criminal responsibility. It is incumbent on the criminal judge to verify that all the elements of the offense have been proved by the accuser, because, as this Court has stated, the irrefutable proof of guilt is an essential requirement for criminal punishment; thus, the burden of proof evidently falls on the accuser and not on the accused.[247]

224. Stereotypes are pre-conceptions of the attributes, conducts, roles or characteristics of individuals who belong to a specific group.[248] The Court has indicated that discriminatory conditions "based on stereotypes […] that are socially dominant and socially persistent, […] are increased when the stereotypes are reflected, implicitly or explicitly, in policies and practices, particularly in the reasoning and the language of [the authorities]."[249]

225. Several of the expert witnesses made important contributions in this regard.[250] Expert witness Stavenhagen, proposed by the Commission and the FIDH, indicated that "[t]he discriminatory application of a law may arise from the grounds for its application, or if the reasons cited in order to apply it are not objective or contain some discriminatory element."

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246 *Cf.* UN Doc. CCPR/C/CHL/CO/5/Add.1, 22 January 2009, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant*, Addendum, Information provided by the Government of Chile on the implementation of the concluding observations of the Human Rights Committee, 21 October 2008, paras. 22 and 23.

247 *Cf. Case of Cabrera García and Montiel Flores v. Mexico*, para. 182, and *Case of J. v. Peru*, para. 233.

248 *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 401, and *Case of Atala Riffo and daughters v. Chile*, para. 111.

249 *Cf. Case of González et al. ("Cotton Field") v. Mexico*, para. 401.

250 *Cf.* Written statement made by expert witness Rodolfo Stavenhagen on May 26, 2013, and affidavit prepared on May 17, 2013, by expert witness Carlos del Valle Rojas (file of statements of presumed victims, witnesses and expert witnesses, folios 288 a 290, 296 and 696).

Expert witness Carlos del Valle Rojas, proposed by the FIDH, analyzed the "juridical-judicial discourse" in order to determine the possible "existence of stereotypes, prejudices and discrimination in the criminal judgments" against the presumed victims in this case. In this regard, the expert witness concluded that the judgments "used discursive terms the judgmental, moral and/or political weight of which denotes the acceptance and reproduction of stereotypes that include strong social and cultural prejudices against the Mapuche communities and negative elements in favor of the prosecution." The expert witness indicated that "a significant part of the legal arguments" of these judicial decisions reveals "stereotypes and prejudices that reflect negatively on these communities, […] even though this is not revealed by the facts proved during the proceedings." He also affirmed that "different parts of the judgments […] use arguments that discriminate against the Mapuche communities" and that, "on various occasions, legal decisions that prejudice Mapuche leaders or community members are substantiated by a series of reasonings that, in turn, are supported by discriminatory terms, stereotypes or preconceived prejudices, in relation to the case examined." The expert witness analyzed different extracts from the domestic judgments that he considered "reveal" this "assimilation of stereotypes and prejudices and the recurrent use of discriminatory reasoning" by the domestic courts.

226. In order to establish whether a difference in treatment is based on a suspect category and to determine whether this constituted discrimination, it is necessary to examine the arguments adduced by the domestic judicial authorities, their actions, the language used, and the context in which th judicial decisions were handed down.[251]

227. The following are among the terms that the Commission and the common interveners of the representatives indicated, in particular, as being discriminatory and, with some variations, they appear in the different judgments:

> "[…] the actions that resulted in these wrongful acts reveal that the form, methods and strategies used had the criminal purpose of causing a generalized state of fear in the region.
>
> The said wrongful acts are inserted in a process of recovery of Mapuche lands carried out committing acts of violence, without respecting the legal and institutional order, resorting to the use of force, planned, coordinated and prepared in advance by radicalized groups that seek to create a climate of insecurity, instability and fear in different sectors of Regions XIII and IX. These actions can be summarized in the formulation of excessive demands, made under pressure by belligerent groups to the owners and proprietors, who are warned that they will suffer different consequences if they do not accede to the groups' demands. Many of these threats have materialized in the forms of attacks on physical integrity, robberies, theft, arson, vandalism and occupation of land, which have affected both the personnel and the property of various owners of agricultural properties and logging companies in this part of the country.
>
> The objective is to instill in the population a justified fear of falling victim to similar attacks and, thereby, to force the owners to cease any further exploitation of their properties and, ultimately, to force them to abandon their properties. The feeling of insecurity and unease that these attacks cause has led to a decrease in the availability of labor and an increase in its cost, an increase in costs and loans both for hiring machinery for exploiting the properties and in the cost of policies to insure the land, the installations and the crops. Furthermore, it is increasingly common to see workers, machinery, vehicles and operations on the different properties under police protection to safeguard operations, all of which affects rights protected by the Constitution.
>
> The foregoing is revealed by – although not necessarily with the same characteristics – the corroborating testimonies of Juan and Julio Sagredo Marín, Miguel Ángel Sagredo Vidal, Mauricio Chaparro Melo, Raúl Arnoldo Forcael Silva, Juan Agustín Figueroa Elgueta, Juan Agustín Figueroa Yávar, Armín Enrique Stappung Schwarzlose, Jorge Pablo Luchsinger Villiger, Osvaldo Moisés Carvajal Rondanelli, Gerardo Jequier Shalhlí and Antonio Arnoldo Boisier Cruces, who stated that they had been direct victims or knew of threats and attacks against individuals or property perpetrated by individuals belonging to the Mapuche ethnic group, witnesses who expressed in different ways the feeling of fear that these acts caused them. The foregoing is related to the words of expert witness José Muñoz Maulen, who stated that he had backed up on a compact disc information from his computer obtained

[251] *Cf.* Case of *Atala Riffo and daughters v. Chile*, para. 95.

from the website "http/fortunecety.es/," which describes different activities related to the land claim movement that some of the members of the Mapuche ethnic group are carrying out in the eighth and ninth region of the country; the information contained in the report of the July 1, 2002, session of the Constitution, Legislation, Justice and Regulation Committee of the Senate of the Republic, which concluded with the finding of lack of service by the State; the information that has not been disproved and contained in part C, pages 10 and 11 of the edition of *El Mercurio* of March 10, 2002, on the number of conflicts caused by Mapuche groups by terrorist acts, online publications of *La Tercera*, *La Segunda* and *El Mercurio*, published on March 26, 1999, December 15, 2001, March 15 and June 15, 2002, respectively, and three tables taken from the webpage of the Chile's Foreign Investment Committee, divided into sectors and by regions, based on the political and administrative division of the country, that allow comparisons to be made between dollars invested in the other regions and in the Ninth, and show that private investment in the region has decreased.[252]

* * *

[…] Regarding the participation of both accused, the following must 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 of victims Juan and Julio Sagredo Marin, Juan Agustin Figueroa Elgueta and Juan Agustin Figueroa Yávar, 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 previously.

2. It has not been sufficiently established that these acts were caused by persons outside the Mapuche communities, since they were clearly intended to create a climate of harassment towards the property owners in the sector, in order to instill fear and make the owners accede to their demands. Their rationale relates to the so-called "Mapuche problem," because the perpetrators knew the territory that was claimed and no Mapuche community or property has been harmed.

3. It has been established that the defendant, Pascual Pichú, is a *Lonko* of the "Antonio Ñirripil" community and Segundo Norín is a *Lonko* of the "Lorenzo Norín" community, and this means that they have authority within the community and some degree of leadership and control over it.

4. It should also be emphasized that the defendants Pichún and Norín have been convicted of other offenses related to land occupation committed prior to these events and against wooded properties located near their respective communities. This is revealed by case file No. 22,530 and joindered cases in which Pascual Pichún was sentenced to four years of medium-term rigorous imprisonment at the maximum level, and Segundo Norín to 800 days of medium-term rigorous imprisonment at the medium level and, in both cases, to the legal ancillary penalties and costs for the offense of *[sic]*. In addition, Pichún Paillalao was also sentenced to 41 days' imprisonment at the maximum level and to the payment of a fine of 10 monthly tax units as perpetrator of the offense of driving under the influence. This is revealed from the respective extracts from his identity documents and record and from the copies of the final judgments duly certified and incorporated.

5. The Mapuche communities of Didaico and Temulemu adjoin the Nancahue forest farm, and

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[252] Thirteenth *considerandum* of the judgment delivered on September 27, 2003, convicting Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao. This passage is almost identical to one included in the previous judgment acquitting them, which was annulled (*supra* paras. 112 to 118); and to another passage contained in the nineteenth *considerandum* of the Judgment delivered on August 22, 2004, by the same court convicting Juan Patricio and Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, and Patricia Roxana Troncoso Robles in the criminal proceedings relating to the act of arson on the Poluco Pidenco property (*supra* para. 126). *Cf.* judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, thirteenth *considerandum*; judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, tenth *considerandum*, and judgment delivered on August 22, 2004, by Angol Oral Criminal Trial Court, second and nineteenth *consideranda* (file of annexes to the Merits Report 176/10, annex 15, 16 and 18, folios 537 to 540, 569 to 571, 679 and 680).

6. According to the testimony of Osvaldo Carvajal, both of the defendants are members of the *Coordinadora Arauco Malleco* C.A.M, a *de facto* organization – he repeated – and one of a violent nature.[253]

* * *

That the facts described in the preceding *considerandum* constitute the terrorist offense established in article 2.4 of Law No 18,314, in relation to article 1 of that law. This is because they reveal that actions were taken in order to instill in some of the population a justified fear of falling victim to such crimes, bearing in mind the circumstances, and also the nature and effects of the means employed, as well as the evidence that they were the result of a premeditated plan to attack the property of third parties engaged in work relating to the construction of the Ralco Power Plant of Alto Bío Bío, all with the purpose of forcing the authorities to take decisions that would prevent the construction of this plant.[254]

* * *

19. That the evidence relating to the first, seventh and thirteenth conclusions of the first instance ruling constitute judicial presumptions that, carefully assessed, prove that the trucks and the backhoe were set on fire in the context of the Pehuenche conflict, in Region 8, province of Bío Bío, Santa Bárbara commune, in the sector of the cordillera known as Alto Bío Bío, which is related to the opposition to the construction of the Ralco Hydroelectric Plant, and where, also, it is well-known that the sisters, Berta and Nicolasa Quintremán Calpán are opposed to the Endesa project because their land – which contains their ancestors, their origins, their culture and their traditions – will be flooded when the Plant is built.

The acts took place in this context as a way of compelling the authorities to take decisions, or of imposing demands to halt the construction of the Plant.

20. That, to this end, on September 29, 2001, and March 3 and 17, 2002, two trucks and a backhoe were set on fire and, subsequently, two more trucks; all vehicles working for Endesa. The first incident involved several individuals all except one of whom wore hoods; they fired a shotgun and hit the truck driver with a stick. The second incident involved at least two individuals with their faces covered, one of them, armed with a shotgun, fired two shots into the air. On the third occasion, a group of hooded individuals was involved, one of whom carried a firearm and fired shots into the air. In all these incidents, inflammable fuel, such as gasoline or a similar product, was used.

The illegal acts described above were carried out violently without observing the legal and institutional order in force, resorting to previously planned acts of violence. Considering how the events occurred, the place and the *modus operandi*, they were perpetrated to create situations of insecurity, instability and anxiety, instilling fear in order to present demands to the authorities under criminal pressure imposing conditions in order to achieve their objectives.[255]

228. The Court considers that the mere use of this reasoning, which reveals stereotypes and biases, as grounds for the judgments constituted a violation of the principle of equality and non-discrimination and the right to equal protection of the law, recognized in Article 24 of the American Convention, in relation to Article 1(1) of this instrument.

229. The allegations of a violation of the right to an impartial judge or court, established in Article 8(1) of the American Convention, are closely linked to the presumption of the terrorist intent "to instill […] fear in the general population" (a subjective element of the definition) that, as the Court has already declared (*supra* paras. 168 to 177), violates the principle of legality and the guarantee of presumption of innocence established in Articles 9 and 8(2) of the Convention, respectively. The alleged violation of Article 8(1) should be considered subsumed in the previously declared violation of Articles 9 and 8(2). Consequently, the Court considers that it is not necessary to rule in this regard.

230. *The Court concludes that the State has violated the principle of equality and non-discrimination and the right to equal protection of the law recognized in Article 24 of the*

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253 Fifteenth *considerandum* of the Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folios 513 and 514).

254 Fifteenth *considerandum* of the Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal (file of annexes to the Merits Report 176/10, annex 20, folios 751 and 752).

255 Nineteenth and twentieth *consideranda* of the Judgment delivered on June 4, 2004, by the Third Chamber of the Concepción Court of Appeal (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1730 and 1731).

American Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

B) Right of the defense to examine witnesses (Article 8(2)(f) of the Convention) in relation to the criminal proceedings against Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe

1. Pertinent facts

231. In the criminal proceedings against Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe the identity of certain witnesses was kept secret.

a. Proceedings against Messrs. Norín Catrimán and Pichún Paillalao

232. In the proceedings against Messrs. Norín Catrimán and Pichún Paillalao, the Traiguén guarantees judge, at the request of the Public Prosecution Service, ordered that the identity of two witnesses be kept secret and prohibited taking photographs of them or recording their image by any other means,[256] based on articles 307 and 308 of the Criminal Procedural Code and articles 15 and 16 of Law No. 18,314.

a) The 2000 Criminal Procedural Code establishes the obligation of the witness to identify himself and provide all his personal data,[257] except when the "public indication of his address could entail danger for [him] or another person," in which case "the President of the chamber or the judge, as applicable, may authorize the witness not to answer this question." Moreover, if the witness avails himself of this right, "the disclosure, in any form, of his identity or information that would lead to this, shall be prohibited," and this shall be ordered by the court (Article 307). Also, the Code stipulates that the court may order "special measures designed to protect the safety of the witness who requests this" in "specific serious cases," which "may be renewed as often as necessary" and, similarly, establishes that "the Public Prosecution Service, *ex officio* or at the request of the interested party, shall adopt any measures required in order to provide the witness, before or after he has given his testimony, with appropriate protection" (Article 308).

b) Article 15 of Law No. 18,314 contains norms that supplement "the general rules on witness protection of the Criminal Procedural Code."[258] They establish that "if, during the investigation stage, the Public Prosecution Service considers that, owing to the circumstances of the case, there is a real risk to the life or physical integrity of a witness or an expert witness" or of certain individuals to whom such persons are related by blood or marriage, or through ties of affection, "it shall order, *ex officio* or at the request of the interested party, any special measures of protection that are required […] to protect the identity of those who intervene in the proceedings, their home, profession and place of

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256 *Cf.* Application by the Public Prosecution Service, Traiguén local prosecutor, of September 2, 2002, addressed to the Traiguén guarantees judge, requesting, among other matters, "[t]hat no mention is made in the investigation files of the first name, last name, profession or trade, place of work, or any other information that could serve to identify the witnessed who appear in the investigation as 'Witness No.1 RUC 83503-6 and 'Witness No.2 RUC 83503-6,' using these codes as a mechanism to verify their identity and eliminating their personal data from the said records," and Decision issued on September 3, 2002, by the Traiguén guarantees judge (file of annexes to the Merits Report 176/10, appendix 1, folios 4422 to 4424).

257 Article 307 of the Criminal Procedural Code establishes that: "[t]he statement of the witness shall commence be indicating his personal information, especially his first names, last names, age, place of birth, civil status, profession, trade or employment, and residence or domicile […]."

258 Article 15 of Law No. 18,314 establishes that: "[n]otwithstanding the general rules on witness protection of the Criminal Procedural Code […]."

work." Article 16 of the Counter-terrorism Act grants the court the authority "to order the prohibition to reveal, in any way, the identity of protected witnesses or expert witnesses, or any information that would lead to their identification," as well as "the prohibition for them to be photographed, or their image to be recorded by any other means."

233. The Public Prosecution Service founded its request on the fact that it was "absolutely necessary to adopt these measures to guarantee the proper protection of the witnesses, as well as of their family members and other persons connected to them by ties of affection, owing to the nature of the illegal acts under investigation and, in particular, considering their characteristics; circumstances that mean that the case investigated is particularly serious." The Public Prosecution Service also asserted that "these measures do not impair the right of defense, because the prosecution has already provided the defense with the records of the investigation so that they can make the corresponding arguments in the hearing prior to the oral trial and prepare the respective cross-examinations for the oral trial." The Traiguén guarantees judge admitted all aspects of this request.[259]

234. Two anonymous witnesses testified at the public hearings held in the trials against Messrs. Norín Catrimán and Pichún Paillalao. They did this behind a "screen" that hid their faces from all those present except the judges and with a "voice distorter." The defense was able to examine them in these conditions. In the second trial, which was held because the first one was annulled, the defense counsel were allowed to know the identity of the said witnesses, but under the express prohibition to transmit this information to the defendants. Mr. Norín Catrimán's defense counsel refused to be informed of the identity of the witnesses because he was unable to tell the defendant. In both the initial acquittal judgment and in the later judgment that delivered a guilty verdict, the testimony of the anonymous witnesses was taken into account and assessed.[260] This factual framework makes it relevant to refer to the fact that, at the date of these proceedings, the last paragraph of Article 18 of the Counter-terrorism Act established that "[t]he testimony of a protected witness or expert witness may never be received and introduced in the trial without the defense having been able to exercise its right to cross-examine him in person."

b. Proceedings against Mr. Ancalaf Llaupe

235. The criminal proceedings against Víctor Ancalaf Llaupe were conducted under the 1906 Code of Criminal Procedure and its amendments and had two stages, the preliminary and the plenary proceedings, both of them of a written nature (*supra* para. 104). According to articles 76 and 78 of this Code, during the preliminary proceedings, which was confidential, "the investigation of the acts that constitute[d] the offense" was conducted and also the "measures to prepare the trial." According to article 449 of this Code, during the plenary adversarial proceedings, it was not necessary to re-submit the evidence collected during the preliminary proceedings if the defendant waived the submission of evidence at that stage and agreed that the judge could deliver his ruling, "without any more formalities than the indictment and the answer to this." In addition, article 189 established the "right' of "[e]very witness" "to request" the "*Carabineros*, the Police Investigation Unit, or the court" to "keep his identity secret from third parties" and "in specific serious cases," the judge could "order special measures to protect the safety of the witness who requests this" that would remain in place for "the reasonable time established by the court and c[ould] be renewed as often as necessary."

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[259] *Cf.* Application by the Public Prosecution Service, Traiguén local prosecutor, of September 2, 2002, addressed to the Traiguén guarantees judge, and Decision issued on September 3, 2002, by the Traiguén guarantees judge (file of annexes to the Merits Report 176/10, appendix 1, folios 4422 to 4424).

[260] *Cf.* Summary of the audio recordings of the oral trial held on March 31 and on April 8, 2001, before the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 424 to 444), Judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, and Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15 and 16, folios 509 to 574).

236. In the proceedings against Mr. Ancalaf Llaupe the identity of certain witnesses was kept secret during the two stages, and even in the plenary proceedings, the defense did not have access to all the proceedings, because secret files were established. The corresponding measures were based on the mere citing of the norms applied, without any specific grounds in relation to the case in question.[261]

2. Arguments of the Commission and of the parties

237. The Commission alleged the violation of Article 8(2)(f) of the Convention, in relation to Articles 1(1) and 2 of this instrument with regard to Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe, citing case law of the European Court of Human Rights in this regard. It argued that the justification for exceptional measures, such as the anonymity of deponents in criminal proceedings, arises from the nature of a certain kind of case and to the extent that the life and personal integrity of the deponents may be at risk; nevertheless, they should be "counterbalanced by other measures […] so as to compensate for the handicap under which the defense is laboring." Regarding the proceedings against Mr. Ancalaf Llaupe, it affirmed that the testimony of anonymous witnesses was received during an inquisitorial proceeding that "was kept secret for most of the investigation," so that it was not possible to examine these witnesses when they were giving their testimony. It added that, even though the testimony of these witnesses was assessed together with other evidence, they were "decisive" in establishing the existence of the offenses and the responsibility of the defendants. It considered that "the restrictions to the 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."

238. The FIDH stated that Chile had "violated the right of defense of the *Lonkos* Aniceto Norín and Pascual Pichún, specifically their right to examine the witnesses present in the court under Article 8(2)(f) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument." They asserted that the new criminal procedural system established witness protection mechanisms "other than the 'faceless' witnesses" established in the Counter-terrorism Act, which was applied in the case of Messrs. Norín Catrimán and Pichún Paillalao. They indicated that it was very serious that the secret identity regime ensures "the impunity [of the] witness who does not tell the truth and prevents cross-examination." It stated that the refusal to lift the anonymity in the case of one of these witnesses was a "strategy" to ensure that he could "lie with impunity." It asserted that "no measure was taken to counterbalance the anonymous witnesses," even though, "during the second trial, an attempt was made to rectify the violation of due process committed in the first trial that was annulled, [and in which] it had been totally prohibited to give out the names of the [anonymous] witnesses, and their identity had only been revealed to the lawyers with the express prohibition to advise the *Lonkos* of their names." It alleged that the right to carry out a "genuine cross-examination" was curtailed, since "it was not permitted to ask questions that would make it possible to infer the identity of the witness." It also affirmed that Law No. 18,314 does not establish that this measure is exceptional; it merely defends the need for it based on the severity of the offenses presumably committed, which constitutes a "circular argument." It also stated that this measure is not subject to judicial control and that the witnesses could come forward to testify with illegitimate interests owing to the authorization under Law 18,314 that they can be paid sums of money.

239. CEJIL affirmed that Chile had violated Article 8(2)(f) of the Convention to the detriment of Mr. Ancalaf Llaupe, within a broader argument on the "access to an effective

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[261] *Cf.* Judicial file of the domestic criminal proceedings held against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1203, 1204, 1235, 1236, 1246, 1435, 1444 to 1446, 1455, 1461 and 1477 to 1482).

defense," stating that the adversarial principle entails the right of the defendant to examine the witnesses who testify for and against him, under the same conditions. It indicated that "[t]he inquisitorial procedure held against [Mr. Ancalaf Llaupe] prevented him from examining the witnesses who incriminated him when they were testifying, leaving the defense in a situation of evident procedural imbalance," which "was aggravated by the use of anonymous witnesses," and because he was "convicted based on testimony provided in secret files." It stated that "there is no evidence in the case file" that the defense of Víctor Ancalaf Llaupe were able to examine and cross-examine witnesses who had testified during the preliminary proceedings. It indicated that "the use of anonymous witnesses must be duly justified and counterbalance adequately [in order to] protect the right of defense." It affirmed that "[n]either the exceptional use of the mechanism [of anonymous witnesses], nor the existence of a real danger was proved during the proceedings." CEJIL also affirmed that the State had violated Article 8(2)(f) of the Convention to the detriment of Mr. Ancalaf Llaupe because the possibility of his defense counsel "obtaining evidence during the plenary proceedings was almost inexistent" and "he did not have a real and effective right to answer the charges and evidence against him."

240. The State indicated that "the possibility of establishing measures of protection for certain witnesses in criminal cases is consequent with the obligation to safeguard the right to life and physical integrity of [the] individual." Nevertheless, "to ensure that [this] cannot affect the right of defense substantively, it must observe certain conditions that also allow this right to be safeguarded." It affirmed that both general procedural laws and the Counter-terrorism Act permit "the cross-examination of witnesses and expert witnesses, even those whose identity is kept confidential," with the restrictions imposed by article 18 of the latter to the effect that questions may not be asked that "entail a risk of revealing the identity [of the witness]," and indicated that the courts "know the identity of the witness and are able to assess the reliability of his testimony, [because, based on the] principle of immediacy that governs the criminal procedural system, every witness or expert witness is examined before [the courts]." It also affirmed that this measure is subject to "prior control," because a request must be made to the guarantees judge together with the respective justification "based on the risk to the safety of the witness or his family." It indicated that this type of testimony is assessed by the oral trial court under its obligation to provide the reasoning for its conclusions, and that "it is possible that the respective court may rely on the testimony of one or more anonymous witnesses, together with other evidence provided, if applicable, to convince it fully of the participation of the defendant in the acts that he is accused of, without this being, in itself, contrary to the right to due process or to the international standards."

3. Considerations of the Court

241. On previous occasions the Court has ruled on violations of the right of the defense to examine witnesses in cases dealing with measures that, under the military criminal justice system, imposed an absolute prohibition to cross-examine witnesses for the prosecution,[262] others in which there were not only "faceless witnesses" but also "faceless judges,"[263] and another that referred to a political trial held before Congress in which the defendant judges were not allowed to cross-examine the witnesses on whose testimony their dismissal was based.[264]

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[262] *Cf. Case of Palamara Iribarne v. Chile*, paras.178 and 179.

[263] *Cf. Case of Castillo Petruzzi et al. v. Peru, Merits, reparations and costs*, paras. 153 to 155; *Case of Lori Berenson Mejía v. Peru*, para.184; *Case of García Asto and Ramírez Rojas v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2005. Series C No. 137, para.152, and *Case of J. v. Peru*, paras. 208 a 210.

[264] *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 83.

242. Subparagraph (f) of Article 8(2) of the Convention establishes the "minimum guarantee" of "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," which underlies the adversarial principle and the principle of procedural equality. The Court has indicated that, among the guarantees recognized to the accused, is that of examining the witnesses for and against them, under the same conditions in order to defend themselves.[265] The anonymity of the witness restricts the exercise of this right, because it prevents the defense from asking questions related to the possible hostility, prejudice and reliability of the deponent, as well as other that would allow arguing that the testimony is untruthful or erroneous.[266]

243. The State's duty to ensure the rights to life and to personal integrity, liberty and safety of those who testify in criminal proceedings may justify the adoption of measures of protection. In this regard, the laws of Chile include both procedural measures (such as maintaining the confidentiality of personal information or physical characteristics that identify a person), and extra-procedural (such as protection of personal safety).

244. In the instant case, the Court will limit its analysis to deciding whether the procedural measure of preserving the anonymity of witnesses, which was applied in the criminal proceedings held against three of the presumed victims (*supra* paras. 232 to 236), entailed a violation of the right of the defense to examine the witnesses. This measure is regulated in Chile as described in paragraph 232 and, in this regard, the Supreme Court has stated that:

> […] such a serious decision may only be taken in each particular case and with complete awareness of the specific circumstances. These are exceptional measures for exceptional situations and are always adopted with absolute control over those who intervene so that the harm to the exercise of any of the rights of the defense in a trial are minimum, and that it never obstructs or limits the exercise of the essence of this guarantee.[267]

245. The Court will now examine whether, in the above-mentioned trials of these three presumed victims in this case, the measure of preserving witness anonymity was adopted subject to judicial control,[268] based on the principles of necessity and proportionality, taking into account that this is an exceptional measure and verifying the existence of a situation of risk for the witness.[269] When making this assessment, the Court will bear in mind the impact that the measures had on the right of defense of the accused.

246. In order to rule in the instant case, the Court will also take into consideration whether, in the specific cases, the State ensured that the effects on the right of defense of the accused that results from the use of the measure of preserving the anonymity of witnesses was sufficiently offset by counterbalancing measures, such as:[270] (a) the judicial authority must be aware of the

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265 *Cf. Case of Castillo Petruzzi et al. v. Peru, Merits, reparations and costs*, para. 154, and *Case of J. v. Peru*, para. 208.

266 *Cf.* ECHR, *Case of Kostovski v. The Netherlands*, No. 11454/85. Judgment of 20 November 1989, para. 42.

267 In its brief with final arguments, the State transcribed parts of a ruling of the Supreme Court of Justice of March 22, 2011, "on the application for a declaration of nullity of the judgment delivered by the Cañete Oral Criminal Court" (merits file, folio 2140 to 2142).

268 *Mutatis mutandi,* ECHR, *Case of Doorson v. The Netherlands*, No. 20524/92. Judgment of 26 March 1996, paras. 70 and 71; *Case of Visser v. The Netherlands*, No. 26668/95. Judgment of 14 February 2002, paras. 47 and 48; *Case of Birutis and Others. v. Lithuania*, Nos. 47698/99 and 48115/99. Judgment of 28 June 2002, para. 30, and *Case of Krasniki v. the Czech Republic*, No. 51277/99. Judgment of 28 May 2006, paras. 79 to 83.

269 *Cf.* ECHR, *Case of Krasniki v. The Czech Republic*, No. 51277/99. Judgment of 28 May 2006, para. 83, and *Case of Al-Khawaja and Tahery v. The United Kingdom*, Nos. 26766/05 and 22228/06. Judgment of 15 December 2011, paras. 124 and 125.

270 *Cf.* ECHR, *Case of Doorson v. The Netherlands*, para. 72; *Case of Van Mechelen and Others v. The Netherlands*, Nos. 21363/93, 21364/93, 21427/93 and 22056/93. Judgment of 23 April 1997, paras. 53 and 54, and *Case of Jasper v. The United Kingdom*, No. 27052/95. Judgment of 16 February 2000, para. 52.

identity of the witness and be able to observe his demeanor under questioning in order to form its own impression of the reliability of the witness and of his testimony,[271] and (b) the defense must be granted every opportunity to examine the witness directly at some stage of the proceedings on matters that are not related to his identity or actual residence; this is so that the defense may assess the demeanor of the witness while under cross-examination in order to be able to dispute his version or, at least, raise doubts about the reliability of the testimony.[272]

247. Even when counterbalancing procedures have been adopted that appear to be sufficient, a conviction should not be based either solely or to a decisive extent on anonymous statements.[273] To the contrary, it would be possible to convict the accused by the disproportionate use of a probative measure that was obtained while impairing this right of defense. Since this is evidence obtained in conditions in which the rights of the accused have been limited, the testimony of anonymous witnesses must be used with extreme caution,[274] must be assessed together with the body of evidence, the observations and objections of the defense, and the rules of sound judicial discretion.[275] The decision as to whether this type of evidence has weighed decisively in the judgment convicting the accused will depend on the existence of other types of supportive evidence so that, the stronger the corroborative evidence, the less likely that the testimony of the anonymous witness will be treated as decisive evidence.[276]

a. Criminal proceedings against Messrs. Norín Catrimán and Pichún Paillalao

248. The Court will now examine the judicial control exercised with regard to the adoption of the mechanism of witness anonymity, the counterbalancing measures taken to offset the effects on the right of defense of the accused and, lastly, whether the testimony of the anonymous witnesses, in the specific circumstances of the proceedings, had a decisive impact on the sentencing and conviction of Messrs. Norín Catrimán and Pichún Paillalao.

249. The judicial control of the anonymity of witnesses was insufficient. The judicial decision that ordered it does not contain any explicit justification, and merely admits a request of the Public Prosecution Service that only refers to the "nature," the "characteristics," and "seriousness" of the case, without specifying the objective criteria, the reasoning, and the verifiable evidence that, in the specific case, would substantiate the alleged risk for the witnesses and their families (*supra* paras. 232 and 233). The Court understands that this

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271 *Cf.* ECHR, *Case of Kostovski v. The Netherlands* (no. 11454/85), Judgment of 20 November 1989, para. 43; ECHR, *Case of Windisch v. Austria*, (no. 12489/86), Judgment of 27 September 1990, para. 29, and ECHR, *Case of Doorson v. The Netherlands*, para. 73.

272 *Cf.* International Criminal Tribunal for the Former Yugoslavia (ICTFY), Prosecutor *v.* Dusko Tadic a/k/a "Dule", Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras. 67 and 72; ECHR, *Case of Kostovski v. The Netherlands*, No. 11454/85. Judgment of 20 November 1989, para. 42; *Case of Windisch v. Austria*, No. 12489/86. Judgment of 27 September 1990, para. 28; *Case of Doorson v. The Netherlands*, para. 73; *Case of Van Mechelen and Others v. The Netherlands*, Nos. 21363/93, 21364/93, 21427/93 and 22056/93. Judgment of 23 April 1997, paras. 59 and 60.

273 *Cf.* ECHR, *Case of Doorson v. The Netherlands*, para. 76, and *Case of Van Mechelen and Others v. The Netherlands*, Nos. 21363/93, 21364/93, 21427/93 and 22056/93. Judgment of 23 April 1997, paras. 53 a 55.

274 *Cf.* ECHR, *Case of Doorson v. The Netherlands*, para. 76, and *Case of Visser v. The Netherlands*, No. 26668/95. Judgment of 14 February 2002, para. 44.

275 *Mutatis mutandis, Case of Velásquez Rodríguez v. Honduras*. *Merits*, para. 146, and *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 44.

276 *Cf.* ECHR, *Case of Al-Khawaja and Tahery v. The United Kingdom*, Nos. 26766/05 and 22228/06. Judgment of 15 December 2011, para. 131.

decision did not constitute effective judicial control because it did not include criteria that would reasonably justify the need for the measure based on a situation of risk for the witnesses.

250. The counterbalancing measures implemented were adequate to safeguard the right of the defense to examine witnesses. The defense had access to the statements made by these witnesses during the investigation stage, so that they could be contested and, in the case of "witnesses for the prosecution whose testimony had not been recorded during the investigation, [this] motivated a divided accessory decision by the judges noting that their statements would be considered insofar as they did not violate due process and would be assessed freely."[277] The request by the Public Prosecution Service was accompanied by a sealed envelope containing information on the identity of the witnesses for whom anonymity was requested;[278] their statements were made in the hearing before the Oral Trial Court with the consequent immediacy in the reception of the evidence, and the defense was given the opportunity to examine them during the hearing and to know their identity, with the reservation that they could not inform the accused (*supra* para. 234).

251. On the vital point of whether the convictions were based solely or to a decisive extent on these statements (*supra* para. 247), there are differences between each of those convicted:

a) Regarding the sentencing of Mr. Norín Catrimán, the testimony of anonymous witnesses was not used as grounds for the declaration of his responsibility as perpetrator of the offense of threat of terrorist arson against the owners of the San Gregorio property. Although witness anonymity was allowed at the investigation stage, without effective judicial control (*supra* para. 249), in this case it did not lead to a violation of the guarantee established in Article 8(2)(f) of the Convention, because the testimony of this witness was not decisive and, at the trial stage, specific counterbalancing measures were guaranteed so that the defense could examine the anonymous witness and contest his testimony (*supra* paras. 234 and 250).

b) To the contrary, the criminal conviction of Mr. Pichún Paillalao as perpetrator of the offense of threat of terrorist arson against the administrator and owners of the Nancahue forest farm was based decisively on the testimony of an anonymous witness ("anonymous witness No. 1"), because, even though reference is made to other types of evidence, these alone would not have been sufficient to convict him, since the other three persons who testified only knew about the events indirectly. Furthermore, the judgment referred to an undated letter with supposed threats signed by Mr. Pichún, and a cheque signed by the administrator of the Nancahue forest farm and made out to the accused.[279] It also mentioned a testimonial statement indicating that the *Coordinadora*

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[277] *Cf.* Judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, thirteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 16, folios 556 to 574).

[278] *Cf.* Application of the Public Prosecution Service, Traiguén local prosecutor of September 2, 2002, addressed to the Traiguén guarantees judge (file of annexes to the Merits Report 176/10, appendix 1, folios 4422 to 4424).

[279] In the sixteenth *considerandum* of the judgment handed down on September 27, 2003, the Angol Oral Criminal Trial Court indicated that "the following information indicates that the accused Pascual Pichún is guilty as the perpetrator of the offense of threats against the owners and administrator of the Nancahue forest farm: […] [u]ndated letter signed by Pascual Pichún Paillalao, as President of the Antonio Ñirripil community, addressed to Juan Agustín and Aída Figueroa Yávar, requesting permission to thin out their pine forest, to pasture the community's animals in the clearings in the forest and, if there were no trees that needed to be thinned out, permission was requested to exploit 100 hectares of closed forest; the letter added that some companies had agreed to grant this benefit, and it was well-known that some that had refused had suffered harm that has caused alarm in the Lumaco sector, and they 'did not want this to happen between us' for any reason. Also copy of cheque No. 1182177 on account No. 62300040301 of Juan A. Figueroa Yávar, signed by Juan A. Figueroa Elgueta in favor of Pascual Pichún for the sum of $130,000 issued on February 26, 2001." The other place in this judgment where reference is made to the letter and the cheque is in subparagraph (C) of the eighth *considerandum* on the evidence provided concerning the "threats of terrorist arson against the owners and administrators of the Nancahue forest farm." In the eighth *considerandum*, when referring to "[t]he documentary evidence […] incorporated," it repeats the content of the sixteenth *considerandum*. With regard to the cheque, there is no record of whether the court analyzed the

Arauco-Malleco was a *de facto* terrorist organization, and that Mr. Pichún belonged to it, without analyzing the impact of this on the perpetration of the offense.[280]

252. Based on the above, *the Court concludes that, when delivering a guilty verdict, a decisive significance was accorded to the testimony of an anonymous witness, which constitutes a violation of the right of the defense to examine witnesses, established in Article 8(2)(f) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Pascual Huentequeo Pichún Paillalao.*

b. Criminal proceedings against Mr. Ancalaf Llaupe

253. Regarding the criminal proceedings against Mr. Ancalaf Llaupe, the Court will analyze the second instance judgment convicting him delivered by the Concepción Court of Appeal on June 4, 2004, which revoked partially the first instance judgment delivered by the investigating judge of the Concepción Court of Appeal on December 30, 2003 (*supra* paras. 144 to 147), as well as the pertinent parts of the first instance judgment. In both judgments the testimony of three anonymous witnesses was taken into account.

254. The Court will also take into account the specific impact that the inquisitorial nature of the criminal proceedings under the former Code of Criminal Procedure applicable to the case had in this regard (*supra* paras. 101 to 104). In particular, Mr. Ancalaf Llaupe was not only unaware of the identity of the said witnesses, but also had no knowledge of the content of their testimony because the preliminary proceedings were of a confidential nature and because, when he was provided with information on those proceedings, he was refused access to the confidential files. It was only on June 12, 2003, almost two month after the preliminary proceedings had ended and three days after he had been notified of the indictment, that his request for copies of the case file was granted, but access to the confidential files was expressly excluded, without the investigating judge offering any justification in this regard (*supra* paras. 138 a 146). Obviously, this made it impossible to exercise control over the adoption and retention of the anonymity.

255. Furthermore, the regulation of this measure under article 189 of the Code of Criminal Procedure in juxtaposition with articles 76 and 78 of this code, which established the confidential nature of the preliminary proceedings (*supra* para. 235), had an impact on the obligation to submit the adoption and retention of the measure to judicial control because, since the accused was even unaware of the existence of the testimony, he was prevented from requesting control of its legality until he had access to the preliminary proceedings.

256. Accordingly, Víctor Ancalaf Llaupe's defense was only able to know the content of the testimony of the anonymous witnesses indirectly and partially based on the references to it in the judgment of December 30, 2003, convicting Mr. Ancalaf. The summary did not copy the statements completely, but merely those parts that served as evidence to sentence and convict Víctor Manuel Ancalaf Llaupe for the perpetration of a terrorist offense.[281]

257. Regarding the right of Mr. Ancalaf Llaupe's defense to obtain the appearance of proposed witnesses, on December 10, 2002, the defense asked that the testimony of seven witnesses be ordered "in order to clarify the defendant's situation." The same day, the investigating judge denied the request without providing the reasons for his decision, merely indicating that "[n]ot

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relationship of this document to the legal analysis of the perpetration of the supposed threats by Mr. Pichún Paillalao. *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, eighth and sixteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 15, folios 509 to 554).

[280] *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, sixteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 15, folios 509 to 554).

[281] *Cf.* Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal (file of annexes to the Merits Report 176/10, annex 20, folios 718 to 759).

admissible for the time being."[282] Subsequently, on July 7, 2003, the defense asked that "[two] witnesses [who he identified] be ordered to appear in order to bring some balance to [Mr. Ancalaf Llaupe's] evidentiary situation," so that they could be questioned as to whether they had seen directly and personally, or whether they knew by some direct and personal means, that Mr. Ancalaf Llaupe had set fire to the trucks in the Alto Bío Bío. The following day, the investigating judge ordered that the said witnesses be summoned.[283] However, on July 28, 2003, the captain of the *Carabineros* of Sipolcar Concepción informed the investigating judge that one of the witnesses had been summoned to appear to testify but the other could not be summoned because "he refused to sign the summons, stating that he did not have the money to travel to Concepción."[284] The body of evidence does not show that the said statements were taken and the Court notes that the State did not provide any explanation or refer to specific evidence in this regard.

258. In this case, the presumed victim had no available means of proof. His arguments are of a negative nature, because they indicate the inexistence of an act. The Court has established on other occasions that, "in proceedings on human rights violations, the State's defense cannot be based on the defendant's impossibility of providing evidence that, in many cases, cannot be obtained without the cooperation of the State."[285] Consequently, the burden of proof fell on the State, and the latter has not proved that the requested measures were taken to allow the defense to obtain the appearance of the proposed witnesses.

259. The evidence that was considered to be "sufficient" to prove the participation of Mr. Ancalaf Llaupe in the acts of which he was convicted consists of four testimonial statements, three of which were provided by anonymous witnesses, to whom his defense did not have access.[286] This means that a decisive significance was given to the statements of anonymous witnesses, which is inadmissible based on the considerations set forth previously.

260. Based on the foregoing, *the Court concludes that Chile violated the right of the defense to examine witnesses and to obtain the appearance of witnesses who might have thrown light on the facts, protected in Article 8(2)(f) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Víctor Manuel Ancalaf Llaupe*.

* * *

261. The Court notes that, even though the Commission and the FIDH[287] asserted the violation of Article 8(2)(f) of the Convention, in relation to Articles 1(1) and 2 of this instrument, and the Commission recommended to the State that it "adapt domestic laws governing criminal procedure so that they are compatible with [that right]" (*infra* para. 434), they did not submit legal arguments on the violation of the general obligation to adapt domestic

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[282] *Cf.* Judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, tome III, folios 1146 to 1148).

[283] *Cf.* Judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, tome IV, folios 1507 to 1520).

[284] *Cf.* Judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, tome IV, folio 1526).

[285] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 135, and *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 73.

[286] *Cf.* Judgment delivered on June 4, 2004, by the Third Chamber of the Concepción Court of Appeal, first, sixteenth and seventeenth *consideranda* (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1723 to 1733), and judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, seventeenth *considerandum* (file of annexes to the Merits Report, annex 20, folios 753 and 754).

[287] Regarding the arguments submitted by the FIDH concerning the violation of Article 2 of the Convention only in their final arguments, the Court considers that they are time-barred (*supra* para. 49).

law that would have allowed this Court to examine the merits of these arguments in relation to a violation of Article 2 of the Convention.

C) Right to appeal the judgment to a higher court (Article 8(2)(h) of the Convention), in relation to the obligations under Articles 1(1) and 2 of this treaty, with regard to Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles

262. Violations of the right to appeal the judgment before a higher court have only been alleged in relation to the two proceedings applying the new Criminal Procedural Code, which establishes that the means to contest a criminal judgment is the appeal for annulment. Neither the Commission nor the representatives alleged a violation of Article 8(2)(h) of the Convention with regard to Mr. Ancalaf Llaupe, in whose proceedings the 1906 Code of Criminal Procedure was applied, which established the remedy of appeal, as well as the possibility of filing a remedy of cassation.

1. Arguments of the Commission and of the parties

263. The Commission offered several "[g]eneral comments on the right to appeal a court ruling." It stated that "in the case of criminal procedural systems […] which operate 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 courts have the authority to perform" and, at the same, it affirmed that "the review of a ruling by a higher court should not impair the effectiveness of [these] principles." It pointed out that the Criminal Procedural Code of Chile excluded the remedy of appeal in the case of criminal judgments delivered by an oral trial court and established that the only remedy against such judgments was the appeal for annulment for the reasons expressly indicated in the law. The Commission affirmed also that the right to appeal the criminal judgment convicting the victims "was violated by Chile's justice system, by the manner in which the courts that heard their cases applied that right." In addition, it considered that the domestic courts, "gave a particularly narrow interpretation of their competence to rule on the said judgments, which was that they could only address matters of law, and then on the grounds strictly prescribed by law." In its Merits Report, the Commission offered general considerations on the two judgments that rejected the appeals for annulment, without analyzing them individually. In answer to a question by the Court in this regard, it clarified that "in its Merits Report it [had] analyzed the application of articles 373 and 374 of the Criminal Procedural Code" and "[i]n this regard, given that the said norms were not applied to Mr. Ancalaf, the conclusion in the Merits Report should be understood in relation to the other victims in the case."

264. In its motions and arguments brief, the FIDH affirmed that Chile had violated Article 8(2)(h) of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of six of the presumed victims.[288] It indicated that the system for appealing criminal judgments in Chile was "not consistent with Article 8(2)(h)" of the Convention, because it excluded the remedy of appeal against the judgments of oral criminal courts, and established the appeal for annulment as the sole remedy against such judgments, which "correspond merely to a formal review of the decision [but, u]nder no circumstances is it possible to assess the facts fully." The

[288] Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia and Juan Ciriaco Millacheo Licán. The FIDH submitted arguments on the judgment relating to Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Huenchunao Mariñán, Millacheo Licán and Ms. Troncoso Robles, but did not analyze the judgment that denied the appeals for annulment filed by Messrs. Norín Catrimán and Pichún Paillalao.

FIDH considered that the right to appeal a judgment had been violated "because the real possibility of a complete review of the facts did not exist." It referred to the grounds for nullity established in article 374.e of the Criminal Procedural Code, indicating that even though "[s]ome authors of legal doctrine" affirm that these grounds allow the existence of errors in the reception or assessment of evidence to be evaluated and, consequently, could meet the obligations of Article 8(2)(h), "practice reveals the contrary." It stated that, even when this norm is usually used "to expand the scope of the appeal for annulment of a judgment of an oral criminal court, this does not provide grounds for a review of the facts," and that "serious legal uncertainty" exists as to its scope. The FIDH asserted that the judgment delivered by the Temuco Court of Appeal, denying the appeals for annulment filed by each of those convicted, failed to make a comprehensive review of the judgments convicting them because: in response to the complaint of omission and improper assessment of the evidence based on the cause for nullity of the said article 374.e, it made "a formal analysis of the judgment," and an interpretation in order to clarify and give "legal validity" to the terms in which the oral trial court had rejected certain evidence that the defense considered to be exculpatory, and failed to rule on the complaint relating to the violation "of the equality of the parties" in relation to the application of criteria for the assessment of evidence.

265. CEJIL did not allege the violation of Article 8(2)(h) of the Convention.

266. The State asserted that the appeal system under the Criminal Procedural Code "is in line" with Article 8(2)(h) of the Convention and affirmed that the appeal for annulment is only one of the mechanisms to avoid judicial error.[289] It indicated that the Convention recognizes those criminal procedural systems "of an accusatory nature, based on the principles of orality, immediacy and concentration, *inter alia*, where deciding the case in a single instance is an essential element of the model" and that "the right to a remedy" does not mean an "appeal" in which both the facts and the law are examined. It pointed out that the grounds for the appeal for annulment allow a comprehensive review "that includes both the legal and factual merits of the judgment," which "supposes an analysis of both the proven facts and the reasons why those facts were considered true; in other words, a control of the assessment of the evidence." It maintained that the grounds included in article 374.e of the Criminal Procedural Code permit, "[i]n practice, the review of factual issues." It indicated that, even if it is considered that the judgments denying the appeals for annulment filed by the presumed victims "contained insufficient reasoning," the evolution of domestic case law on the grounds included in article 374.e "opens the way for the appeal for annulment to allow a higher court to review the facts […] by examining [the] reasoning behind the ruling" and cited extracts from judgments of 2009, 2012 and 2013 to justify this statement. Regarding the ruling issued by the Temuco Court of Appeal on October 13, 2004, it asserted that "the reasoning of the review may indeed appear inadequate," but that "even though the [said] ruling can be questioned, this cannot be a reason for requesting the legal amendment of the remedy."

2. Considerations of the Court

267. The dispute on the alleged violation of Article 8(2)(h) of the Convention refers, fundamentally, to the effectiveness of the appeal for declaration of nullity. The examination of this issue will be divided into three parts: (a) scope and content of the right to appeal the judgment; (b) appeal system established in the Criminal Procedural Code of Chile, and (c) analysis of the judgments denying the appeals for annulment in light of Article 8(2)(h) of the Convention.

[289] It also referred to the oral trial, to the collegiate composition of the oral criminal court, and to the adoption of the standard that the court must be convinced "beyond all reasonable doubt."

a) Scope and content of the right to appeal the judgment

268. The pertinent provision is contained in Article 8(2)(h) of the Convention, which stipulates the following:

> **Article 8**
> **Right to a Fair Trial**
>
> […]
> 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:
> […]
> h) the right to appeal the judgment to a higher court.

269. The scope and content of the right to appeal the judgment have been specified in numerous cases decided by this Court.[290] In general, the Court has determined that it is an essential guarantee that must be respected within the framework of due process of law in order to permit a guilty verdict to be reviewed by a different and higher judge or court.[291] Anyone subjected to an investigation and to criminal proceedings must be protected at the different stages of the process, which include the investigation, indictment, trial and sentencing.[292]

270. In particular, considering that the American Convention must be interpreted taking into account is object and purpose,[293] which is the effective protection of human rights, the Court has determined that it must be an ordinary, accessible and effective remedy that permits a comprehensive review or examination of the appealed ruling, that is available to anyone who has been convicted, and that observes basic procedural guarantees:

a) *Ordinary:* the right to file an appeal against the judgment must be guaranteed before the judgment becomes *res judicata*, because it seeks to protect the right of defense by avoiding the adoption of a final decision in flawed proceedings involving errors that unduly prejudice the interests of an individual.[294]

b) *Accessible:* the filing of the appeal should not be so complex that it makes this right illusory.[295] The formalities for its admission must be minimal and should not constitute an obstacle for the remedy to comply with its purpose of examining and deciding the errors claimed by the appellant.[296]

c) *Effective:* it is not sufficient that the remedy exists formally; rather it must permit obtaining results or responses in order to achieve the purpose for which it was conceived.[297] Regardless of the appeal regime or system adopted by the States Parties and the name given to the means of contesting the adverse judgment, it must constitute

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290 *Cf. Case of Castillo Petruzzi et al. Merits, reparations and costs*, para. 161; *Case of Herrera Ulloa v. Costa Rica*, paras. 157 to 168; *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs.* Judgment of November 17, 2009. Series C No. 206, paras. 88 to 91; *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, para. 179; *Case of Mohamed v. Argentina*, paras. 88 to 117; *Case of Mendoza et al. v. Argentina*, paras. 241 to 261, and *Case of Liakat Ali Alibux v. Suriname*, paras. 83 to 111.

291 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 158, and *Case of Liakat Ali Alibux v. Suriname*, para. 84.

292 *Cf. Case of Mohamed v. Argentina*, para. 91, and *Case of Liakat Ali Alibux v. Suriname*, para. 47.

293 According to Article 31(1) of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

294 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 158, and *Case of Liakat Ali Alibux v. Suriname*, para. 85.

295 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 164, and *Case of Liakat Ali Alibux v. Suriname*, para. 55.

296 *Cf. Case of Mohamed v. Argentina*, para. 99, and *Case of Liakat Ali Alibux v. Suriname*, para.86.

297 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 161, and *Case of Liakat Ali Alibux v. Suriname*, para. 52.

an appropriate mechanism to rectify an erroneous conviction.[298] This requirement is closely related to the following.

d) *Allowing a comprehensive review or examination of the judgment appealed:* it must ensure the possibility of a comprehensive examination of the decision appealed.[299] Therefore, it must permit an analysis of the factual, probative and legal issues on which the contested judgment was based because, in jurisdictional activities, the determination of the facts and the application of the law are interdependent, so that an erroneous determination of the facts entails an erroneous or inappropriate application of the law. Consequently, the grounds for the admissibility of the appeal should make it possible to carry out a comprehensive examination of the contested aspects of the adverse judgment.[300] In this way, it is possible to obtain a two-stage judicial ruling, because the comprehensive review of the judgment permits the reasoning to be confirmed and grants greater credibility to the State's jurisdictional action, while providing greater security and protection to the rights of the person who has been convicted.[301]

e) *Available to anyone who has been sentenced and convicted:* the right to appeal the judgment cannot be effective if it is not guaranteed to everyone who has been sentenced and convicted, because the sentence is the expression of the exercise of the State's punitive powers. It must be ensured even to the individual who has been sentenced in a judgment that revokes an acquittal.[302]

f) *Observing the minimum procedural guarantees:* appeal regimes must respect the minimum procedural guarantees that, pursuant to Article 8 of the Convention, are pertinent and necessary to decide the errors asserted by the appellant, without this entailing the need to conduct a new oral trial.[303]

b) The appeal system under the Criminal Procedural Code of Chile (Law No. 19,696 of 2000)

271. The Criminal Procedural Code also introduced substantial variations in the appeals regime adopted. It determined that "decisions issued by an oral criminal trial court could not be appealed" (Article 364) and established the appeal for annulment as the only means of contesting ("to invalidate") the oral trial and the final judgment (Article 372).

272. The main pertinent provisions concerning appeals are transcribed below, as well as article 342 of the Criminal Procedural Code, which establishes the contents required of a judgment under pain of nullity, and article 297 on the assessment of the evidence, referred to article 342.c of this code:

> Article 297. Assessment of the evidence. The courts shall assess the evidence freely, but may not disregard the principles of logic, the lessons of experience, and scientifically established knowledge.
>
> The Court must refer in its reasoning to all the evidence produced, even the evidence that it may have rejected, in that case indicating why it rejected it.
>
> The assessment of the evidence in the judgment shall require an indication of the evidence used to substantiate each of the facts and circumstances that were found proved. This substantiation shall allow the reasoning used in order to reach the conclusions arrived at in the judgment to be reproduced.

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298 *Cf. Case of Mohamed v. Argentina*, para.100, and *Case of Liakat Ali Alibux v. Suriname*, para. 86.

299 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 165, and *Case of Liakat Ali Alibux v. Suriname*, para. 56.

300 *Cf. Case of Mohamed v. Argentina*, para.100, and *Case of Liakat Ali Alibux v. Suriname*, para. 86.

301 *Cf. Case of Barreto Leiva v. Venezuela*, para. 89, and *Case of Liakat Ali Alibux v. Suriname*, para. 49.

302 *Cf. Case of Mohamed v. Argentina*, para.92, and *Case of Liakat Ali Alibux v. Suriname*, para. 84.

303 *Cf. Case of Mohamed v. Argentina*, para.101, and *Case of Liakat Ali Alibux v. Suriname*, para. 87.

[…]

Article 342. Content of the judgment. The final judgment shall contain:

a) The name of the court and the date judgment is delivered; identification of the accused and of the accuser or accusers;

b) A brief description of the facts and circumstances that were the object of the accusation; if appropriate, the harm whose reparation is claimed in the civil action and the claim for redress, and the exculpatory arguments alleged by the accused;

c) A clear, cogent and complete description of each of the facts and circumstances that the court found proved, whether favorable or unfavorable to the accused and an analysis of the evidence that supports those conclusions in accordance with article 297;

d) The legal and doctrinal reasons used in the legal classification of each of the facts and circumstances, and to found the judgment;

e) The decision to either convict or acquit each of the accused of each of the offenses they were accused of in the indictment; the ruling on any civil liability the accused may have and on the amount of compensation, if appropriate;

f) The ruling on the costs of the proceedings, and

g) The signature of the judges who delivered the judgment.

The judgment shall always be drawn up by a designated member of the collegiate court, and the dissenting or separate opinion shall be prepared by its author. The judgment shall indicate the name of the judge who prepared it, and that of whoever dissents or provides a separate opinion.

Article 372. Appeal for annulment. The appeal for annulment is granted to invalidate the oral trial and the final judgment, or only the latter, for the reasons expressly indicated by law.

It shall be filed in writing within ten days of notification of the final judgment before the court that conducted the oral trial.

Article 373. Reasons for the appeal. The declaration of nullity of the oral trial and of the judgment shall be admissible:

a) When rights or guarantees recognized in the Constitution or international treaties in force in Chile have been violated during the trial or in the judgment, and

b) When there has been an erroneous application of the law in the judgment that has substantially affected the outcome.

Article 374. Absolute grounds for annulment. The trial and the judgment shall be annulled, whenever:

a) The judgment has been delivered by a court lacking jurisdiction, or one that was not composed by legally appointed judges; when it has been delivered by a guarantee judge or with the presence of a judge of an oral criminal trial court who is involved with the law, or whose disqualification was pending or has been declared by a competent court, and when it has been decided by fewer votes or delivered by fewer judges that required by law, or by judges who have not attended the trial;

b) The hearing of the oral trial took place in the absence of any of the persons whose continued presence is required, under pain of nullity, by articles 284 and 286;

c) The defense has been prevented from exercising the rights that the law grants him;

d) The legal provisions on the continuity and the public nature of the trial have been violated during the oral trial;

e) The judgment has omitted any of the requirements established in article 342, subparagraphs (c), (d) or (e);

f) When the judgment has been delivered infringing the provisions of article 341, and

g) When the judgment delivered is contrary to another criminal judgment that is *res judicata*.

(…) [304]

Article 381. Information to be provided once the appeal has been admitted. When the appeal has been admitted, the court shall forward to the higher court a copy of the final judgment, the record of the hearing of the oral trial or the specific actions during the trial that are being contested, and the brief in which the appeal was filed..

(…)

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[304] Articles 376 to 383 of the Criminal Procedural Code regulate the requirements for, and the filing of, the appeal brief, the determination of the competent court, the causes of inadmissibility, the effects of admission of the appeal, the background information to be forwarded to the higher court once the appeal is admitted, and the actions to be taken before it is decided.

Article 384. Ruling on the appeal. The court shall rule on the appeal within 20 days of the date on which it has concluded its examination of the appeal.

In the judgment, the court must describe the grounds on which its decision is based; rule on the contested issues, unless it upholds the appeal, in which case it may merely rule on the grounds that it would have found sufficient, and declare whether or not the oral trial and final judgment that have been appealed are null, or whether only the said judgment is null, in the cases indicated in the following article.

The ruling on the appeal shall be announced in the hearing indicated to this end, with the reading of its operative paragraphs or a brief summary of the judgment.[305]

Article 385. Nullity of the judgment. The court may invalidate the judgment alone, and deliver the replacement judgment, which must meet the legal requirements, without a new hearing but separately if the grounds for annulment are not related to the trial formalities or to the facts and circumstances that were considered proved, but rather to the fact that the judgment classified as an offense an act that the law does not consider so, applied a punishment when it was not in order to apply any punishment, or imposed a punishment greater than the one required by law.

The replacement judgment shall include the factual considerations, the legal grounds, and the decisions of the ruling that was annulled, which do not refer to the issues that were appealed or that were incompatible with the decision taken on the appeal, as established in the judgment appealed.[306]

Article 386. Nullity of the oral trial and of the judgment. With the exception of the cases mentioned in article 385 if the court upholds the appeal, it shall annul the judgment and the oral trial, determine the situation in which the proceedings are left, and order that the case files be forwarded to the corresponding competent court so that it may order that a new oral trial be held.

The fact that the appeal was accepted owing to an error or defect in the judgment shall not be an obstacle to the ordering of a new oral trial.

Article 387. Inadmissibility of appeals. The decision on an appeal for annulment shall not be open to any type of appeal, without prejudice to the review of the final judgment sentencing an individual referred to in this Code.[307]

In addition, the judgment delivered in the new trial held as a result of the ruling that accepted the appeal for annulment shall not be open to any type of appeal. However, if the judgment convicts an individual, while the one annulled would have acquitted him, the appeal for annulment in favor of the accused shall be admissible, in accordance with the general rules.

273. In summary, the appeal regime under the Criminal Procedural Code is as follows:

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[305] This final subparagraph of article 384 of the Criminal Procedural Code was added by a modification of Law No. 20,074 published on November 14, 2005, that "amends the Criminal Procedural and the Criminal Codes." Available at: http://www.leychile.cl/Navegar?idNorma=243832&buscar=20074

[306] This second subparagraph of article 384 of the Criminal Procedural Code was added by a modification of Law No. 20,074 published on November 14, 2005, that "amends the Criminal Procedural and the Criminal Codes." Available at: http://www.leychile.cl/Navegar?idNorma=243832&buscar=20074

[307] This refers to the appeal for review established in articles 473 and *ff.* (Article 473 is transcribed below, for information only):

Article 473. Admissibility of the review. Exceptionally, the Supreme Court may review final judgments that have convicted someone of a crime or simple offense, in order to annul them, in the following cases; whenever:

a) As a result of contradictory verdicts, two or more individuals are convicted of the same offense which could only have been committed by one of them;

b) Anyone has been convicted as the perpetrator of, or the accomplice or accessory to, the murder of a person who is found to be alive following the verdict;

c) Anyone who has been convicted as the result of a judgment based on a document or on testimony of one or more persons, if the said document or testimony has been declared to be false by a final verdict in criminal proceedings;

d) Following the guilty verdict, an action occurs or is discovered or a document appears that was unknown during the trial that is sufficient to establish the innocence of the condemned man, and

e) The guilty verdict has been pronounced as the result of malfeasance or the bribery of the judge who delivered it or of one or more of the judges who assisted in its delivery, the existence of which has been declared in a final judgment.

a) A distinction is made between the "reasons for the appeal" for annulment in general (Article 373) and the "absolute grounds for annulment" (Article 374). In the latter, the trial and the judgment will always be annulled. In the other situations, even though, in general, it is established that "[t]he declaration of the nullity of the oral trial and of the judgment shall be admissible," article 385 authorizes the court to "invalidate the judgment alone."

b) If both the oral trial and the judgment are invalidated, article 386 is applicable and the case will be forwarded to the corresponding competent oral court for a new oral trial to be held.

c) If the judgment alone is invalidated and the requirements of article 385 are met, the higher court must deliver another judgment to replace it.

d) The ruling declaring the annulment must (article 384.2) "describe the grounds on which its decision is based; rule on the contested issues, unless it upholds the appeal, in which case it may merely rule on the grounds that it would have found sufficient, and declare whether or not the oral trial and final judgment that have been appealed are null, or whether only the said judgment is null, in the cases indicated" in Article 385.

e) The replacement judgment "shall repeat the factual considerations, the legal grounds and the decisions of the ruling that was annulled, that do not refer to the issues that were the object of the appeal or that were incompatible with the decision taken on the appeal, as established in the judgment appealed " (article 385.2).

c) Analysis of the judgments denying the appeals for annulment in light of Article 8(2)(h) of the Convention

274. The Court must now analyze whether the appeal system under the Criminal Procedural Code, as it was applied in this case, is consistent with the requirements of Article 8(2)(h) of the Convention. To this end, The Court is not required to rule on each of the aspects contested in the appeals for annulment, but rather to evaluate whether the examination made by the higher courts that decided the appeals was compatible with the requirement of an effective remedy established in the American Convention. Nor does the Court have to rule on other aspects in which an abstract examination of the norms on remedies in criminal proceedings in force in Chile might reveal some contradiction with the minimum procedural guarantees established in the American Convention.

c.i) Criminal proceedings against Norín Catrimán and Pichún Paillalao (judgment delivered by the Second Chamber of the Supreme Court of Justice on December 15, 2003, denying the appeals for annulment)

275. Messrs. Norín Catrimán and Pichún Paillalao filed separate appeals for annulment against the partially guilty verdict of the Angol Oral Criminal Trial Court of September 27, 2003, requesting the annulment of the trial with regard to the offenses for which they had been convicted and the holding of a new trial. In addition, they asked that the judgment be annulled and that a replacement judgment be delivered acquitting those who had been convicted; that it be declared that the offenses were not of a terrorist nature, and that the punishment be amended (*supra* para. 118).

276. On December 15, 2003, the Second Chamber of the Supreme Court of Justice delivered a judgment in which it rejected all the flaws described by the appellants and upheld the partially guilty verdict with regard to Messrs. Pichún Paillalao and Norín Catrimán (*supra* para. 118).

277. In the judgment rejecting the appeals, the Second Chamber summarized the flaws described by the appellants Norín Catrimán and Pichún Paillalao, and indicated that, "basically,

they both complain about the following aspects: (a) violation of constitutional guarantees and international treaties; (b) certain formal errors they believe they see in the judgment; (c) they disagree that the facts that were considered proved constitute the offense of threats, and (d) that these threats are not of a terrorist nature." It concluded that none of the foregoing was substantiated; hence, it could not be admitted. It added that "the evidence provided in the hearing on the appeals had no procedural significance that could change the decision." Consequently, it rejected the appeals and declared that the appealed judgment "is not annulled."

278. There is no evidence that, in any part of its verdict, the Second Chamber examined the facts of the case or the legal considerations regarding the definition of the offense to verify that the statements on which the appealed judgment was founded were based on convincing evidence and on correct legal analysis. It merely sought to analyze the internal coherence of the judgment, indicating that:

> […] The statements analyzed above were made by individuals linked directly to the facts or who knew about them for different reasons, and whose testimony is consistent with the expert opinions and documentary evidence incorporated during the hearing that constitute the background information and that, taken as a whole and freely assessed, lead to the conviction that the facts contained in the private and the prosecutor's indictment have been proved beyond any reasonable doubt. […]

It also indicated that:

> […] The standard of conviction beyond any reasonable doubt pertains to Anglo-Saxon law and not to that of continental Europe; thus, it is a novelty for the Chilean legal system. However, it is a useful concept, because it is sufficiently evolved and eliminates discussions regarding the degree of conviction required, revealing that is it not an absolute conviction, but one that excludes the most important doubts. Accordingly, the phrase of 'sufficient conviction' was replaced by the phrase of 'beyond any reasonable doubt.' (E. Pfeffer U. *Código Procesal Penal, Anotado y Concordado*, Editorial Jurídica of Chile, 2001, p. 340). […]

On these grounds, it concluded that:

> […] it is not found that the judgment contested by the appeals fails to meet the requirements of paragraphs (c) and (d) of article 342 of the Criminal Procedural Code, because a clear, cogent and complete description of the facts can be appreciated, together with the reasons used to define each act legally, beyond any reasonable doubt. […]

279. It can be seen that, after making a descriptive reference to the facts that the Oral Criminal Trial Court considered proved, and to the opinion on how they were codified, and citing parts of the analysis of the evidence by the said court, the Second Chamber merely concluded the four lines indicated in paragraph 278. The Court has verified that the Second Chamber's ruling did not make a comprehensive analysis to conclude that the guilty verdict met the legal requirements to consider that the facts had been proved, or of the legal grounds that supported their classification under the law. The simple description of the lower court's arguments, without the higher court that decided the appeal setting out its own reasoning that would logically support the operative paragraphs of its decision, means that the latter did not comply with the requirement of an effective remedy protected by Article 8(2)(h) of the Convention, which establishes that the appellants' complaints and disagreements must be decided; that is, that they have effective access to the two-stage judicial ruling (*supra* para. 270.d). These flaws make the guarantee protected by Article 8(2)(h) of the Convention illusory and prejudice the right of defense of anyone who has been criminally convicted.

280. The foregoing clearly reveals that the judgment of the Second Chamber did not make a comprehensive examination of the ruling appealed, because it did not analyze all the contested factual, evidentiary and legal issues on which the guilty verdict against Messrs. Norín Catrimán and Pichún Paillalao was based. This means that it did not take into account the interdependence that exists between the factual determinations and the application of the law, so that an erroneous determination of the facts entails an erroneous or incorrect application of the law. Consequently, the remedy of appeal for annulment available to Messrs. Norín Catrimán

and Pichún Paillalao was not adapted to the basic requirements needed to comply with Article 8(2)(h) of the American Convention, thus violating their right to appeal the guilty verdict.

c.ii) Criminal proceedings against Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles (judgment delivered by the Temuco Court of Appeal on October 13, 2004, denying the appeals for annulment)

281. The five persons convicted of the offense of terrorist arson (*supra* para. 128) filed separate appeals for annulment. The five appeals were rejected together by the Temuco Court of Appeal in a judgment of October 13, 2004 (*supra* paras. 126 to 128).

282. The appellants submitted arguments relating to both the incorrect assessment of the evidence and the erroneous application of the law. Specifically, they affirmed that several testimonies offered by the prosecution had not been assessed, or had not been assessed in an independent manner, and that certain evidence proposed by the defense had been rejected unduly. They also argued that the subjective element of the definition of the offense of terrorism had not been proved and that the principle of guilt had been violated because the classification of the acts as terrorism had been concluded based on acts carried out by third parties.[308]

283. The judgment of the Temuco Court of Appeal, when ruling on the arguments cited by the appellants, stated that the court that decided the appeal for annulment:

> […] by law, must restrict itself to evaluating whether the judgment […] of the oral trial court […] was sufficient in itself; whether it had made an appropriate assessment of the evidence on which its conclusions were founded, and whether it indicated the reasons why it rejected the evidence that had not been assessed, *without reviewing the facts that were established therein* because, to the contrary, the principle of immediacy would be violated and *the appeal for annulment would be impaired, which does not have an impact on the factual aspects* as they were established by the oral criminal trial court. (*Considerandum* 5) *[Italics added]*

In another passage, it stated that a certain conclusion of the oral trial court appeared:

> […] in subparagraphs one, two and three of the fourteenth *considerandum*, *which establishes the facts, and thus cannot be examined by this court.* (*Considerandum* 20) *[Italics added]*

284. It also stated that:

> […] The judgment must be sufficient in itself, and to this end must contain a coherent and explicit analysis of the result of the assessment of evidence, and have the necessary clarity to be comprehensible to the reader, which may be another court that hears the case by means of an appeal, without the latter having to re-examine the proceedings and make a new assessment, due to ignorance of the elements on which the decision was based […]. (Third *considerandum*)
>
> However, this requirement does not signify that all the evidence must be assessed, because what art. 342.c of the Criminal Procedural Code expressly requires is that the court make an assessment of the evidence that substantiates its conclusions, and this is according to article 297 of this code, when it establishes that the assessment of the evidence in the judgment shall require an indication of the evidence taken into account in order to substantiate each of the facts and circumstances that was considered proved.
>
> Similarly, not all the evidence is subject to assessment, but only the evidence that serves as grounds for the conclusions reached by the court. Regarding the remainder of the evidence provided during the proceedings, and which is not subject to assessment, art. 297 of the Criminal Procedural Code establishes that the court must indicate the reasons why it was rejected. (Fourth *considerandum*)

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[308] *Cf.* Appeals for annulment filed by Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles against the judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 208 to 321 and 1166 to 1199), and Judgment delivered on October 13, 2004, by the Temuco Court of Appeal (file of annexes to the Merits Report 176/10, annex 19, folios 688 to 716).

285. Regarding the argument of the appellants that the exculpatory testimonial evidence was not assessed, the court of appeal stated that the complaints expressed in this regard "correspond to evidence that was not used by the court to substantiate its conclusions" and that, "therefore, it is evidence […] that the court is not required to assess, but only to state the reason why it was rejected."

286. Expert witness Claudio Fuentes Maureira, proposed by the State, indicated that the fifth *considerandum* of the judgment of the court of appeal (*supra* para. 283) involved "an over-restrictive interpretation of the norms of the Criminal Procedural Code."[309]

287. The Inter-American Court is not required to analyze whether a judgment of a domestic court interpreted and applied domestic law correctly or incorrectly, but only to determine whether or not this violated a provision of the American Convention. The foregoing reveals with absolute clarity that the Temuco Court of Appeal did not make a comprehensive examination of the decision appealed, because it did not analyze all the contested factual, probative and legal aspects on which the guilty verdict was based. This means that it did not take into account the interdependence that exists between the factual determinations and the application of the law, so that an erroneous determination of the facts entails an erroneous or improper application of the law (*supra* para. 270.d).

288. In addition, this Court notes that the judgment that denied the appeal made an interpretation of the Criminal Procedural Code (*supra* para. 284) that permitted evidence that the appellants considered relevant to support their defense not to be assessed, merely indicating the reasons why it was "rejected." In this regard, it should be emphasized that, when deciding the objections submitted by the appellant, the higher court hearing the appeal to which a person convicted has the right under Article 8(2)(h) of the American Convention must ensure that the guilty verdict provides clear, complete and logical grounds in which, in addition to describing the content of the evidence, it sets out its assessment of this and indicates the reasons why it considered – or did not consider – it reliable and appropriate to prove the elements of criminal responsibility and, therefore, to disprove the presumption of innocence.

289. It is also possible to note that, with regard to the argument of the defense regarding the improper assessment of the evidence (alleging that numerous testimonies were not assessed individually, so that the conclusions derived from them did not take into account the particularities of each of these statements and the supposed contradictions between them), the Court of Appeal stated that it "agreed with the Public Prosecution Service that the law makes it obligatory to analyze all the evidence, but not to analyze each piece of evidence individually, thus the criterion of the court was correct in setting out the testimony on those aspects on which the statements corroborated each other." By proceeding in this way, the higher court did not resolve the appellants' complaint or disagreement regarding the evidence, which referred not only to the alleged obligation to make an individual assessment of the evidence, but also to specific objections and comments on the content of explicit evidence and the conclusions that the lower court had derived from this evidence. In this regard, this Court underlines that, when a guilty verdict is appealed and in order not to make the right to be heard in equal conditions illusory, the higher court that decides an appeal must ensure that the lower court has complied with its obligation to describe an assessment that takes into account both the inculpatory and the exculpatory evidence. Even if the lower court chooses to assess the evidence together, it has the duty to explain clearly the points on which agreement exists and those on which there is disagreement, as well as to refer to any objections that the defense may have raised on specific points or aspects of this evidence. These aspects raised by the defense in the appeal against the guilty verdict were not sufficiently decided by the higher court in this case.

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[309] *Cf.* Statement made by expert witness Carlos Fuentes Maureira before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

290. Consequently, the appeal for annulment available to Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo and Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles was not adapted to the basic requirements needed to comply with Article 8(2)(h) of the American Convention, and thus their right to appeal a judgment convicting them was violated.

* * *

291. Based on the above, *the Court concludes that the State violated the right to appeal the judgment, established in Article 8(2)(h) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles*.

3. Obligation to adopt domestic legal provisions

292. The Court observes that the dispute concerning the legislative framework of the appeal for annulment is circumscribed to the grounds for this remedy established in the Criminal Procedural Code (*supra* paras. 263 to 266). Chile affirmed that, under Article 374.e) of this code, the factual aspects may be examined by a review of the assessment of the evidence made by the lower court, without this entailing the possibility of the higher court re-establishing the facts.[310] Additionally, in its final arguments brief, the State also affirmed that the purpose of the grounds established in Article 373.b) is to ensure the correct application of the law and to permit "the review of factual aspects; for example, when the Court examines the facts that have already been proved and gives them a different legal classification." For their part, the representatives understood that the grounds established in Article 374.e) of this code do not permit the review of "facts or factual presumptions of judgments," and are limited to "legal aspects." The Commission did not offer specific arguments on the compatibility of the grounds for the appeal for annulment with the right to appeal the judgment.

293. Regarding the State's argument concerning article 373.b) of the Criminal Procedural Code, the Court observes that, under the said grounds for nullity, it is possible to contest the judgment based on "erroneous application of the law." From an analysis of the text of this provision, the Court is unable to conclude that it meets the requirement of an effective remedy, because the way it is worded does not impose on the judge or court the obligation to make an analysis that would allow it to make a ruling on the arguments of the appellants about the assessment of the acts that those convicted were accused of, which constitutes the basic presumption for the criminal punishment imposed on them by the State. Even though these grounds could have indirect implications for the factual framework of the case, due to the interdependence that exists in the jurisdictional activity between the determination of the facts and the application of the law (*supra* para. 270.d), owing to the way the subparagraph is drafted, they do not ensure legal certainty to the person who is found guilty as regards the possibility of filing complaints about factual issues.

294. In relation to whether the grounds for nullity established in paragraph (e) of article 374 of the Criminal Procedural Code is consistent with the criterion of an effective remedy to which

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[310] It asserted that this subparagraph permits, "[i]n practice, a review of factual questions [by means of the] control of the assessment of the evidence and of the probative reasoning made by the lower court," both by reading the judgments that transcribe the statements of witnesses and expert witnesses in their entirety, and by the possibility of presenting evidence of the grounds cited, which results in the "higher court, among other practices, listening to the audio recordings that constitute the official record of the hearing of the oral trial." According to the State, the grounds established in Article 374.e) signify a "control of the probative reasoning," in the sense of making an "opinion about the opinion," rather than an "opinion about the fact," particularly with regard to "the substantiation," which "consists rather in a legal admonition relating to the absence of, or inadequate, substantiation of the facts, based among other provisions, on the rules of sound judicial discretion and the duty of the court to provide the reasoning for its decision, but with an evident relationship to the facts."

anyone who has been convicted has a right under Article 8(2)(h) of the Convention, the Court notes that the expert opinions in the case file on the scope of these grounds reach contradictory conclusions.[311] It can be observed that these grounds make it possible to contest the verdict when the judgment does not observe the requirements that article 342 of the code imposes on the judge. These include the obligation to include a "clear, cogent and complete description of each of the facts and circumstances that the Court found proved, whether favorable or unfavorable to the accused, and [that] of the assessment of the evidence that would substantiate these conclusions in accordance with article 297" (*supra* para. 272). Meanwhile, article 297 of the Criminal Procedural Code establishes as criteria for assessing the evidence, "the principles of logic, the lessons of experience, and scientifically established knowledge"; stipulates the obligation to "refer in its reasoning to all the evidence produced, even the evidence that it may have rejected, in that case indicating why it was rejected," and imposes the need to "indicate the evidence used to substantiate each of the facts and circumstances that were found proved" and that "[t]his substantiation shall allow the reasoning used to reach the conclusions arrived at in the judgment to be reproduced" (*supra* para. 272).

295. The Court notes that the text of Article 374.e) of the Criminal Procedural Code establishes grounds for absolute nullity based on the obligations to assess the evidence and to justify this assessment established in the same procedural code. In addition, this Court is aware that, under article 381 of the Criminal Procedural Code, it is necessary to forward to the higher court that decides the appeal not only the judgment that is appealed and the brief filing the appeal, but also the measures that are contested or the recording of the hearing of the oral trial (*supra* para. 272) which, according to expert witness Fuentes Maureira, corresponds to the audio recordings of the public hearing. Thus, under article 374.e of this code the appellant is allowed to file arguments that not only refer to the rigor of the reasoning of the guilty verdict and its determination based on the evidence, but also allow him to offer as a parameter to support these arguments the actions and evidence during the oral trial that, according to the appellant, were unduly assessed and the conclusions unduly substantiated in the guilty verdict.

296. With regard to the position held by the parties in relation to the interpretation that the domestic courts have accorded to the grounds for absolute nullity of article 374.e) of the Criminal Procedural Code, the extracts from judgments cited by the State[312] show that, in those

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311 On the one hand, expert witness Fuentes Maureira, proposed by the State, affirmed that, under the said grounds, "if a judge […] should cite a criterion for assessment [of the evidence] contrary to sound judicial discretion [… or] if he should derive irrational conclusions from the evidence presented," that are contrary to "the lessons of experience, and scientifically established knowledge according to the rules of logic," and this "leads to an improbable or impossible conclusion," it is possible to obtain "the annulment of the trial." He explained that, "in Chile, more and more case law exists in which, increasingly, the oral trial courts are being required to write all that the witnesses have said in the context of the trial in greater detail; in other words, one can find in the judgments, not only the decision based on an assessment of the evidence, but also a complete and detailed description of everything that the witnesses have said, together with the possibility of attaching the relevant part of the audio recording of the hearing. From this perspective […] the higher court, by reading the judgment and listening to the recordings, is able to review certain evidentiary aspects of the trial hearing." To the contrary, expert witness Fierro Morales, proposed by the FIDH, stated that "the very conception of the appeal for annulment […] as a remedy of a "special" and strictly legal nature, with grounds that are specifically set forth in the law, with a series of requirements for filing it that the case law of the higher courts of justice has used in an overly formal way to declare the appeals inadmissible and, especially, the idea that it is not possible, either directly or indirectly, to review any aspect relating to the facts, since this is the exclusive attribution of the trial court, are some of the objections that are being increasingly raised against the appeal for annulment as an appropriate and sufficient remedy to guarantee the right to appeal of the person who has been convicted." *Cf.* Statement made by expert witness Carlos Fuentes Maureira before the Inter-American Court during the public hearing held on May 29 and 30, 2013, and affidavit prepared on May 17, 2013, by expert witness Claudio Alejandro Fierro Morales (file of statements of presumed victims, witnesses and expert witnesses, folio 20).

312 Both the State and the representatives cited extracts from domestic judgments deciding appeals for annulment in support of their respective positions. The appeals related to the scope of the said grounds in relation to the possibility of examining matters of a factual nature in the context of trials on criminal acts. The Court will take this information on domestic decisions into account, inasmuch as the parties did not contest the veracity of its content, but recalls that the

cases, the higher court made an analysis that went beyond matters that were strictly juridical and that, to the contrary, involved an examination that compared the body of evidence in the case to the assessment made, and the legal consequences derived from it by the lower court. In this regard, the Court notes that these are recent judgments from 2009, 2012 and 2013. The Court notes that the representatives called attention to the existence of other domestic rulings in which the scope of the above-mentioned grounds for annulment is restrictive on this point and affirmed that it was impossible to analyze matters relating to the establishment of the facts in the oral trial. These decisions date from 2010, 2011 and 2012. In these judgments, an interpretation was made that reduced the scope of the review to questions that were, above all, related to the appropriate application of the rules of evidentiary law.

297. The Court considers that the elements provided are not sufficient to conclude that the grounds under article 374.e) of the Criminal Procedural Code do not comply with the standard of an effective remedy guaranteed in Article 8(2)(h) of the Convention as regards the possibility of contesting factual matters by means of arguments relating to the lower court's assessment of the evidence. Taking into account that there is an interrelationship between the factual, evidentiary and legal dimensions of the criminal judgment (*supra* para. 270.d), the Court considers that, since it is not a conclusion that can be derived from the text of the said grounds, it has not been proved that, based on these grounds, it is not possible to contest matters relating to the factual framework of the judgment by examining the assessment of the evidence in it. Therefore, the Court concludes that, in the instant case, the State did not violate the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention, in relation to the right to appeal the judgment established in Article 8(2)(h) of this instrument, to the detriment of the eight presumed victims in this case.

298. Nevertheless, the Court insists that the interpretation that the domestic courts make of the said grounds must ensure that the content and criteria developed by this Court regarding the right to appeal the judgment are guaranteed (*supra* para. 270). The Court reiterates that the grounds for the admissibility of the appeal ensured by Article 8(2)(h)) of the Convention must make it possible to contest matters that have an impact on the factual aspect of the guilty verdict, because the appeal should allow an extensive control of the contested aspects, and this calls for the possibility of analyzing the factual, evidentiary and legal issues on which the guilty verdict is based.

VII.3 – RIGHTS TO PERSONAL LIBERTY AND TO THE PRESUMPTION OF INNOCENCE (ARTICLES 7(1), 7(3), 7(5) AND 8(2)[313] OF THE AMERICAN CONVENTION)

A) Arguments of the Commission and of the parties

299. The Commission did not refer to this matter.

300. The FIDH alleged the violation of the right to personal liberty of Aniceto Norín Catrimán, Pascual Pichún Paillalao, Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Huenchunao Mariñán and Juan Ciriaco Millacheo Licán, referring jointly to the arbitrary nature of the pre-trial detention, the violation of the right to be tried within a reasonable time or released, and the violation of the principle of the presumption of innocence. It indicated that the fact that they were "incarcerated for more than a year, because they were considered a danger to the security of society, constitutes arbitrary imprisonment" and that "[t]he proceedings do not include a decision referring to the danger to the investigation or the danger of flight of the accused."

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complete text of these decisions was not provided, but rather citations from parts of them; thus they will be assessed with all the evidence before the Court.

313 The pertinent provisions of the American Convention are transcribed *infra* para. 307.

301. CEJIL alleged that the violation of the right to liberty occurred owing to the arbitrary nature of the arrest and pre-trial detention ordered against Víctor Ancalaf Llaupe, and affirmed that this resulted in a violation of the principle of the presumption of innocence and the violation of the right to be tried within a reasonable time or be released. It stated that "the arrest and pre-trial detention ordered against Víctor Ancalaf Llaupe suffered from two fundamental irregularities: (i) no reasons were given for the measure ordered, and (ii) the pre-trial detention did not respond to procedural purposes." It argued that his arrest was ordered "without justifying a legitimate purpose, and without identifying the evidence that warranted the adoption of such a restrictive measure as the deprivation of liberty of someone who has been indicted." It also argued that the indictment "was supported by evidence produced during secret preliminary proceedings, in violation of the adversarial principle." CEJIL argued that the indictment of Mr. Ancalaf and the denials of the requests for pre-trial release were based solely on the grounds of "danger to the security of society," which implied "an absolute legal presumption of dangerousness" that "violates the American Convention, making the measure arbitrary" and that, since it is a "non-procedural criterion," it "violated the principle of the innocence of Mr. Ancalaf and turned the pre-trial detention ordered against him into an arbitrary measure." It indicated that the pre-trial detention was "an automatic consequence of the indictment," reflecting "the particularity of the inquisitorial system where the notions of proceedings and punishment are not clearly separated." In addition, it argued that "the proceedings under the Counter-terrorism Act convert the ordering and implementing of pre-trial detention into the general rule," "a practice [that] violates the guarantee of presumption of innocence." CEJIL alleged that Article 2 of the Convention had been violated in relation to the regulation of the grounds of "danger to the security of society."

302. The State did not refer specifically to the pre-trial detention of the presumed victims, but referred in general terms to the domestic law in force that regulates pre-trial detention and its application in Chile. It indicated that this precautionary measure "does not infringe the principle of the presumption of innocence, in view of its exceptional and preventive nature, constituting, also, an essential measure to safeguard the security of the investigation, of the victim, and of society, in certain cases." It asserted that "the judge is not obliged to order pre-trial detention, even in the case of serious offenses with severe punishments," "including terrorist offenses," and that the "high standard of evidence that must be presented to the court in order to warrant pre-trial detention is a sufficient argument to reject the allegations that have been made with regard to this precautionary measure." It affirmed that "the Counter-terrorism Act does not contain any special norm that permits ordering pre-trial detention." It referred to the grounds for pre-trial detention relating to the "danger to the security of society or of the victim" (*infra* para. 359).

B) Domestic legal framework

303. *Constitution.* Article 19.7 subparagraphs (e) and (f), of the Constitution of the Republic of Chile establishes:

> e) Pre-trial release shall be in order unless the judge considers that pre-trial detention or custody is necessary for the preliminary investigations or for the safety of the victim or of society. The law shall establish the requirements and methods to obtain it.
>
> The decision granting pre-trial release to those accused of the offenses referred to in article 9 shall always be consulted with a higher authority. This and the appeal against the decision issued on the release shall be heard by the competent higher court composed exclusively of full-time members. The decision that approves or grants the release must be taken unanimously. While the pre-trial release lasts, the accused shall always be subject to supervisory measures by the legally-established authority;
>
> f) In criminal cases the accused cannot be obliged to testify under oath with regard to an act that he has committed; nor can his relatives in the ascending or descending lines, his spouse and other persons who, according to the case and circumstances, are indicated by law, be obliged to testify against him.

304. *Code of Criminal Procedure*. The pre-trial detention of Víctor Ancalaf Llaupe was regulated by the provisions of the 1906 Code of Criminal Procedure. Article 274 of this code regulated bringing the accused to trial and article 363 of the code regulated the grounds on which "pre-trial release could be denied" and the grounds or purposes for which "it was understood that pre-trial detention or custody [was] necessary."[314] Furthermore, article 277 of this code stipulated that "during the proceedings, custody becomes pre-trial detention." The relevant articles of the code are transcribed below.

> 2. DETENTION
>
> I. General regime
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> Art. 251. To ensure the action of justice, the judges may order the detention of a person in the way and in the cases determined by law.
>
> Art. 252. The detention deprives of liberty for a short time an individual against whom there are well-founded suspicions that he is responsible for an offense, or one against whom there is reason to believe that he has not provided the timely cooperation with justice required by law for the investigation of a wrongful act.
>
> Art. 253. No inhabitant of the Republic may be detained unless it is by order of a public official expressly authorized by law and after this order has been legally notified, unless he is surprised *in flagrante delicto* and, in that case, solely in order to take him before a competent judge.
>
> Art. 254. The detention may be carried out: 1) by order of the judge conducting the preliminary investigation or hearing the offense;
>
> (...)
>
> Art. 255. The judge conducting the preliminary investigation may order the detention:
>
> 1) When, following the establishment of the existence of an act that has the characteristics of an offense, the judge has well-founded suspicions to identify the perpetrator, accomplice, accessory after the fact, or the person whose detention is ordered;
>
> (...)
>
> 3. PROSECUTION AND PRE-TRIAL DETENTION
>
> Article 274. After the judge has examined the accused, he shall bring him to trial if, from the case file, it is clear that:
>
> 1) The existence of the offense investigated is validated, and
>
> 2) There are well-founded presumptions to consider that the accused has participated in the offense as perpetrator, accomplice or accessory after the fact.
>
> The judge shall try the accused for each of the wrongful acts that he is accused of, when the said circumstances are present.
>
> Article 275. The decision by which the accused is sent to trial or released shall be reasoned and shall indicate whether or not the conditions established in article 274 have been met.
>
> The authority who sends the accused to trial shall also state the background information taken into consideration and shall give a brief description of the acts that constitute the criminal offenses attributed to the accused.
>
> In the same decision, the judge shall include the particulars of the accused for the corresponding department, and shall grant the release of the accused, establishing if appropriate the amount of the

[314] Expert witness Mauricio Duce explained that article 10.2 of Law 18,314 made the provisions of Title VI of Law 12,927 (on State Security of August 26, 1975) applicable to the case and, in its article 27.2, Law 18,314 makes Title II of Volume II of the Code of Military Justice, in force at the time, applicable. Lastly, this Code, in its articles 137, 138, 140 and 142, made certain provisions of the Code of Criminal Procedure applicable, related, *inter alia*, to the indictment and to pre-trial release. Article 140 of the Code of Military Justice made article 274 of the Code of Criminal Procedure applicable, while article 142 of the Code of Military Justice made the provisions of the Code of Criminal Procedure applicable with regard to pre-trial release. *Cf.* Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio (file of statements of presumed victims, witnesses and expert witnesses, folio 38). Additionally, the Court notes that the investigating judge referred to article 275 of the Code of Criminal Procedure in the indictment issued against Mr. Ancalaf Llaupe.

surety, when the offense for which he is being tried makes this benefit admissible in any of the forms established in articles 357 or 359, unless there is a reason to keep him in pre-trial detention, which must be indicated.

If necessary, the decision referred to in the preceding paragraph may be issued in separate resolutions.

Article 276. The decision to bring the accused to trial shall be notified to the person deprived of liberty as established in article 66.

If the accused is at liberty and has an official legal representative in the proceedings, the latter shall be notified by certified writ. If he does not have such a representative, the court shall decide the measures to notify him personally as soon as possible.

Article 277. During the proceedings, arrest becomes pre-trial detention

4. PROVISIONS COMMON TO ARREST AND PRE-TRIAL DETENTION

Art. 280. (302) All orders for arrest or prison shall be issued in writing, and to implement them, the judge or authority who issued them shall issue a signed warrant in which this order is transcribed literally.

Art. 281. (303) The warrant for arrest or prison shall contain:

1) The name and title of the official who issues it;

2) The name of the person responsible for executing it, if the instructions are not issued in a general way to the law enforcement personnel represented by the security police or an army unit, or in another way;

3) The first and last name of the person to be arrested or, if unavailable, the circumstances that individualize him or determine his identity;

4) The reason for the arrest or prison, unless it is advisable to omit this for a genuine reason;

5) The determination of the prison or public place of detention where the person arrested should be taken, or of his home when this has been decided.

6) An indication of whether or not he should be kept incommunicado, and

7) The signature of the official and of the secretary, if applicable.

[ ]

Title IX

PRE-TRIAL RELEASE

Art. 356. Pre-trial release is a right of every person detained or imprisoned. This right may always be exercised in the way and under the conditions established in this Title.

Pre-trial detention shall only last the time necessary to meet its purposes. The judge, when deciding a request for release, shall always give special consideration to the time that the detainee or prisoner has been subject to pre-trial detention.

The detainee or prisoner shall be released at any stage of the case at which his innocence emerges.

All the officials who intervene in a proceeding are obliged to extend the detention of those found guilty and the pre-trial detention of the accused for the shortest time possible.

(...)

Art. 363. Pre-trial release can only be denied, by a reasoned decision, based on proven information from the proceedings, when the judge considers that the detention or prison is necessary for the success of the preliminary investigations, or when the release of the detainee or prisoner would be dangerous for the security of society or of the victim.

It shall be understood that the arrest or pre-trial detention is necessary for the success of the investigations only when the judge considers that there is a serious and well-founded suspicion that the accused may obstruct the investigation, by actions such as the destruction, modification, concealment or falsification of probative elements; or when he may induce co-accused, witnesses, expert witnesses or third parties to provide false information or to conduct themselves in a disloyal or reticent manner.

To consider whether the release of the accused may be dangerous for the security of society, the judge must consider, in particular, any of the following circumstances: the severity of the punishment assigned to the offense; the number of offense he is charged with and their nature; the existence of pending proceedings; the fact that he is subject to a precautionary measure, on parole, or serving one

of the alternative punishments established in Law 18,216; the existence of prior sentences that he has not yet served, based on the gravity of the offenses in question, and having acted as part of a group or gang.

It shall be understood that the safety of the victim of the offense is in danger owing to the release of the detainee or prisoner when proven information allows it to be presumed that the latter may attack the former or his family. In order to apply this norm, it shall be sufficient that the judge has verified this information by any means.

The court must include a detailed record in the proceedings of the information that has precluded pre-trial release, when it cannot mention them in the decision because this would affect the success of the investigation.

(…)

Art. 364.[315] Pre-trial release can be requested and granted at any stage of the trial.

305. *Criminal Procedural Code*. Pre-trial detention is regulated in articles 139 to 154 of the Criminal Procedural Code of 2000 (*supra* para. 101). The pre-trial detention of Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles, Aniceto Norín Catrimán and Pascual Pichún Paillalao was governed by this code. The following are the relevant provisions for this case:

Article 139. Admissibility of pre-trial detention. Everyone has the right to personal liberty and safety. Pre-trial detention shall only be admissible when other precautionary measures are insufficient to ensure the objectives of the proceedings.

Article 140. Requirements for ordering pre-trial detention. Once the investigation is underway, the court, at the request of the Public Prosecution Service or of the complainant, may order the pre-trial detention of the accused provided that the applicant substantiates that the following requirements are met:

a) That there is information supporting the existence of the offense investigated;

b) That there is information leading to a well-founded presumption that the accused has participated in the offense as perpetrator, accomplice or accessory after the fact, and

c) That there is information allowing the court to consider that pre-trial detention is essential for the success of specific and precise investigation measures, or that the release of the accused is dangerous for the security of society and of the victim.

It shall be understood that pre-trial detention is essential for the success of the investigation when there is a serious and well-founded suspicion that the accused may obstruct the investigation by the destruction, modification, concealment or falsification of probative elements; or when he may induce co-accused, witnesses, expert witnesses or third parties to provide false information or to conduct themselves in a disloyal or reticent manner.

To consider whether the release of the accused may be dangerous for the security of society, the court must consider, in particular, any of the following circumstances: the severity of the punishment assigned to the offense; the number of offense he is charged with and their nature; the existence of pending proceedings; the fact that he is subject to a precautionary measure, on parole, or serving one of the alternative punishments established by law; the existence of prior sentences that he has not yet served, based on the gravity of the offenses in question, and having acted as part of a group or gang.

Article 141. Inadmissibility of pre-trial detention. Pre-trial detention may not be ordered when it appears to be disproportionate to the seriousness of the offense, the circumstances in which this was committed, and the probable punishment. Pre-trial detention may not be ordered: […]
c) When the court considers that, if he is convicted, the accused may be eligible for an alternate measure to the deprivation or restriction of liberty established in the law and the accused verifies that he has permanent ties to the community, through his social and family roots. […].

Article 142. Processing of the request for pre-trial detention. The request for pre-trial detention may be made verbally in the hearing to open the investigation, during the hearing to prepare the oral trial, or in the hearing of the oral trial. It may also be requested at any stage of the investigation with regard to the accused against whom this is being conducted, in which case the judge shall set a hearing to decide the request, summoning to it the accused, his defense counsel, and the other parties. The presence of

[315] Text established in Decree Law 2,185, of April 12, 1978.

the accused and his defense counsel is a requirement for the validity of the hearing in which the request for pre-trial detention is decided. Once the grounds for the request have been indicated by the person making it, the court must always hear the defense counsel, the other parties if they are present and wish to intervene, and the accused.

Article 143. Decision on pre-trial detention. At the conclusion of the hearing, the court shall rule on the pre-trial detention by a reasoned decision, in which it states clearly the information that justifies the decision.

Article 144. Modification and revocation of pre-trial detention. The decision that orders or rejects pre-trial detention may be modified *ex officio* or at the request of any of the parties at any stage of the proceedings. When the accused requests the revocation of pre-trial detention, the court may reject it outright; also, it may summon all the parties to a hearing in order to discuss whether the circumstances that authorized the measure subsist. In any case, it shall be obliged to conduct the latter procedure when two months have passed since the last oral hearing in which the pre-trial detention was ordered or maintained. […]

Article 145. Substitution of pre-trial detention and review *ex officio*. At any time during the proceedings, the court, *ex officio* or at the request of one of the parties, may substitute pre-trial detention by any of the measures that are established in the provision of paragraph 6 of this Title [Other personal precautionary measures]. When six months has passed since pre-trial detention was ordered or since the last oral hearing in which this was decided, the court shall *ex officio* convene a hearing in order to consider whether to conclude them or to continue them.

Article 146. Surety to replace pre-trial detention. When the pre-trial detention has been or must be imposed in order to ensure the appearance of the accused at the trial and the eventual execution of the sentence, the court may authorize its replacement by a sufficient financial surety, and shall establish the amount.. […]
[…]

Article 149. Remedies related to the measure of pre-trial detention. The decision that orders, maintains, denies its admissibility or revokes pre-trial detention may be appealed when it has been delivered in a hearing. In the other cases, it shall not admit any remedy.

Article 150. Execution of the measure of pre-trial detention. […] The accused shall be treated as if he were innocent at all times. Pre-trial detention shall be implemented so that it does not acquire the characteristics of a punishment, or lead to restrictions other than those that are necessary to avoid flight and to ensure the safety of the other inmates, and of the persons who carry out functions or for any other reason are on the premises. […]
[…]

Article 154. Court order. All orders for pre-trial detention or arrest shall be issued in writing by the court and shall contain: […] (b) the reason for the arrest or detention […].

C) Considerations of the Court

306. The legal analysis of this alleged violations will be divided into the following parts:

a) General considerations on personal liberty, pre-trial detention, and presumption of innocence, and

b) Examination of the alleged violations:

i. Pre-trial detention imposed on Víctor Manuel Ancalaf Llaupe;

ii. Pre-trial detention imposed on Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo, José Huenchunao Mariñán and Patricia Troncoso Robles

iii. Pre-trial detention imposed on Aniceto Norín Catrimán and Pascual Pichún Paillalao.

1. General considerations on personal liberty, pre-trial detention, and presumption of innocence

a) Pre-trial detention in the American Convention

307. The pertinent provisions of the American Convention are as follows:

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

[...]

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

[...]

Article 8. Right to a Fair Trial

[...]

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.

[...]

308. Thus, paragraph 1 of Article 7 establishes the right to personal liberty and security in general, and the other paragraphs establish specific aspects of this right. The violation of any of those paragraphs entails the violation of Article 7(1) of the Convention, "because the failure to respect the guarantees of the individual deprived of liberty results in the failure to protect this person's right to liberty."[316]

309. The general principle in this regard is that liberty is always the rule, and its limitation or restriction always the exception.[317] This is the effect of Article 7(2), which stipulates that: "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." But mere compliance with the legal formalities is not sufficient, because Article 7(3) of the American Convention, by establishing that "[n]o one shall be subject to arbitrary arrest or imprisonment," prohibits arrest or imprisonment by means that may be legal, but that, in practice, are unreasonable, unpredictable, or disproportionate.[318]

310. The application of this general principle to cases of pre-trial detention or custody arises from the combined effect of Articles 7(5) and 8(2). Based on these articles, the Court has established that the general rule must be the liberty of the accused while his criminal responsibility is being decided,[319] because he enjoys a legal status of innocence and this requires that the State accord him a treatment in keeping with his situation of someone who has not been convicted. In exceptional cases, the State may resort to a measure of preventive incarceration in order to avoid situations that jeopardize achieving the objectives of the

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316 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 54, and *Case of Barreto Leiva v. Venezuela*, para. 116.

317 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 53; *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 106, and *Case of Barreto Leiva v. Venezuela*, para. 121.

318 *Cf. Case of Gangaram Panday v. Suriname. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of J. v. Peru*, para.127.

319 *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 67, and *Case of J. v. Peru*, para.157.

proceedings.[320] For a measure of deprivation of liberty to be in accordance with the guarantees established in the Convention, its application must be exceptional in nature and respect the principle of the presumption of innocence, and also the principles of legality, necessity and proportionality that are essential in a democratic society.[321]

311. The Court has also indicated the characteristics that a measure of pre-trial detention or custody should have in order to adhere to the provisions of the American Convention:

> **a)** *It is a precautionary rather than a punitive measure:* it must be aimed at achieving legitimate purposes that are reasonably related to the criminal proceedings underway. It cannot become a premature punishment or be based on general or special preventive objectives that could be attributed to the punishment.[322]
>
> **b)** *It must be based on sufficient evidence:* To order and maintain measures such as pre-trial detention, there must be sufficient evidence that permits the reasonable supposition that the individual subjected to trial has taken part in the unlawful act under investigation.[323] The verification of this important presumption is a necessary first step in order to restrict the right to personal liberty by means of a precautionary measure, because if there is not the slightest evidence linking the individual to the wrongful act investigated, there will be no need to safeguard the objectives of the proceedings. In the Court's opinion, the suspicion must be founded on specific facts; that is, not on mere conjectures or abstract intuitions.[324] Thus, it is evident that the State must not arrest someone in order to then investigate him; rather, it is only authorized to deprive a person of his liberty when it has sufficient information to be able to bring him to trial.[325]
>
> **c)** *It is subject to periodic review:* The Court has underscored that pre-trial detention should not be continued when the reasons for its adoption no longer exist. The Court has also observed that the domestic authorities are responsible for assessing the pertinence of maintaining any precautionary measures they issue pursuant to their own laws. In this regard, the domestic authorities must provide sufficient reasons to justify why the restriction of liberty has been maintained,[326] and these must be based on the need to ensure that the detainee will not impede the efficient implementation of the investigations or evade the action of justice; to the contrary, it becomes an arbitrary deprivation of liberty according to Article 7(3) of the American Convention.[327] The Court also emphasizes that the judge does not have to wait until an acquittal is delivered for a person who has been detained to recover his freedom, but must periodically assess whether the grounds for the measure remain, as well as its necessity and proportionality, and also if the duration of the detention has exceeded the legal and

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320 *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77; *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, para. 144, and *Case of J. v. Peru*, para. 157.

321 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*. Preliminary objections, merits, reparations and costs. Judgment of September 2, 2004. Series C No. 112, para. 228, and *Case of J. v. Peru*, para. 158.

322 *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77; *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103; *Case of Barreto Leiva v. Venezuela*, para. 111, and *Case of J. v. Peru*, para. 159.

323 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 101 and 102; *Case of Barreto Leiva v. Venezuela*, para. 111 and 115, and *Case of J. v. Peru*, para. 159.

324 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103.

325 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103.

326 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 107; and *Case of J. v. Peru*, para. 163.

327 *Cf. Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of October 30, 2008. Series C No. 187, para. 74, and *Case of J. v. Peru*, para. 163.

reasonable limits. Whenever it appears that the pre-trial detention does not meet these conditions, the release of the detainee should be ordered, without prejudice to the continuation of the respective proceedings.[328]

312. Pursuant to the above, it is not sufficient that the pre-trial detention is legal; it is essential that it is not arbitrary, which means that the law and its application must respect the following requirements:

a) *Purpose compatible with the Convention:* the purpose of measures that deprive or restrict liberty must be compatible with the Convention (*supra* para. 311.a). The Court has indicated that "the deprivation of liberty of the accused cannot be based on general or special preventive objectives that can be attributed to the punishment, but can only be based […] on a legitimate objective, namely: to ensure that the accused will not obstruct the implementation of the proceedings or evade the action of justice."[329] Thus, the Court has indicated repeatedly that the personal characteristics of the supposed perpetrator and the seriousness of the offense he is accused of are not, in themselves, sufficient justification for pre-trial detention.[330] It has also stressed that risks to the proceedings cannot be presumed, but must be verified in each case, based on the objective and precise circumstances of the specific case.[331]

b) *Suitability:* the measures adopted must be suitable to achieve the objective sought.[332]

c) *Necessity:* they must be necessary; in other words, they must be absolutely essential to achieve the objective sought and there is no less onerous measure as regards the right affected among all those that are equally suitable to achieve this objective.[333] Thus, even when the aspect relating to sufficient evidence that allows it to be supposed that the accused has taken part in the illegal act has been determined (*supra* para. 311.b), the deprivation of liberty must be strictly necessary to ensure that the accused will not obstruct the said procedural objectives.[334]

d) *Proportionality:* they must be strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or disproportionate in relation to the advantages obtained by this restriction and the achievement of the objective sought.[335]

e) Any restriction of liberty that does not contain sufficient justification that allows an assessment of whether it is in keeping with the above conditions will be arbitrary and, therefore, violate Article 7(3) of the Convention.[336] Thus, in order to respect the presumption of innocence when ordering precautionary measures that restrict liberty, in

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328 *Cf. Case of Bayarri v. Argentina*, para. 76.

329 *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77, and *Case of J. v. Peru*, para. 157.

330 *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 69, and *Case of J. v. Peru*, para. 159.

331 *Cf.* Case of *Barreto Leiva v. Venezuela*, para. 115, and *Case of J. v. Peru*, para.159.

332 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 93.

333 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 93.

334 *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103, and *Case of Barreto Leiva v. Venezuela*, para. 111.

335 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 93.

336 *Cf. Case of García Asto and Ramírez Rojas v. Peru*, para. 128, and *Case of J. v. Peru*, para.158.

each specific case the State must justify and prove, precisely and in detail, the existence of the said requirements established by the Convention.[337]

2. Examination of the alleged violations

a) Pre-trial detention de Víctor Ancalaf Llaupe[338]

a.i) Pertinent facts

313. As already indicated (*supra* para. 137), on October 17, 2002, the investigating judge of the Concepción Court of Appeal issued the indictment against Víctor Ancalaf Llaupe and also "issue[d] an arrest warrant against [him]." Mr. Ancalaf Llaupe was arrested on November 6, 2002, and, as he was already being processed, he was kept in pre-trial detention. No specific reasons were given for the pre-trial detention which was a result of the proceedings.

314. The indictment included a list of evidence gathered and a summary of the acts investigated and, with regard to the implication of Víctor Manuel Ancalaf Llaupe in the said acts, it indicated the following in the seventh paragraph:

> 7. That, these same events and the preliminary statements of Víctor Manuel Ancalaf Llaupe himself, on folios 318 and 967, reveal well-founded presumptions to consider that he participated as perpetrator in the three offenses described above. On this basis and also in view of the provisions of articles 15 of the Criminal Code, 274, 275 and 276 of the Code of Criminal Procedure, and 10 and 14 of Law No 18,314, it is declared that Víctor Manuel Ancalaf Llaupe is brought to trial as perpetrator of the terrorist offenses described in the preceding *consideranda*, committed on September 29, 2001, and March 3 and 17, 2002, established in article 2.4 of Law No. 18,314 in relation to article 1 of the same law.

315. On April 24, 2003, Mr. Ancalaf Llaupe's defense filed a request for his pre-trial release, "[c]onsidering the time that [Mr. Ancalaf] had been deprived of liberty and that it cannot be considered that his release may interfere with the measures taken in the preliminary proceedings." The investigating judge denied this request the following day.[339] On April 30, 2003, Mr. Ancalaf's defense filed an appeal against this decision, which was denied on May 5, 2003, by the Concepción Court of Appeal without any explicit justification.

316. Eight months after the start of the deprivation of liberty, on July 7, 2003, Mr. Ancalaf's defense filed another request for pre-trial release considering that "[t]he investigation had concluded." The following day, the investigating judge denied this request in the same terms as the denial of April 25, 2003.

317. Mr. Ancalaf remained in pre-trial detention until December 30, 2003, the date on which the judgment convicting him was delivered (*supra* para. 144).

a.ii) Considerations of the Court

318. Having examined the indictment of Víctor Ancalaf Llaupe issued on October 17, 2002, based on which he was deprived of liberty, the Court notes that this decision did not comply

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337 *Cf. Case of Palamara Iribarne v. Chile*, para. 198, and *Case of J. v. Peru*, para. 159.

338 The evidence relating to the facts established in this chapter regarding the pre-trial detention of Mr. Ancalaf Llaupe is in the file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe, a copy of which was provided to the Court in these proceedings (file of annexes to the CEJIL motions and arguments brief, annex A, folios 990 to 1018, and 1444 to 1520), and with the helpful evidence presented by the State with briefs of October 17 and 23, 2013, with which it provided a copy of the file of the criminal proceedings held against Mr. Ancalaf Llaupe. This evidence was also provided during the processing of the case before the Commission (file of annexes to the Merits Report, annex 6 and appendix 1).

339 "With regard to the fourth petition, based on the merits of this case, the number of offenses that the accused is charged with and their nature, and pursuant to article 363.1 and 3 of the Code of Criminal Procedure, and articles 142 of the Code of Military Justice and 27 of Law 12,927, the pre-trial release requested by the accused Victor Manuel Ancalaf is not admissible as he is considered to be a danger to the security of society." *Cf.* Decision issued on April 25, 2003, by the investigating judge of the Concepción Court of Appeal (file of annexes to the CEJIL motions and arguments brief, annex A, folio 1446).

with the first element required to restrict the right to personal liberty by means of a precautionary measure, which is that it should indicate the existence of sufficient evidence about participation in the illegal act investigated (*supra* para. 311.b). The list of evidence gathered and the statement that the background information and "the preliminary statements of Víctor Manuel Ancalaf Llaupe" constitute "well-founded presumptions to consider that he had participated as a perpetrator of the three offenses" investigated (*supra* para. 314), does not allow it to be verified that this requirement had been met. It should be recalled that Mr. Ancalaf Llaupe was unable to examine the case file until June 2003, months after the conclusion of the preliminary proceedings, which had been kept confidential under article 78 of the Code of Criminal Procedure (*supra* paras. 138 to 140). It was only at the stage of the plenary proceedings that he could have access to the case file; however, he remained without access to the confidential files (*supra* paras. 142 to 144).

319. The European Court of Human Rights, when ruling on a detention in a case related to the investigation of a terrorist offense, stated that a situation is possible in which a suspect may be arrested "on the basis of information which is reliable but which cannot be disclosed to the suspect or produced in court without jeopardizing the informant." The European Court decided that even though, owing to the difficulties inherent in the investigation and processing of terrorist crimes, the "reasonableness" cannot always be evaluated using the same standards as in ordinary crime, "the exigencies of dealing with a terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the safeguard secured by Article 5 § 1 (c) [of the European Convention] is impaired."[340]

320. In the instant case, there is no evidence that the secrecy of everything relating to the preliminary proceedings (or the "confidential files" even after this) responded to a measure that was necessary in order to protect information that could affect the investigation. Consequently, the accused's defense was not given the opportunity to examine any of the documents and evidence on which his deprivation of liberty was based. In addition, the investigating judge's assertion in the indictment that there were "well-founded presumptions to consider that [Mr. Ancalaf] participated as perpetrator of the three offenses" investigated, was not accompanied by specific information that the accused and his defense could contest.[341] Consequently, the Court decides that the State did not comply with the requirement of establishing the existence of sufficient evidence that would allow a reasonably presumption of the identity of those who had taken part in the offense investigated (*supra* para. 312.b).

321. Furthermore, the pre-trial detention de Víctor Ancalaf Llaupe was not ordered to achieve a legitimate objective, because the indictment did not refer to the need for deprivation of liberty

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340 ECHR, *Case of O'Hara v. The United Kingdom*, No. 37555/97. Judgment of 16 October 2001, paras. 33 to 35.

341 ECHR, *Case of A. and Others. v. The United Kingdom,* No. 3455/05. Judgment of 19 February 2009, para. 220. The European Court Europeo has indicated that: "[t]he Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations." "Where, however, the open material consisted purely of general assertions and [the competent organ's] decision to […] maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied." In this case, the European Court considered that some detainees were not in a position effectively to challenge the allegations against them and, therefore, found that there had been a violation of Article 5.4 of the European Convention.

or to the purpose sought by this in the specific case. The objective sought with the pre-trial detention became clear when all the requests for pre-trial release made by Mr. Ancalaf Llaupe, and the corresponding appeals, were denied. The only justification for the adverse decisions was that the requests were denied "because he was considered a danger to the security of society," "[t]aking into account the number of offenses the accused is charged with and their nature." The appeals were rejected outright and without any justification.

322. The Court considers that this objective of denying the release of the accused because he would be a danger "to the security of society" has an open-ended meaning that can permit objectives that are not in keeping with the Convention. In this regard, expert witness Duce, proposed by CEJIL, explained that these grounds are open to different interpretations that may include not only legitimate procedural objectives, but also objectives that the Court, in its case law, has considered illegitimate for ordering and maintaining pre-trial detention.[342]

323. This makes it essential to verify whether, in this specific case, the reference to the liberty of the accused being a danger "to the security of society" was supported by any factor or reason that could be considered to seek a preventive objective and that justified the need for the measure in the specific case. Thus, in this case, when referring to the danger, reference was made to only two of the criteria that article 363 of the Code of Criminal Procedure established must be taken into account "in particular": "the severity of the punishment assigned to the offense" and "the number of offenses that the accused is charged with and their nature." The Court reiterates that the use of these criteria alone are insufficient to justify pre-trial detention (*supra* para. 312.a).

324. In addition, the failure to provide the reasoning for the judicial decisions, aggravated by the confidentiality of the preliminary proceedings, prevented the defense from knowing why the pre-trial detention had been maintained and this precluded the defense from presenting evidence and arguments to challenge decisive inculpatory evidence or to achieve his pre-trial release.[343] In this regard, expert witness Fierro Morales indicated that "[i]t is in this context, and in absolute secret, that the investigating judge decided that, with regard to Mr. Ancalaf, there were well-founded presumptions that implicated him as perpetrator in the acts investigated as terrorist offenses."[344]

325. Furthermore, in neither the indictment nor the denials of the requests for pre-trial release was it assessed positively that Víctor Ancalaf Llaupe had come forward voluntarily when he was summoned to testify and that, when his defense filed the second request, the investigation against him had concluded.

326. Since his criminal responsibility had not been established legally, Mr. Ancalaf Llaupe had the right to be presumed innocent under Article 8(2) of the American Convention. On this basis, the State had the obligation not to restrict his liberty more than strictly necessary, because pre-trial detention is a precautionary rather than a punitive measure. Consequently, the State restricted the liberty of Mr. Ancalaf without respecting the right to presumption of innocence and violated his right not to be subject to arbitrary arrest established in Article 7(3) of the Convention.

327. *Based on the above, it must be concluded that the State violated the right to personal liberty, not to be subject to arbitrary arrest, and not to suffer pre-trial detention in conditions that were not adapted to international standards, recognized in Article 7(1), 7(3) and 7(5) of*

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342 *Cf.* Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio (file of statements of presumed victims, witnesses and expert witnesses, folios 70 and 71).

343 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 118.

344 Affidavit prepared on May 17, 2013, by expert witness Claudio Alejandro Fierro (file of statements of presumed victims, witnesses and expert witnesses, folio 8).

the American Convention, and the right to presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Víctor Manuel Ancalaf Llaupe.

b) Pre-trial detention of Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles[345]

b.i) Pertinent facts

a) Pre-trial detention of Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Troncoso Robles

328. On January 28, 2003, the hearing to open the investigation with regard to, among others, Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Troncoso Robles was held in the Collipulli Guarantees Court. During the hearing, the Public Prosecution Service requested their pre-trial detention and the judge ordered this. She based her decision on the consideration that "the confidential testimony seen by this judge constitutes well-founded presumptions of the participation of the accused in the said acts" and that "at the present time, since the accused are subject to personal precautionary measures in other pending proceedings, without prejudice to the subsequent review of such measures, it was in order to grant the pre-trial detention requested by the Public Prosecution Service." The precautionary measure to which they were already subject was also that of pre-trial detention.[346]

b) Pre-trial detention of Juan Patricio Marileo Saravia

329. During the hearing to monitor the detention and to open the investigation with regard to Juan Patricio Marileo Saravia, held in the competent court on March 16, 2003, the Public Prosecution Service requested his pre-trial detention and, in a decision issued the same day, the Collipulli Alternate Guarantees Court ordered this. It founded its decision as follows: "based on the information provided, this judge finds that both the existence of the offense to be investigated, and the participation and responsibility in it that can be attributed to the accused have been proved sufficiently at this procedural stage." He also indicated that "based on the form and circumstances of the perpetration of the wrongful act investigated, the importance of the harm caused by it, and the punishment that it entails, this judge finds that, at this procedural stage, the release of the accused would be a danger to the security of society; thus, this make the precautionary measures of pre-trial detention admissible in his regard." In addition, he indicated that "none of the circumstances established by the provisions of article 141 of the Criminal Procedural Code to exclude pre-trial detention are present in this case" and that "nor have the social and family ties indicated in the said article as a condition for the exclusion of pre-trial detention been proved during this hearing."

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[345] The evidence relating to the facts established in this chapter on the pre-trial detention of Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles can be found in the file of the domestic criminal proceedings, a copy of which was provided during the processing of the case before the Commission (file of annexes to the Merits Report, appendix 1, folios 7804 to 10016).

[346] The text of the decision indicates that "the respective defense counsel opposed the precautionary measure of pre-trial detention indicating that article 140.b) of the Criminal Procedural Code had not been proved; in other words, that the participation of each of them in [the] events had not been proved." After referring to the information presented by the Public Prosecution Service, which included testimony from anonymous witnesses, the judge considered that the existence of the offense had proved and that "the secret testimony examined by this judge gave rise to well-founded presumptions of the participation of the accused in [the] events." She added "that, at this stage of the proceedings, it is not necessary to assess this background material as evidence, and it will be open to discussion at the pertinent procedural opportunity," in other words, "during the oral trial." Lastly, she took into account that the accused were already in pre-trial detention as a result of other pending proceedings (file of annexes to the Merits Report 176/10, appendix 1, folios 8666 and 8667).

c) Review of the need to maintain the five presumed victims in pre-trial detention

330. Acting separately or together, on reiterated occasions (April 1, May 30, June 18, September 12 and 24, October 7 and 13, and November 24, 2003), the presumed victims requested the Collipulli First Instance Guarantees Court to review the precautionary measure of pre-trial detention. In all the cases, the court denied the requests, and the corresponding appeals were also denied. In general, the denials were based on the argument that the release would be "dangerous for the security of society" or that the circumstances that made the pre-trial detention advisable had not changed. In one case, the court added, "furthermore, […] at this time there is no other precautionary measure that would ensure the objectives of the proceedings."[347] Regarding the requests of September 12, 2003, and thereafter, no decision was taken because, at the request of the Public Prosecution Service, the Temuco Court of Appeal had ordered that no change be made in the situation.

331. In a brief of January 8, 2004, the defense of the five presumed victims requested a hearing to review their precautionary measures "as ordered by article 145.2 of the Criminal Procedural Code, because six months had passed since the last time that this onerous precautionary measure had been revised [and their] clients had been deprived of liberty for more than a year." The following day, the Collipulli Guarantees Court of First Instance with combined jurisdiction decided that "[s]ince an order that no change be made has been issued in these proceedings, the request is inadmissible at this time." On January 28, 2004, the Supreme Court of Justice of Chile decided that "there is no reason to annul the "no change" order, although this should be restricted to the processing of background information, without this precluding a decision on the pre-trial detention of the accused." The court set the date of February 13, 2004, for the hearing to review the precautionary measure imposed on the five accused.

332. After this hearing, citing among other grounds, "the international treaties referred to by the Public Criminal Defender," the court decided to substitute the pre-trial detention by other precautionary measures consisting in the obligation to appear before the corresponding authority periodically, and the prohibition to leave the country, and an "order of immediate release" was issued. On February 18, 2004, the prosecutor and two complainants filed an appeal against the said decision and, on February 24, 2004, a hearing was held before the Temuco Court of Appeal which, citing among other grounds, Articles 7(1) and 7(2) "of the Pact of San José, Costa Rica," decided unanimously to confirm the decision appealed and impose on the accused, also, the "precautionary measures of night-time house arrest […] with the obligation to appear […] personally before the authority responsible for monitoring compliance with the measure that had been decided."

b.ii) Considerations of the Court

333. The Court considers that the decisions to adopt and maintain the pre-trial detention were not in accordance with the requirements of the American Convention that they be based on sufficient probative elements – with the exception of the decision regarding Juan Patricio Marileo Saravia which did comply with this requirement (*infra* para. 336) – and seek a legitimate objective, as well as the obligation to conduct periodic reviews.

a) Insufficient probative elements

334. The judicial decision that initially ordered the pre-trial detention of Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles did not comply with the requirement that it be based on sufficient probative elements reasonably to suppose that the said individuals had taken part in the criminal act investigated,

[347] Decision issued on June 23, 2003, by the Collipulli court on the hearing to review the precautionary measure held that same day (file of annexes to the Merits Report 176/10, Appendix 1, Annex 7, folios 8421-8424).

because it was based merely on "confidential testimony," without including elements that could corroborate this conclusion (*supra* para. 328). This testimony relates to statements whose contents could not be examined by the defense, because at the stage of the investigation at which the pre-trial detention was requested and ordered, the secrecy of the investigation proceedings had been decreed for 40 days pursuant to article 182 of the Criminal Procedural Code. Moreover, when the judge evaluated the request for pre-trial detention filed by the Public Prosecution Service during the hearing, the defense pointed out that information was being used "which he ha[d] been unable to access."

335. This reference to "confidential testimony" was not accompanied by additional arguments or explanations that, without revealing information that had to be temporarily kept confidential with regard to a probative element, would have provided more information allowing the justification for the judicial decision to be known and enabling the accused and their defense to contest the adoption of the precautionary measure of pre-trial detention. Consequently, the defense of the accused had no knowledge of the evidence and no information concerning the elements that this supposedly gave the judge for basing her considerations regarding possible participation in the criminal act.

336. Regarding Juan Patricio Marileo Saravia, the judicial decision to adopt the measure of pre-trial detention (*supra* para. 329) provided sufficient evidence to conclude that it complied with the first requirement to indicate the evidence that resulted in a reasonable presumption that the person had taken part in the wrongful act investigated.

b) Lack of a legitimate purpose

337. With regard to the requirement that the need for pre-trial detention must be justified by a legitimate purpose (*supra* para. 312.a), the decisions ordering the pre-trial detention were not in keeping with the American Convention:

> a) The decision with regard to Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles did not refer to whether the precautionary measure sought some procedural objective and was necessary in relation to the investigation, but merely ordered it on the basis that the accused were subject to this type of measure in relation to other proceedings. This reasoning does not substantiate the need for the measure in relation to the investigation and prosecution in the specific case.
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> b) The grounds for the decision with regard to Juan Patricio Marileo was that his release would represent a "danger to the security of society," an open-ended reason that, as already indicated (*supra* paras. 322 and 323), makes it essential to verify whether, in the specific case, the reference to these grounds was accompanied by a factor or criterion that could be considered to seek a precautionary objective and that would justify the measure, in the specific case. In this regard, the decision that ordered pre-trial detention merely indicated that it was considered necessary "during [the actual] procedural stage" of the case "based on the manner and circumstances of the perpetration of the wrongful act investigated, the importance of the harm caused by this, and the punishment it entailed." With regard to the criterion or factor relating to "the manner [and] circumstances of the perpetration of the wrongful act investigated," the Court notes that this factor was not accompanied by an explanation about how it might entail a procedural risk. The judge did not justify whether it would have any effects on the obstruction of specific measures that were pending at that stage of the proceedings. Regarding the reference to criteria such as the punishment and the "harm caused by the offense," the Court reiterates that the seriousness of the offense is not, in itself, sufficient justification for pre-trial detention (*supra* para. 312.a). Consequently, the Court finds that the domestic court did not justify the need to order pre-trial detention based on a procedural risk in the specific case.

338. The decisions that denied the request for review did not cite any legitimate purpose to maintain the pre-trial detention, so that the situation indicated in the preceding paragraphs remained unchanged.

339. Consequently, the Court finds that the judges failed to justify the decision to impose or maintain the pre-trial detention based on a legitimate purpose such as the existence of a procedural risk in the specific case.

c) Inadequate periodic review

340. The judicial decisions denying the requests for review did not comply adequately with the function of analyzing whether it was pertinent to maintain the detention measures. The statements that "there is no new information to review" and that "there is no information that would allow it to be presumed that the circumstances have changed that made pre-trial detention advisable," reveal an erroneous notion based on considering that it would be necessary to prove that the initial circumstances had changed, instead of understanding that it is the judge's task to analyze whether circumstances subsist that mean that the pre-trial detention should be maintained and is a proportionate measure to achieve the procedural objective sought. The judicial decisions ignored the need to justify and to provide the reasons for maintaining the precautionary measure imposed, and failed to mention any procedural objective that would have required maintaining it. Moreover, in one case, the decision to maintain the pre-trial detention was adopted without any justification.

341. With regard to the judicial decision of June 23, 2003, that maintained the pre-trial detention of Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, Juan Patricio Marileo and Patricia Troncoso Robles, it did not contain an explanation of the information to which it refers that "does not change the circumstances that made the pre-trial detention advisable," and disregarded the fact that the review of the pre-trial detention imposed entailed justifying and providing the reasons for the need to maintain it. This was particularly serious in the instant case, because the initial adoption of the precautionary measure did not comply with any of the treaty-based requirements (*supra* paras. 334, 335 and 337). Furthermore, when maintaining the measure, the court did not explain which procedural objectives it was referring to and why there was no other precautionary measure that "permitted ensuring the objectives of the proceedings." In this regard, article 155 of the Criminal Procedural Code, to which the defense referred, established another seven personal precautionary measures that could be imposed either separately or together, among other matters, "to ensure the success of the investigation" and "to ensure the appearance of the accused at the different stages of the proceedings or for the execution of judgment," which, it would seem, were not considered by the judicial authority.

d) Presumption of innocence

342. In view of the fact that their criminal responsibility had not yet been established legally, the presumed victims had the right to be presumed innocent, pursuant to Article 8(2) of the American Convention. This gave rise to the State's obligation not to restrict their freedom more than strictly necessary, because pre-trial detention is a precautionary rather than a punitive measure. Consequently, the State restricted the freedom of Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles without respecting the right to the presumption of innocence and violated their right not to be subject to arbitrary imprisonment established in Article 7(3) of the Convention.

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343. *Based on the above, it must be concluded that the State violated the rights to personal liberty, not to be subject to arbitrary arrest, and not to suffer pre-trial detention in conditions that were not adapted to international standards, established in Article 7(1), 7(3) and 7(5) of*

the American Convention, and the right to the presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

c) Pre-trial detention of Aniceto Norín Catrimán and Pascual Pichún Paillalao[348]

344. The pre-trial detention of Messrs. Norín Catrimán and Pichún Paillalao was also governed by the provisions of articles 139 to 154 of the Criminal Procedural Code of 2000 (*supra* para. 305). They were both investigated and tried in relation to two offenses of terrorist arson and for the offense of threats of terrorist arson. They were sentenced and convicted as perpetrators of the offense of threats and acquitted of the offenses of terrorist arson (*supra* paras. 106 to 119).

c.i) Pertinent facts

a) *Pre-trial detention of Aniceto Norín Catrimán Pascual and Pascual Pichún Paillalao*

345. On January 11, 2002, a hearing was held before the Traiguén Guarantees Court to monitor the detention and open the investigation with regard to Aniceto Norín Catrimán, during which the Public Prosecution Service requested that the court order his pre-trial detention. The defense pointed out, among other matters, that "the prosecutor ha[d] not justified this and c[ould] not base his request on the fact that the relevant information he possessed ha[d] been declared secret, because, it [was] precisely on this information that the court must base its decision." The prosecutor asserted that "regarding the participation, there are a series of testimonies that, at this time, are confidential, but if [the judge] wishes to examine them [he could] make them available to her," and the judge ordered a recess "in order to examine the information." The same day, the court ordered the measure requested, on the basis that:

> The requirements established in article 140 have been met; the offense has been proved, there is well-founded information that allows it to be presumed that the accused participated as perpetrator. In addition, there is also information from the court that reviewed and examined the information contained in the file of the investigation proceedings which the prosecutor showed me that allows it to be considered that pre-trial detention is essential for the success of the investigation and also considering that the release of the accused at this time would constitute a grave danger for society, especially because of the number of offenses of which he has been indicted and the severity of the punishment assigned to at least one of them: the offense of arson that is penalized by medium-term rigorous imprisonment at any of its levels for more than five years and one day.

346. On January 14, 2002, Mr. Norín Catrimán's defense appealed the ruling issued on January 11, 2002, alleging that "[i]t has been argued that some information has been declared confidential, but it has never been indicated whether this contains information against my client" and that "by not disclosing the information that justifies such a severe precautionary measure, the possibilities of contesting it are impaired." On January 18, 2002, a hearing was held to decide the said appeal, following which the Temuco Court of Appeal decided to confirm the decision appealed, with the exception of the argument "that the pre-trial detention would be essential for the success of the investigation," which it ordered should be "eliminated."

347. On March 4, 2002, a hearing was held before the Traiguén Guarantees Court to monitor the arrest and indictment of Pascual Pichún Paillalao, during which the Public Prosecution Service requested pre-trial detention. The court granted this, on the basis that "there is information that justifies the existence of the offense; also, there are well-founded presumptions that the accused participated in it and also there is specific information that allows the court to consider that pre-trial detention is essential for the success of the

[348] The evidence relating to the facts established in this chapter on the pre-trial detention of Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao are to be found in the file of the domestic criminal proceedings, a copy of which was provided during the processing of the case before the Commission (file of annexes to the Merits Report, appendix 1, folios 4319 to 5159).

investigation." On March 9, 2002, Mr. Pichún Paillalao's defense appealed the decision of March 4, 2002. On March 13, a hearing was held to decide this appeal, following which the Temuco Court of Appeal decided to confirm the decision appealed, as follows:

> Based on the circumstances of the act, the testimony of those present in the court, the seriousness of the offense investigated, and the personal history of the accused, and also taking into consideration the provisions of article 140 of the Criminal Procedural Code, the appealed decision of March 4 this year is confirmed, considering that the release of the accused Pascual Pichún Paillalao would be dangerous for society.

b) *Review of the need to maintain the pre-trial detention*

348. Acting separately or jointly, the presumed victims requested repeatedly (February 22, June 14, July 4, and August 9, 2002) the review of the precautionary measure of pre-trial detention before the Traiguén Guarantees Court. The ruling was always adverse and the appeals filed were denied by the Temuco Court of Appeal (except in one case in which it was declared abandoned owing to the defense's failure to appear[349]). The arguments on which the denials were based were, basically, that the danger to the security of society persisted owing to the egregious nature of the offenses attributed to the accused. In one of the adverse decisions, it was also asserted that "as the defense has said, the Guarantees Court must safeguard the innocence of the accused; however, this court must also safeguard the rights of the victim."[350] In another it explained that "in this regard the requirements of the three paragraphs of article 140 are met: the offense has been proved, there are well-founded presumptions to consider that they are the perpetrators, and also owing to the seriousness of the offenses for which they are in pre-trial detention and the severity of the punishment assigned to the offense."[351] In a subsequent decision, the court indicated that "having analyzed what has been said and also the information which it has seen in the case file, the requirements for maintaining the detention have not changed, because [the accused] have been indicted of an offense under Law No 18,314 that merits a severe punishment and, therefore, release would constitute a danger to society."[352]

c.ii) Considerations of the Court

349. The Court considers that the decisions to adopt and to maintain pre-trial detention were not in keeping with the requirements of the American Convention that it should be based on sufficient evidence and seek a legitimate objective, and must be reviewed periodically.

a) Insufficient probative elements

350. The decision to impose pre-trial detention on Aniceto Norín Catrimán (*supra* paras. 345 and 346) was based on testimony that was "confidential" because it had been decided that some of the investigation procedures would be closed. Moreover, additional arguments or explanation were not provided that, without revealing information regarding the evidence that needed to be kept confidential temporarily, would have provided more information that would have allowed the grounds for the judicial decision to be known and enabled the accused and his defense to contest the adoption of the precautionary measure of pre-trial detention. Therefore, it was not consistent with the requirements of the American Convention.

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[349] Decision issued on June 28, 2002, by the Temuco Court of Appeal (file of annexes to the Merits Report 176/10, appendix 1, folio 4370).

[350] Decision issued on July 11, 2002, by the Traiguén Guarantees Court (file of annexes to the Merits Report 176/10, appendix 1, folios 4354 to 4364).

[351] Decision issued on April 8, 2002, by the Traiguén Guarantees Court (file of annexes to the Merits Report 176/10, appendix 1, folio 4551).

[352] Decision issued on June 19, 2002, by the Traiguén Guarantees Court (file of annexes to the Merits Report 176/10, appendix 1, folio 4345).

351. The judicial decision ordering the pre-trial detention of Pascual Pichún Paillalao was based on the existence of elements and "presumptions" concerning the perpetration of the criminal act and the accused's participation in it (*supra* para. 347). Even though the written judicial decision does not provide details of the evidence on which this conclusion was based, during the hearing reference was made to elements that, at that stage, could be considered to implicate Mr. Pascual Pichún in the incident investigated. The defense did not contest this aspect in the appeal. Consequently, the Court does not find that the State failed to comply with this first requirement of the measure being based on the existence of sufficient element implicating the accused in the wrongful act under investigation.

b) Lack of a legitimate objective

352. It has been proved that the grounds for the decision to impose and maintain the pre-trial detention of Messrs. Norín Catrimán and Pichún Paillalao was that their release would constitute a "grave danger for society," or "considering [their release] dangerous for the security of society" (*supra* paras. 345 to 347). To this end, criteria such as the "number of offenses investigated," the "severity of the punishment," the "seriousness of the offense investigated" and the "personal history of the accused," were taken into account that, in themselves, do not justify pre-trial detention, and that were not assessed when evaluating the need for the measure in the circumstances of the specific case. Even though the decision ordering the pre-trial detention of Mr. Pascual Pichún indicated that it was "essential for the success of the investigation," this assertion was not justified in a way that allowed it to be known if it was considered that the release of the accused would in some way affect the implementation of specific measures.

c) Inadequate periodic review

353. None of the judicial decisions adopted in relation to the requests to review the maintenance of the pre-trial detention of Messrs. Norín Catriman and Pichún Paillalao (*supra* para. 348) analyzed the need to provide the reasons that justified the maintenance of the precautionary measure. Nor was any reference made to any legitimate procedural objective that made it necessary to maintain them. None of the judicial decisions assessed factors or criteria that could be related to a legitimate objective that would have justified the need for the measure in the specific case.

d) Presumption of innocence

354. Since their criminal responsibility had not yet been established, the presumed victims had the right to be presumed innocent under Article 8(2) of the American Convention. This gave rise to the State's obligation not to restrict their freedom more than strictly necessary, because pre-trial detention is a precautionary rather than a punitive measure.[353] Consequently, the State restricted the liberty of the presumed victims without respecting the right to the presumption of innocence, and violated their right not to be subject to arbitrary imprisonment established in Article 7(3) of the Convention.

* * *

355. Based on the above, it must be concluded that the State violated the rights to personal liberty, not to be subject to arbitrary imprisonment, and not to suffer pre-trial detention in conditions that were not consistent with international standards established in Article 7(1), 7(3) and 7(5) of the American Convention, and the right to the presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao.

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[353] *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77, and *Case of J. v. Peru*, para. 371.

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356. In view of the fact that the pre-trial detention to which the presumed victims were subjected was arbitrary, the Court does not find it necessary to consider whether the time of more than one year, in each case, during which they were in pre-trial detention exceeded reasonable limits.[354]

357. To all the foregoing, it should be added that, in none of the cases, the condition of seven of the presumed victims as members of an indigenous people was taken into account and, in particular, the positions of traditional authority occupied by Messrs. Norín Catrimán and Pichún Paillalao as *Lonkos* and Mr. Ancalaf Llaupe as *Werken* of their respective communities. In order to ensure effectively the rights established in Article 7 of the Convention, in relation to Article 1(1) of this instrument, when interpreting and applying their domestic laws, State must take into consideration the inherent characteristics that differentiate members of the indigenous peoples from the general population and that constitute their cultural identity.[355] The prolonged duration of pre-trial detention may have different effects on members of indigenous peoples owing to their economic, social and cultural characteristics and, in the case of community leaders, may also have negative consequences on the values, practices and customs of the community or communities in which they exercise their leadership.[356]

358. For the reasons set out in this chapter, *the Court concludes that the State violated the rights to personal liberty, not to be subject to arbitrary imprisonment, and not to suffer pre-trial detention in conditions that are not consistent with international standards recognized in Article 7(1), 7(3) and 7(5) of the American Convention, and the right to the presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Víctor Ancalaf Llaupe, Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, Patricia Troncoso Robles, Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao.*

3. Alleged non-compliance with the obligation established in Article 2 of the American Convention (Domestic legal effects)

359. CEJIL alleged that Article 2 of the Convention had been violated in relation to the regulation of "[t]he grounds of danger to the security of society," because it considered that "it violates the treaty-based guarantees, owing both to its implications and to the failure to adapt it to the relevant international standards." CEJIL referred to the 2008 reform of the Criminal Procedural Code in relation to these grounds, but affirmed that "the ambiguity of the grounds […] was not rectified" and, rather, that "certain hypotheses [were included] where the judge was obliged to presume they existed (article 140.3, Criminal Procedural Code)." The FIDH did not allege a violation of Article 2 of the Convention, but asked the Court to order that "the grounds of danger to the security of society be eliminated" from domestic law (*infra* para. 462). Meanwhile, Chile contested these allegations, arguing that "with regard to the admissibility of pre-trial detention owing to danger to society or to the victim, it is […] irresponsible to allege that safeguards should not be ordered in cases where past events indicate that a person could, if in liberty, not only flee or affect the investigation, but also endanger the victim of the offense investigated or other persons." The State affirmed that it "did not understand why the safety of the investigation would be a legal right that had sufficient value to provide grounds for ordering

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354 *Cf. Case of Tibi v. Ecuador*, para. 120, and *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 142.

355 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 59 and 60, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 162.

356 *Mutatis mutandis*, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 154, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012 Series C No. 250, para. 177.

a precautionary measure involving the pre-trial detention of an accused, but not the safety of persons."

360. In order to rule on the alleged violation of Article 2 of the Convention, as it has in other cases,[357] the Court will only refer to the domestic laws applied to the presumed victims and will not examine the 2008 reform of the Criminal Procedural Code referred to by CEJIL and expert witness Duce.[358] Furthermore, the Court will only rule on the grounds of "danger to the security of society," because this is where the dispute lies in the instant case. The Court notes that these grounds are stipulated in article 363 of the Code of Criminal Procedure, applied to Mr. Ancalaf, which regulates the reasons why "pre-trial release [could be] denied" and the reasons or purposes for which it was "understood that arrest or pre-trial detention [was] necessary" (*supra* para. 304). Under the 2000 reform of criminal procedure, this reason was maintained in article 140.c) of the Criminal Procedural Code as possible grounds for ordering pre-trial detention (*supra* para. 305). The text of the grounds is almost identical in both codes. Expert witness Duce referred to the regulation of the grounds of "danger to the security of society" in Chile and its interpretation by the courts.[359]

361. The Court considers that the wording of the grounds of "danger to the security of society" admits several interpretations in relation to achieving both legitimate and non-precautionary objectives. Regarding the latter interpretation, the Court reiterates its consistent case law concerning the standards that should regulate pre-trial detention as regards its exceptional and limited temporal nature, strict necessity and proportionality and, above all, the standards relating to the fact that its objectives should be inherent in its precautionary nature (the objectives of protecting the proceedings according to the needs that are justified in specific proceedings) and cannot constitute a premature punishment that violates the principle of the presumption of innocence which protects the accused (*supra* paras. 307 to 312). The Court considers that it is not in discussion that States Parties may adopt domestic legal provisions to prevent crime, at times by means of its legal system, particularly criminal law, by imposing punishment, but it should be emphasized that this is not a function of pre-trial detention.

362. Furthermore, the Court notes that, when stipulating these grounds in the said article 140.c) of the Criminal Procedural Code, it was established that, in order to consider whether they had been constituted, "the judge must give special consideration to some of the […] circumstances" described in the norm (*supra* para. 305). Based on the evidence provided to this Court, it is possible to maintain that this regulation did not prohibit the possibility of the judge

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357 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 214*, and Case of Mohamed v. Argentina*, para. 162.

358 *Cf.* Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio (file of statements of presumed victims, witnesses and expert witnesses, folio 39).

359 Among other points, expert witness Duce explained that "although the grounds 'danger to the security of society' admitted the possibility of an interpretation consistent with international human rights law, the way in which it was traditionally interpreted and applied in the context of the inquisitorial system in force, and particularly in this case in which [he is] giving this expert opinion, reveals a problem of compatibility with international human rights law." In addition, regarding the way the courts apply the said grounds, he explained that "the courts usually understand that 'danger to the security of society' will be constituted by the objective presence of one or some of the circumstances listed in the third and fourth paragraphs of article 140 of the Code of Criminal Procedure (for example, that the offense in question warrants a criminal sentence, in other words that it is a serious crime as in this case), without the need to justify exactly how, in the specific case that is the object of the decision, the liberty of the accused will constitute this danger to the security of society. […] Indeed, if it is interpreted that, in the case of serious offenses or those that warrant criminal sentences, there is necessarily a danger to the security of society (without any precise explanation), the appropriate decision would be to apply pre-trial detention in all these cases, regardless of their specific circumstances." He also indicated that "[s]ince no specific meaning is given to the exact scope of these grounds in the cases examined, the defense is prevented from contesting the reasons why this precautionary measure has been requested or ordered, and a rather formal justification of the judges' decisions is also fostered." *Cf.* Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio (file of statements of presumed victims, witnesses and expert witnesses, folios 37 to 80).

taking other criteria into account that allowed him to assess the need for the measure in a specific case in order to achieve procedural objectives. However, the Court takes into account the clarification made by expert witness Duce to the effect that "the [Chilean] courts usually understand that the danger to the security of society will be constituted by the objective presence of one or some of [these] circumstances," which is particularly serious if it is recalled that they include "the severity of the punishment assigned to the offense" and "the nature of the [offenses involved]." The Court reiterates that neither of these criteria are, in themselves, sufficient justification for pre-trial detention (*supra* para. 312.a) and adds that to base pre-trial detention solely on these criteria results in a violation of the presumption of innocence. Criteria of this nature must be assessed in the context of evaluating the need for the measure in the circumstances of the specific case.

363. By ordering and maintaining the measures of pre-trial detention of the eight victims in this case, the grounds of "danger to the security of society" was applied repeatedly in the way indicated by expert witness Duce, without justifying the need for the measure in the circumstances of the specific case, and based above all on criteria relating to the seriousness of the offense investigated and the severity of the punishment (*supra* paras. 321 to 327, 337 to 339 and 352).

364. Based on the foregoing, the Court finds that article 363 of the Code of Criminal Procedure applied to Mr. Ancalaf and article 140.c of the Criminal Procedural Code of 2000 applied to the other seven presumed victims, which established the grounds for pre-trial detention concerning "danger to the security of society," were not *per se* contrary to the American Convention, because they could be interpreted in a way that was consistent with it, provided that they were applied seeking a procedural objective and the criteria taken into account were assessed in relation to the evaluation of whether there was a procedural risk in the circumstances of the specific case. Consequently, Chile did not violate the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention, in relation to Article 7 of the American Convention, to the detriment of the eight presumed victims of this case. The violation of their right to personal liberty resulted from the judicial interpretation and application of these norms.

VII.4 – FREEDOM OF THOUGHT AND EXPRESSION, POLITICAL RIGHTS, AND RIGHTS TO PERSONAL INTEGRITY AND TO THE PROTECTION OF THE FAMILY (ARTICLES 13, 23, 5(1) AND 17 OF THE AMERICAN CONVENTION)

365. The alleged violations examined in this chapter are a result of the pre-trial detention and the main and ancillary punishments imposed on the presumed victims. The Court must determine whether these consequences have constituted autonomous violations of the American Convention.

A) Arguments of the Commission and of the parties

366. The Commission affirmed that Chile violated the rights established in Articles 13 and 23 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of the eight presumed victims owing to "the impact [of the] classification of an offense as a terrorist act" on "the imposition of the [ancillary] punishments […] which, owing to their content, affect the exercise of other rights recognized in Articles 5 and 17 of the Convention.

367. With regard to the alleged violations of the right to freedom of thought and expression and political rights, the common interveners submitted the following arguments:

> **a)** CEJIL indicated that the State had violated these rights to the detriment of Víctor Manuel Ancalaf Llaupe, in relation to Articles 1(1), 2 and 8 of this instrument. It affirmed that "punishments restricting freedom of expression […] are the result of a sentence

imposed arbitrarily." It also indicated that article 9 of the Chilean Constitution establishes "grounds for general and absolute prior censure for all those who are convicted of a terrorist offense, because it prohibits *a priori* emitting or disseminating information or opinions." The application of this norm to Mr. Ancalaf Llaupe, who "performed tasks relating to the diffusion and distribution of information in his community and as its spokesperson," resulted in "a violation of the social dimension of freedom of expression." It also asserted that the imposing punishments on Mr. Ancalaf Llaupe under the Counter-terrorism Act resulted in an "indirect violation of [the right to] the freedom of expression of the Mapuche people, because it had an intimidating and inhibiting effect on its members, preventing them from the full exercise" of this right. In addition, it affirmed that the arbitrary conviction of Mr. Ancalaf Llaupe also meant that "ancillary penalties were imposed on him that still restrict the full exercise of his political rights" and, therefore, as regards the communities that he represents, their "political relationship with the State authorities has been impaired and, consequently, their ability to take part in public decisions that concern them."

b) The FIDH endorsed the arguments presented by CEJIL regarding the alleged violation of Articles 13 and 23 of the Convention in relation to the application of ancillary penalties,[360] and added that "the expression of claims for the recovery of ancestral lands is a right protected by Article 13(1) […] and the discriminatory use of emergency criminal laws with the effect of limiting this expression violates [the provisions of] Article 13(3) [of the Convention]" because, by obstructing "the free discussion of ideas and opinions, it limits freedom of expression and the effective development of the democratic process." According to the FIDH, "[t]he sentences, and the policy of applying the anti-terrorism legislation" restricted the right to freedom of expression by "obstructing the expression of claims for the expansion of the indigenous lands" and by "stigmatizing […] as terrorists, Mapuche activists in favor of respect for indigenous rights and access to their territorial rights," as well as because "they harmed the Mapuche protest in order to silence it."

368. As regards the rights to personal integrity and to the protection of the family, the common interveners argued as follows:

a) CEJIL stated that Chile had incurred in a violation of Articles 5 and 17 of the Convention to the detriment of Víctor Ancalaf Llaupe. It indicated that "by treating him as a terrorist, the State placed him under a special legal regime that affected and still today radically affects his life, that of his family and his community, as well as the exercise of his role as a traditional authority of the Mapuche people." It also indicated that Mr. Ancalaf "remained during all the time he was deprived of liberty, which lasted more than four years," in a prison located "more than 300 kilometers" from his community and this "had been denounced by various human rights organizations owing to the inhuman detention conditions," which "had both physical and mental effects on [Mr.] Ancalaf." These effects were increased "by the distance that separated the detention center from his community," because "it was almost impossible for him to receive visits and the emotional and material support of his friends and family during his years of imprisonment; [and …] also, his children and his wife were deprived of contact with their father and husband," because they had very limited resources and had to overcome serious obstacles in order to visit him. This situation was aggravated by the State authorities' refusal of the requests that he and his wife made for his transfer to a prison nearer to his community.

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[360] The FIDH argued the violation to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

b) The FIDH affirmed that the State had violated the right to personal integrity protected in Article 5 of the Convention because "the sentences and the trials held against its clients" affected their personal integrity. It indicated that "[t]he pursuit, arrest and imprisonment" and, in the case of some of them, life in hiding, caused them "suffering and harm to their physical and moral integrity." These effects on their integrity were based, among other factors, on "physical and psychological health problems" resulting from their "arrest during vast police raids," their identification by the press, the political authorities and the Public Prosecution Service as dangerous terrorists," the "detention conditions," the distance of the prisons from their families and communities, and the financial difficulties of their families to be able to visit them, as well as the direct consequences of the deprivation of liberty on them and on the family dynamics and, in some cases, the "hunger strikes" carried out to "demand their release and the non-application of the Counter-terrorism Act." The FIDH did not allege the violation of the right to the protection of the family.

369. The State did not submit specific arguments to contest these alleged violations. It merely indicated, in general, that it "rejected […] each and every one of the human rights violations attributed to it."

B) Considerations of the Court

1. Right to freedom of thought and expression

370. Article 13 of the Convention establishes the following:

> Article 13
>
> Freedom of thought and expression
>
> 1. 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.
>
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a) respect for the rights or reputations of others; or
>
> b) the protection of national security, public order, or public health or morals.
>
> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
>
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
>
> 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

371. In its case law, the Court has referred to the broad content of the right to freedom of thought and expression established in Article 13 of the Convention. This norm protects the right to seek, receive and impart information and ideas of all kinds.[361] The Court has indicated that freedom of expression has an individual dimension and a social dimension, based on which it

[361] *Cf.* Advisory Opinion OC-5/85 of November 13, 1985, para. 30; *Case of Kimel v. Argentina*, para. 53, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 119.

has understood that a series of rights are protected by this article.[362] The two dimensions are equally important and must be fully ensured simultaneously in order to make the right to freedom of expression completely effective in the terms of Article 13 of the Convention.[363] Thus, in light of both dimensions, freedom of expression requires, on the one hand, that no one be arbitrarily prevented from expressing his own opinions and therefore represents a right of each individual, but, on the other hand, it also entails a collective right to receive any type of information and the expression of the opinions of others.[364]

372. The individual dimension of freedom of expression includes the right to use any appropriate means to disseminate opinions, ideas and information so that it reaches the greatest number of persons. Thus, expression and diffusion are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to express oneself freely.[365]

373. In the instant case, the ancillary penalties established in Article 9 of the Chilean Constitution were imposed on Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe (*supra* paras. 117 and 144). Thus, among other matters, "for 15 years, they were disqualified from […] exploiting a social communication medium or from being a director or administrator of one, or from performing functions related to the emission and diffusion of opinions and information."

374. The Court considers that this ancillary penalty entailed an undue restriction of the exercise of the right to freedom of thought and expression of Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe, not only because it was imposed based on judgments that applied a criminal law that violated the principle of legality and several procedural guarantees (*supra* Chapter VII.1 and VII.2), but also because, in the circumstances of this case, it is contrary to the principle of the proportionality of the punishment. As the Court has determined, this principles signifies "that the State's response to a wrongful act of the perpetrator of an offense must be proportionate to the right affected and to the responsibility of the perpetrator, so that it should be established based on the different nature and seriousness of the acts."[366]

375. The Court has verified that, as traditional authorities of the Mapuche indigenous people, Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe played a decisive role in communicating the interests, and in the political, spiritual and social guidance, of their respective communities (*supra* para. 78). The imposition of the above-mentioned ancillary penalty has restricted their possibility of taking part in the diffusion of opinions, ideas and information by performing functions in social media, and this could limit the sphere of action of their right to freedom of thought and expression in the exercise of their functions as leaders or representatives of their communities. This, in turn, has a negative impact on the social dimension of the right to freedom of thought and expression, which, as the Court has

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362 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs.* Judgment of February 5, 2001 Series C No. 73, para. 65, and *Case of Mémoli v. Argentina*, para. 119.

363 *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 149, and *Case of Mémoli v. Argentina*, para. 119.

364 *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*, para. 146, and *Case of Mémoli v. Argentina*, para. 119.

365 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, para. 65, and *Case of Vélez Restrepo and family members v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 138.

366 *Cf. Case of Vargas Areco v. Paraguay. Merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 155, para. 108, and *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163, para. 196.

established in its case law, involves the right of everyone to receive the opinions, reports, and news of third parties.[367]

376. In addition, it could have produced an intimidating and inhibiting effect on the exercise of freedom of expression, derived from the specific effects of the undue application of the Counter-terrorism Act to members of the Mapuche indigenous people. In other cases, the Court has previously referred to the intimidating effect on the exercise of freedom of expression that may result from the fear of being subject to a civil or criminal sanction that is unnecessary or disproportionate in a democratic society, and that may lead to the self-censorship of the person on whom the punishment is imposed, and on other members of society.[368] In the instant case, the Court considers that the way in which the Counter-terrorism Act was applied to members of the Mapuche indigenous people could have instilled a reasonable fear in other members of this people involved in actions related to the social protest and the claim for their territorial rights, or who would eventually want to participate in this.

377. Nevertheless, the Court is not persuaded by the argument of CEJIL that the restriction of freedom of expression stipulated in article 9 of the Chilean Constitution constitutes prior censorship prohibited by Article 13 of the Convention (*supra* para. 367.a). The argument appears not to have taken into account that this was an ancillary penalty established by law, which was imposed by a sentence in a criminal trial.

378. Based on the foregoing, *the Court concludes that Chile violated the right to freedom of thought and expression protected in Article 13(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe.*

2. Political rights

379. The Court reiterates that, in the instant case, the presumed victims were sentenced in criminal proceedings that were held in conditions that violated the American Convention (*supra* Chapter VII.1 and VII.2) and, in addition, it has verified that ancillary penalties were imposed that restricted their political rights (*supra* paras. 117, 126 and 144). Based on the arguments presented in this regard, the Court will rule on the alleged violation of Article 23 of the Convention to the detriment of the presumed victims.

380. Article 23 of the Convention stipulates the following:

> Article 23.
> Right to Participate in Government
>
> 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.

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[367] *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*, para. 148, and *Case of Vélez Restrepo and family members v. Colombia*, para. 138.

[368] *Mutatis Mutandi, Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs.* Judgment of January 27, 2009. Series C No. 193, para. 129, and *Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 74.

381. Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe were subject to ancillary penalties that restricted their political rights, as established in articles 28 of the Criminal Code and 9 of the Constitution. The other five presumed victims, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, were only subject to the ancillary penalties, which also restricted their political rights, established in article 28 of the Criminal Code.

382. Article 9 of the Chilean Constitution establishes, among other matters, that those responsible for terrorist offenses "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." It added that this "is understood […] without prejudice to other disqualifications or those that last longer according to the law." In this regard, article 28 of the Criminal Code establishes the penalties of "absolute and permanent disqualification from public office or functions and political rights, as well as absolute disqualification from titled professions for the duration of the sentence."

383. To the extent that the effective exercise of political rights constitutes an end in itself and, also, a fundamental means that democratic societies have to ensure the other human rights established in the Convention,[369] the Court considers that, in the circumstances of this case, the imposition of the said ancillary penalties, which affected the right to vote, direct participation in public affairs, and access to public office, of an absolute and perpetual nature or for a fixed but prolonged term (15 years), is contrary to the principle of the proportionality of the punishment (*supra,* para. 374) and constituted a very serious impairment of the political rights of Segundo Aniceto Norín Catrimán, Pascual Huetequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

384. The foregoing is particularly serious in the case of Messrs. Ancalaf Llaupe, Norín Catrimán and Pichún Paillalao, due to their status as traditional leaders of their communities (*supra* para. 78). Thus, the imposition of the said penalties also had an impact on the representation of the interests of their communities in relation to other communities, as well as in relation to the rest of Chilean society. Specifically, the Court underlines that, owing to these penalties, they were prevented from taking part in or guiding public activities in State entities that seek to promote, coordinate and execute actions to develop and protect the indigenous communities they represented, which constituted a concrete violation of the rights protected by Article 23 of the Convention. These conclusions, which the Court derives from the nature of the penalties imposed, are confirmed, *inter alia*, by the testimony of Mr. Ancalaf Llaupe,[370] Ms. Troncoso Robles[371] and Juan Pichú,[372] the son of Pascual Pichún Paillalao.

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369 *Cf. Case of Castañeda Gutman v. United Mexican States*, para. 143, and *Case of López Mendoza v. Venezuela*, para. 108.

370 Mr. Ancalaf Llaupe stated that he "was subject […] to a life-long prohibition to exercise public office [or] the civil right of presiding any department in a company or […] taking office in a municipality or any other State entity." *Cf.* Statement made by presumed victim Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

371 Ms. Troncoso Robles indicated that, owing to the judgment convicting her, she was "forever disqualified from public office [and] from political rights." *Cf.* Written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folio 657).

385. It should also be emphasized that, owing to their status as Mapuche leaders, Messrs. Norín Catrimán and Pichún Paillalao (*Lonkos*), and Mr. Ancalaf Llaupe (*Werken*), the restriction of their political rights also affected their communities because, owing to the nature of their functions and their social position, not only their individual rights were affected, but also those of the members of the Mapuche indigenous people they represented.

386. Based on the above considerations, *the Court concludes that the State violated the political rights protected by Article 23 of the American Convention, in relation to Article 1(1) of this instrument to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Víctor Manuel Ancalaf Llaupe and Patricia Roxana Troncoso Robles.*

3. Right to personal integrity

387. Article 5(1) of the Convention establishes the following:

> **Article 5**
> **Right to Humane Treatment**
>
> 1. Every person has the right to have his physical, mental, and moral integrity respected.

388. The Court has established that "the violation of the right to physical and mental integrity of the individual has different levels and encompasses torture and other types of abuse or cruel, inhuman or degrading treatment, the physical and mental aftereffects of which vary in intensity according to endogenous and exogenous factors that must be demonstrated in each specific situation."[373] The former refer to the characteristics of the treatment, such as the duration, method used or the way in which the suffering was inflicted, as well as the physical and mental effects that these may cause. The latter refer to the conditions of the individual who endures this suffering, including age, sex, health, and any other personal situation.[374]

389. The Court has indicated in its case law that criminal sanctions are an expression of the punitive powers of the State and entail the impairment, deprivation or alteration of the rights of the individual as a result of a wrongful act.[375] Accordingly, in a democratic system, great care must be taken to ensure that these measures are adopted with strict respect for the basic rights of the individual and include a careful verification of the effective existence of the wrongful act.[376] This last point has already been considered in other chapters of this Judgment, in which it has been concluded that several rights have been violated. It must now be determined whether the treatment received by the presumed victims entailed a disregard of the "basic rights of the individual," or whether it was the usual result of deprivation of liberty.

390. The Court has also determined in its case law that, often, an inescapable consequence of the deprivation of liberty are effects on the enjoyment of human rights, in addition to the right

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372 Juan Pichún stated that when his father had served his term of imprisonment, he could not exercise "the citizen's right to participate, [because] he was denied the right to vote, [and any] participation [...] to be able to assume public office." *Cf.* Statement made por Juan Pichún before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

373 *Cf. Case of Loayza Tamayo v. Peru. Merits*, para. 57, and *Case of Mendoza et al. v. Argentina*, para. 201.

374 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, para. 74, and *Case of Mendoza et al. v. Argentina*, para. 190.

375 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*, para. 106, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160, para. 314.

376 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*, para. 106, and *Case of J. v. Peru*, para. 278.

to personal liberty, such as the right to privacy and to family life.[377] Nevertheless, this restriction of rights – the result of the deprivation of liberty or a collateral effect – must be limited strictly, because any restriction of a human right can only be justified in international law when it is necessary in a democratic society.[378] Although the Court has also stated that the restriction of the right to personal integrity, among others, is not justified based on the deprivation of liberty and is prohibited by international law,[379] an examination of the judgments in the cases heard by this Court in this regard reveals that these were cases in which the conditions of the deprivation of liberty were cruel, inhuman or degrading, and even caused death or injuries, often serious, to a large number of prisoners.[380]

391. In this case, it has not been alleged, nor does it appear in the case file, that the presumed victims were subject to cruel, inhuman or degrading treatment, or to abuse or differentiated treatment that harmed them. The allegations in relation to the violations of personal integrity refer to what the Court has called a collateral effect of the situation of deprivation of liberty.[381]

392. Between 2002 and 2007, while they were being prosecuted for terrorist offenses, Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio and Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles went on hunger strike several times.[382] It could be considered that these hunger strikes could have been undertaken in order to protest against inhuman prison conditions and as a measure to get these changed. However, the case file shows that these hunger strikes had different motives related to the detention and prosecution of the presumed victims and to the fact that the Counter-terrorism Act had been applied to them.[383] They were undertaken in order to be heard by the authorities, to denounce the irregularities in their judicial proceedings and to demand their release or, otherwise, to obtain prison benefits, as well

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377 *Cf. Case of the Gómez Paquiyauri Brothers v. Peru. Merits, reparations and costs*. Judgment of July 8, 2004. Series C No. 110, para. 108, and *Case of Vélez Loor v. Panama*, para. 209.

378 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 154. Similarly, *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela. Merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150, para. 113, and *Case of Vélez Loor v. Panama*, para. 209.

379 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 155, and *Case of Fleury et al. v. Haiti. Merits and reparations.* Judgment of November 23, 2011. Series C No. 236, para. 84.

380 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 170, and *Case of Pacheco Teruel et al. v. Honduras*, para. 60.

381 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 154, and *Case of Vélez Loor v. Panama*, para. 209.

382 *Cf.* Note 09.01.03.55/02 of August 7, 2002, signed by the Head of the Traiguén Preventive Detention Center and addressed to the Head of the Genchi Security Department, Santiago; Note 09.01.01.229/02 of February 16, 2002, signed by the Head of the Angol Preventive Detention Center and addressed to the judge of the Traiguén Guarantees Court; Note 09.01.03.23/02 of August 20, 2002, signed by the Head of the Traiguén Preventive Detention Center and addressed to the Head of the Genchi Security Department, Santiago; Note 09.01.01.1384/03 of August 21, 2003, signed by the Head of the Angol Preventive Detention Center and addressed to the judge of the Collipulli Court with combined jurisdiction (file of annexes to the Merits Report 176/10, appendix 1, folios 4391, 4438, 4541 and 9131); written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles, and affidavit prepared on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñá*)* (file of statements of presumed victims, witnesses and expert witnesses, folios 191 and 207), and statement made by presumed victim Florencio Jaime Marileo Saravia before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

383 *Cf.* Written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folio 652); affidavit prepared on May 14, 2013, by presumed victim Juan Patricio Marileo Saravia (file of statements of presumed victims, witnesses and expert witnesses, folio 191), and Note No. 06 of October 13, 2003, signed by the Head of the Victoria Prison Sentences Center addressed to the Head of the Security Department, Chilean Prison Service (file of annexes to the Merits Report 176/10, appendix 1, folio 9196).

as to prevent the continued application of the Counter-terrorism Act.[384] This had a bearing on the presentation of a bill to amend the act that, in October 2010, culminated in the promulgation of Law No. 20,467[385] (*supra* para. 98 and footnote 104).

393. It is undeniable that these hunger strikes, which lasted from 30 to 112 days, caused serious emotional and physical consequences for the presumed victims.[386] Expert witness Vargas Forman explained that "[h]unger strikes are used to call the attention of the legal and the political system to the fact that members of the Mapuche people are treated as terrorists, to denounce irregular legal proceedings, […] to obtain prison benefits, to reveal discriminatory treatment." She also stated that "[h]unger strikes constitute extreme experiences of emotional pain" with "long-term physical and mental consequences," and that, in the case of the presumed victims in this case, "the experience caused extreme individual, family and cultural traumas."[387]

394. However, the effects on the personal integrity of those who undertake hunger strikes with the above-mentioned characteristics and objectives cannot be attributed to the State.

395. In statements made both during the public hearing and by affidavit, the presumed victims referred, among other matters, to the impact of the conviction for terrorist offenses and having served a prison sentence on different dimensions of their life (*supra* paras. 119, 129, 130 and 152) or, in the case of Juan Ciriaco Millacheo Licán and José Benicio Huenchunao Mariñán, to the time they spent as fugitives from justice (*supra* paras. 131 and 132). They referred to their feelings of "injustice," "pain," and "mistrust" owing to the application of the Counter-terrorism Act, and to the discrimination and stigmatization suffered by both themselves and by their family members and their communities, because they had been branded as terrorists.[388]

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[384] *Cf.* Written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 650 and 651); affidavit prepared on May 14, 2013, by presumed victim Juan Patricio Marileo Saravia (file of statements of presumed victims, witnesses and expert witnesses, folio 191), and statement made by presumed victim Florencio Jaime Marileo Saravia before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[385] *Cf.* Affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo, and written statement made on May 26, 2013, by expert witness Rodolfo Stavenhagen (file of statements of presumed victims, witnesses and expert witnesses, folios 342 and 702).

[386] *Cf.* Affidavits prepared on May 17, 2013, by presumed victims Juan Patricio Marileo Saravia and José Benicio Huenchunao Mariñán, and written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of the presumed victims, witnesses and expert witnesses, folios 191, 207 and 650).

[387] *Cf.* Affidavit prepared on May 15, 2013, by expert witness Ruth Vargas Forman (file of statements of the presumed victims, witnesses and expert witnesses, folios 400 and 401).

[388] In this regard, Mr. Norín Catrimán explained that "[s]omething like this had never been seen before; it has caused so much suffering. We were treated like extremely dangerous people; we never hurt another person. […] We all changed owing to the way the State of Chile treated us, treating the Mapuche like terrorists. This has never happened in the history of our people; there were always serious injustices to take our land away from us, but treating us as terrorists harmed our people and our families, the members of my community," and he indicated that "[i]f you consider this, we are being tried for something that has never been seen before. Prosecution based on something that had never been heard before, and paying a price that was so unjust, so painful. We don't even know what a terrorist is and having to pay for something so unjust hurts. That is painful, that hurts." Similarly, Mr. Huenchunao Mariñán testified on the "profound feeling of injustice that [he] and [his] people suffered owing to the application of the Counter-terrorism Act, and the arbitrary proceedings conducted by institutions of the State of Chile against [him], arresting [him] and convicting [him] as a terrorist." *Cf.* Written statement made on May 27, 2013, by presumed victim Segundo Aniceto Norín Catrimán, and affidavit prepared on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán (file of statements of the presumed victims, witnesses and expert witnesses, folios 210 and 636). See also: Affidavits prepared on May 15, 2013, by expert witness Ruth Vargas Forman; on May 17, 2013, by presumed victims Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and José Benicio Huenchunao Mariñán; written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 391, 554, 183, 193, 197, 201, 205, 630, 637, 640, 642, 647 and 657), and statements made by presumed victims Florencio Jaime Marileo Saravia and Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013 .

396. In this regard, expert witness Vargas Forman, who gave her expert psycho-social opinions by affidavit, noted that "[t]he application of the Counter-terrorism Act is perceived as an extreme indication of discriminatory persecution [against the Mapuche] that concluded with long sentences, imprisonment and significant losses at the individual, family and community level." She also stated that the prison terms had a considerable impact on the presumed victims at both the personal level and in relation to their family and community.[389]

397. In addition, the presumed victims referred to the difficulties resulting from their criminal record and branding as "terrorists" in their reincorporation into society after serving their sentences, especially in the search for work.[390]

398. The presumed victims also referred to the personal changes, the suffering and other consequences of the time spent in prison. For example, the psychological report records that Mr. Ancalaf Llaupe stated that "[a]ll the problems have arisen due to the imprisonment; I realize that one changes."[391] Also, Mr. Huenchunao Mariñán stated that "imprisonment is a harsh punishment, when one is convicted because of social protest, considering it a criminal act."[392] The Court understands that this refers to consequences of the deprivation of liberty or collateral effects (*supra* para. 391).

399. There is evidence in the case file, including the statements made by presumed victims, complemented by helpful evidence presented by the State, that Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles were progressively granted certain "prison benefits" while serving their sentences, such as "Sunday release," "weekend release" and "supervised release," and also that some of them benefited from a remission of sentence (*supra* paras. 119, 129 to 132 and 152). The Court assesses positively that the State implemented this type of measures; however, it does not eliminate the human rights violations that the Court has determined in other parts of this Judgment.

400. The Court understands the harm that the deprivation of liberty may have caused to the presumed victims, but considers that there has not been an autonomous violation of Article 5(1) of the American Convention. As indicated, this harm was the consequences of the deprivation of liberty or the collateral effects (*supra* para. 391).

4. Right to the protection of the family

401. Article 17(1) of the American Convention establishes the following:

Article 17
Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

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389 *Cf.* Affidavit prepared on May 15, 2013, by expert witness Ruth Vargas Forman (file of statements of the presumed victims, witnesses and expert witnesses, folios 372 and 390).

390 *Cf.* Affidavit prepared on May 17, 2013, by presumed victim Juan Patricio Marileo Saravia; written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 193 and 658), and statement made by presumed victim Florencio Jaime Marileo Saravia before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

391 *Cf.* Psychological and psychosocial report on presumed victim Víctor Manuel Ancalaf Llaupe and his family, prepared by expert witness Ruth Vargas Forman (file of statements of the presumed victims, witnesses and expert witnesses, folio 96).

392 *Cf.* Affidavit prepared on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán (file of statements of presumed victims, witnesses and expert witnesses, folio 205).

402. CEJIL alleged the violation of Article 17 to the detriment of Víctor Manuel Ancalaf Llaupe, adducing that the significant distance between his family home and community and the detention center where he was confined made it impossible to receive visits from his wife and children, and their emotional support, and this was aggravated by the State's refusal to transfer him to a prison nearer to his community. The FIDH did not allege the violation of this article in relation to the other victims.

403. Mr. Ancalaf Llaupe was confined in the "El Manzano" Prison in Concepción, situated more than 250 kilometers from Temuco where his community and family were located. From the onset of his imprisonment, both Mr. Ancalaf Llaupe and his lawyer raised the issue of the need to transfer him to a prison nearer to his place of residence. In addition, his wife, Karina Prado, requested her husband's transfer to the Temuco prison, owing to the obstacles to travelling with her five children to Concepción to visit her husband and their father, and the high costs involved. However, the Concepción Court of Appeal denied Mrs. Prado's request and the subsequent request by Mr. Ancalaf Llaupe without justifying the denial and without taking into consideration a report of the Chilean Prison Service indicating that there were "no problems for the inmate [… to be] transferred to the Temuco prison, because the individual mentioned lives and has family support in that city" (*supra* paras. 139 and 141). This situation had a negative influence on the frequency of the visits and the contact that Mr. Ancalaf Llaupe had with his family, increasing his feelings of concern and helplessness, as well as the deterioration of his relations with the members of his family.[393]

404. The Court has established that the State is obliged to encourage the development and strength of the family unit.[394] It has also asserted that this entails the right of everyone to receive protection from arbitrary or illegal interference in his or her family,[395] and also that States have positive obligations in favor of effective respect for family life.[396] The Court has also recognized that the mutual enjoyment of coexistence between parents and children is a fundamental element of family life.[397]

405. In the case of persons deprived of liberty, rule 37 of the United Nations Standard Minimum Rules for the Treatment of Prisoners recognizes the importance of the contact of prisoners with the world outside when establishing that "[p]risoners shall be allowed under

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[393] Víctor Ancalaf's wife, Karina Prado, testified that: "[t]he first three years when we travelled to Concepción were very difficult and complicated, because in order to go with the five children, [she] needed to pay for three adults and sometimes she did not have the money; sometimes she went alone and had to leave them in someone's care. […] Concepción is […] eight hours away." *Cf.* Affidavit prepared on May 17, 2013, by Karina del Carmen Prado Figueroa (file of statements of presumed victims, witnesses and expert witnesses, folio 84). Similarly, his son, Marías Ancalaf Prado, testified about "[h]ow far away the prison was" and indicated that "[a]t one time it was more difficult to go, around the middle of my father's imprisonment, then our visits were less frequent; we went every two months; sometimes only two siblings went with my mother. It was a matter of money; my mother didn't have enough to pay for the travel costs of so many children and for herself; it was complicated to travel with all her children. Every time we went to visit my father it cost a lot of money and the financial situation, the time, everything was difficult." *Cf.* Affidavit prepared on May 17, 2013, by Matías Ancalaf Prado (file of statements of presumed victims, witnesses and expert witnesses, folios 30 and 31). See also: Psychological and psycho-social report on presumed victim Víctor Manuel Ancalaf Llaupe and family prepared by expert witness Ruth Vargas Forman (file of statements of presumed victims, witnesses and expert witnesses, folios 96, 97, 100, 107 and 108).

[394] *Cf. Juridical Status and Human Rights of the Child, supra*, para. 66, and *Case of the Pacheco Tineo Family v. Bolivia*, para. 226.

[395] *Cf. Juridical Status and Human Rights of the Child, supra*, para. 72, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, para. 312.

[396] *Cf. Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 189, and *Case of Vélez Restrepo and family members v. Colombia*, para. 225. Also, ECHR, *Case of Olsson v. Sweden No. 1, No. 10465/83.* Judgment of 24 March 1988, para. 81.

[397] *Cf. Juridical Status and Human Rights of the Child, supra*, para. 47, and *Case of Vélez Restrepo and family members v. Colombia*, para. 225. Also, ECHR, *Case of Johansen v. Norway, No. 17383/90.* Judgment of 7 August 1996, para. 52, and *Case of K. and T. v. Finland, No. 25702/94.* Judgment of 27 April 2000. Final, 12 July 2001, para. 151.

necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits." Moreover, rule 79 recognizes that "special attention shall be paid to the maintenance and improvement of [...] relations between a prisoner and his family."[398] Similarly, Principle XVIII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas recognizes the right of such persons "to maintain direct and personal contact through regular visits with members of their family, [...] especially their parents, sons and daughters, and their respective partners."[399]

406. The State occupies a special position of guarantor with regard to persons deprived of liberty, because the prison authorities exercise a strong or special control over those who are in their custody.[400] Thus, there is a special relationship and interaction of subjection between the individual deprived of liberty and the State, characterized by the particular intensity with which the State can regulate his rights and obligations, and by the circumstances inherent in imprisonment, where the inmate is impeded from satisfying a series of basic needs that are essential for the development of a decent life for himself.[401]

407. The visits by family members to individuals deprived of liberty is an essential element of the right to the protection of the family both of the person deprived of liberty and for the family members, not only because it represents an opportunity for contact with the outside world, but also because the support of the family members for those deprived of liberty while they serve their sentence is fundamental in many aspects, ranging from affective and emotional support to financial support. Therefore, based on the provisions of Articles 17(1) and 1(1) of the American Convention, States, as guarantors of the rights of individuals in their custody, have the obligation to adopt the most appropriate measures to facilitate and to implement contact between the individuals deprived of liberty and their families.

408. The Court emphasizes that one of the difficulties in keeping up relationships between those deprived of liberty and their family members may be their confinement in prisons that are very far from their homes, or of difficult access because the geographical conditions and communication routes make it very expensive and complicated for members of the family to make frequent visits, which could eventually result in a violation of both the right to protection of the family and other rights, such as the right to personal integrity, depending on the particularities of each case. Therefore, State must, insofar as possible, facilitate the transfer of prisoners to prisons nearer to the place where their family lives. In the case of indigenous people deprived of liberty, the adoption of this measure is especially important given the significance of the ties that these individuals have with their place of origin or their community.

409. Consequently, it is clear that, by confining Mr. Ancalaf Llaupe in a prison that was very far from his family home and arbitrarily denying the repeated requests to transfer him to a prison that was nearer, to which the Prison Service had agreed (*supra* para. 403), the State violated the right to protection of the family.

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[398] *Cf. Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at: https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf

[399] *Cf.* Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* Resolution 1/08, approved during its 131st regular period of sessions, held from March 3 to 14, 2008. Available at: http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm

[400] *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 152, and *Case of Mendoza et al. v. Argentina*, para. 188.

[401] *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 152, and *Case of Mendoza et al. v. Argentina*, para. 188.

410. Based on the above, *the Court concludes that the State violated the right to protection of the family established in Article 17(1) of the American Convention, in relation to the obligation to ensure rights established in Article 1(1) of this treaty, to the detriment of Víctor Manuel Ancalaf Llaupe.*

411. With regard to the other presumed victims, since no violations in this regard were alleged (even though in the arguments of the FIDH and in the statements of the presumed victims and their family members there are some references to the distance that the family members had to travel and the difficulties faced by the latter to visit them in prison), there is insufficient evidence to allow this Court to substantiate that, in those cases, there has been non-compliance with the State's duty to protect the family.

VIII – REPARATIONS
(Application of Article 63(1) of the American Convention)

412. Pursuant to Article 63(1) of the American Convention,[402] the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to make adequate reparation,[403] and that this provision reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility.[404]

413. Reparation of the harm caused by the violation of an international obligation requires, when possible, full restitution (*restitutio in integrum*), which consists in re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine other measures to ensure the rights that have been violated and to redress the consequences of the violations.[405] Accordingly, in this case, the Court has considered the need to award different measures of reparation in order to ensure the violated right and redress the harm fully.[406]

414. The Court has established that reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must take these factors into consideration in order to rule appropriate and in accordance with the law.[407]

415. According to the considerations on the merits, and the violations of the American Convention declared in Chapter VII of this Judgment, the Court will proceed to analyze the claims presented by the Inter-American Commission and the common interveners of the representatives of the victims in light of the criteria established in its case law in relation to the nature and scope of the obligation to make reparation, in order to establish measures aimed at

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[402] Article 63(1) of the American Convention establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[403] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para.25, and *Case of Liakat Ali Alibux v. Suriname*, para. 137.

[404] *Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and costs.* Judgment of September 10, 1993. Series C No. 15, para. 43, and *Case of Liakat Ali Alibux v. Suriname*, para. 137.

[405] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para.26, and *Case of Osorio Rivera and family members v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2013. Series C No. 274, para. 236.

[406] *Cf. Case of the Las Dos Erres Massacre v. Guatemala*, para. 226, and *Case of Osorio Rivera and family members v. Peru*, para. 236.

[407] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Liakat Ali Alibux v. Suriname*, para. 139.

redressing the harm caused to the victims.[408] The Court will also take into consideration the observations made by the victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles with regard to reparations in their written statements before this Court.[409] The State did not present specific arguments concerning the reparations requested, but when contesting some of the violations it referred to aspects that are related to the reparations requested in this case concerning amendments to domestic law.

A) Injured party

416. The Court considers that, in the terms of Article 63(1) of the Convention, the injured party is anyone who has been declared a victim of the violation of any right recognized therein. Consequently, the Court finds that the "injured party" are: Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

B) Measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition

1. Measure of restitution: nullify the criminal convictions imposed on the victims

417. The Commission asked the Court to order the State to "[eliminate the effects of the terrorism convictions imposed on Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Ancalaf Llaupe." In addition, it indicated that, "[i]f 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 guarantees of due process."

418. CEJIL asked that "the Court […] order the State to eliminate immediately all the effects of the conviction imposed on the *Werken* Víctor Ancalaf Llaupe, in the proceedings under case file 1-2002, Concepción Court of Appeal." It indicated that, in view of the fact that Mr. Ancalaf had "served the prison sentence imposed on him, it did not seek a review of the judgment delivered in violation of the rights and guarantees protected by the American Convention, but rather the elimination of the effects that it continues to have and which do not allow him to live his life fully."

419. The FIDH indicated that the effects of all the convictions should be annulled, including "all the disqualifications that affect the victims." It asked the Court to order the State to "eliminate any annotation in any public record of the trial and sentencing of the victims, […] especially from the criminal records, and records of the police and the Public Prosecution Service, as well as the elimination of the DNA samples obtained from the victims under Law

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[408] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, paras. 25 and 26, and *Case of Liakat Ali Alibux v. Suriname*, para. 138.

[409] In the statements they made on May 27, 2013, Mr. Norín Catrimán and Ms. Troncoso Robles stated that they "should […] receive full reparation," "based on the principle of equity" and, to this end, they asked that the Court order "measures of non-repetition, such as the restitution, protection and titling of land," "measures of satisfaction, [such as] the act of public acknowledgement of international responsibility, and the publication and dissemination of the Judgment," "measures of rehabilitation, [such] as the provisions of basic goods […] and services," "guarantees of non-repetition, [such as] the implementation of programs to record, document and monitor cases and situations with similar characteristics; the monitoring of compliance with the judgment of the Court; adaptation of the laws, [and] education and training of those responsible for the selective application of the law that gave rise to the violations," as well as "compensation for the [pecuniary and non-pecuniary] damage caused" and reimbursement of "costs and expenses" (file of statements of presumed victims, witnesses and expert witnesses, folios 663 and 664).

19,970."[410] In particular, with regard to José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán, it requested the annulment of the execution of their criminal sentences.

420. The State, without contesting the arguments submitted by the common interveners, indicated that the Counter-terrorism Act had been "amended towards the end of 2010 by the enactment of Law No. 20,467," in relation to "the definition and punishment of terrorist offenses, which restricted the offense and, in some cases, reduced the punishments applicable to [such] offenses." Furthermore, without referring specifically to the judgments convicting the victims in this case, it explained that, "considering the fundamental changes introduced [in this] law, Chile's domestic legislation contains certain legal mechanisms to review criminal judgments delivered based on laws that are more onerous for those convicted, ensuring strict compliance with the principles of equality before the law for those who benefit from a new more favorable law enacted before their conviction and those who have been subject to final judgments for similar acts." It indicated that "the principle of the imperative and retroactive application to the accused or the person who has been convicted of the most favorable criminal law is absolute and of constitutional rank" and that, according to article 18 of the Criminal Code, "it applies to ongoing cases and also to those that have concluded in a judicial sentence, which can be modified [*ex officio* or at the request of the interested party] at any time, in order to adjust it to the new more favorable law, waiving the authority of a final judgment."

421. As indicated in this Judgment, the sentences convicting the eight victims in this case – determining their criminal responsibility for terrorist offenses – were delivered based on a law that violated the principle of legality and the right to the presumption of innocence (*supra* paras. 168 to 177), and imposed ancillary penalties that entailed undue and disproportionate restrictions to the right to freedom of thought and expression (*supra* para. 374) and to the exercise of political rights (*supra* para. 383). The Court also found that, in the substantiation of the judgments, reasoning was used that revealed stereotypes and prejudices, which constituted a violation of the principle of equality and non-discrimination and the right to equal protection of the law (*supra* paras. 223 to 228 and 230). Added to this, in the case of Messrs. Pichún Paillalao and Ancalaf Llaupe, there were violations of the right of defense protected in Article 8(2)(f) of the Convention (*supra* paras. 248 to 259) and, with regard to seven of the victims in this case, the right to appeal these adverse criminal judgments was violated (*supra* paras. 274 to 291). This means that the sentences were arbitrary and incompatible with the American Convention.

422. Therefore, in view of the characteristics of this case, and as it has on previous occasions,[411] the Court establishes that the State must adopt, within six months of notification of this Judgment, all the administrative, judicial or any other type of measure necessary to nullify all the effects of the criminal judgments convicting Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles that the Court has referred to in this Judgment. This includes: (i) annulling the declaration that the eight victims in this case were perpetrators of terrorist offenses; (ii) annulling the prison sentences and ancillary penalties, consequences and records, as soon as possible, as well as any civil sentences imposed on the victims, and (iii) ordering the release of the victims who are still on parole. In addition, the State must, within six months of notification of this Judgment, eliminate the judicial, administrative, criminal or police

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[410] In its final written arguments, the FIDH clarified that although the DNA samples "are not part of the judgments, they do form part of their effects, because following [the delivery] of the judgments, Law 19,970 was enacted […] which imposed the obligation to register the DNA of those convicted of terrorist offenses" and indicated that the DNA of José Benicio Huenchunao, Juan Patricio Marileo Saravia and Florencio Jaime Marileo Saravia had been recorded."

[411] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88; *Case of Herrera Ulloa v. Costa Rica*; *Case of Palamara Iribarne v. Chile*; *Case of Kimel v. Argentina*; *Case of Tristán Donoso v. Panama; Case of Usón Ramírez v. Venezuela,* and *Case of López Mendoza v. Venezuela*.

records that exist against the eight victims in relation to the said judgments, and also annul their registration in any type of national or international records that link them to terrorist acts.

2. Measures of rehabilitation: medical and psychological treatment

423. The FIDH asked that "any future medical expenses that the victims and their family members have to incur as a result of the violations of the rights under the Convention be compensated." It did not indicate any specific amount for this compensation. It indicated that "access to specialized health care services (psychological and physical treatment) for [the victims] and their family unit was required, based on inter-cultural criteria." It affirmed that, under Chile's public health care system, "they only receive basic services" and do not have access to mental health care. It alleged that all the victims have suffered from a series of illnesses or physical ailments following their detention, derived mainly from the hunger strikes they undertook, or following their time in hiding during which they "did not have access to professional health care services." It referred to these physical and mental problems. In addition to this compensation, it requested "the inclusion of all the victims and the members of their family in the Program of Reparation and Comprehensive Care in the Field of Health and Human Rights (PRAIS)," which "would give them preferential access to the public health care system."

424. Based on the testimony of the victims and on the expert appraisal of psychologist Vargas Forman, the Court has verified that the violations declared in this Judgment had a psychological impact on the victims. Thus, this expert witness concluded that "the symptoms suffered by [the eight victims in this case] fall within the sphere of post-traumatic stress syndrome," "the symptoms of which are the expression of the contextual events that they have undergone" that have caused them "severe emotional suffering, which has had an impact on their individual functioning and [on] the family dynamics." She also stated that these symptoms of "emotional suffering arise from the arrest, pre-trial detention, hearings and subsequent sentencing of each one."[412] The victims and also some of their family members referred to specific physical ailments they had suffered as a result of the facts.[413]

425. The Court finds, as it has in other cases,[414] that the State must provide immediately and free of charge, through its specialized health care institutions or personnel, the necessary and appropriate medical and psychological or psychiatric treatment to Segundo Aniceto Norín Catrimán, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, following their informed consent, including the provision of any medicines they may eventually require, also free of charge, based on the ailments of each of them related to this case; as well as, if appropriate, the transport and other expenses that are strictly necessary and directly related to the medical and psychological treatment.

426. If the State does not have the institutions or personnel who are able to provide the level of care required, it must resort to specialized private institutions or those of civil society. Furthermore, the respective treatment must be provided, insofar as possible, in the centers

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412 *Cf.* Affidavit prepared on May 15, 2013, by expert witness Ruth Elizabeth Vargas Forman (file of statements of presumed victims, witnesses and expert witnesses, folios 374 and 375).

413 *Cf.* Affidavits prepared on May 14, 2013, by presumed victim Juan Ciriaco Millacheo Licán, by witness Soledad Angélica Millacheo Licán, and by witness Lorenza Saravia Tripaillán; on May 16, 2013, by witness Flora Collonao Millano; on May 17 by presumed victims Juan Patricio Marileo Saravia and José Benicio Huenchunao Mariñán, and written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 191, 196 to 198, 208, 215, 216, 233, 247, 248, 650 and 651).

414 *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*, paras. 51.d) and e), operative paragraph 8, and *Case of J. v. Peru*, para. 397.

nearest to their places of residence[415] in Chile for as long as necessary. When providing this treatment, the particular circumstances and needs of each victim must also be considered, as well as their customs and traditions, as agreed with each of them and following an individual assessment.[416] To this end, the victims must advise the State if they wish to receive this medical, psychological or psychiatric treatment within six months of notification of this Judgment.

3. Measures of satisfaction

a) Publication and broadcasting of the Judgment

427. CEJIL asked that the Court order Chile: (i) "to publish the pertinent parts of the judgment once in the official gazette […] and the summary of the judgment prepared by the Court in another national newspaper with widespread circulation" within "six months of the date of notification of the Judgment"; (ii) "to publish immediately the complete text [of the Judgment] on the official websites of the Presidency of the Republic, the Ministry of Foreign Affairs, the Ministry of Social Development, and the National Indigenous Development Corporation (CONADI), until it has been complied with fully," and (iii) "to broadcast, within six months of notification of the judgment, the official summary on a radio station with broad coverage in Region IX" and, to this end, "the State must translate the [official summary] into the Mapudungun language" so that "the Mapuche people may be made aware of it." The FIDH requested the "publication of part of the judgment in the media," and also the "broadcasting of an official summary of the judgment by radio, in Spanish and in Mapudungun, taking special care to ensure that it is broadcast in areas with a high concentration of Mapuche people." It also requested that the judgment be aired "simultaneously on all television stations at the time of the main news program."

428. The Court establishes, as it has in other cases,[417] that the State must publish, within six months of notification of this Judgment: (a) the official summary of this Judgment prepared by the Court, once, in the official gazette; (b) the official summary of this Judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) this Judgment in its entirety, available for one year, on an official website of the State, taking into consideration the characteristics of the publication ordered.

429. The Court also finds it appropriate as it has in other cases,[418] to establish that the State must broadcast the official summary of the Judgment, in Spanish and in Mapudungun, using a radio station with broad coverage in Regions VIII and IX. The broadcast must be made on the first Sunday of the month on at least three occasions. The State must advise the common interveners, at least two weeks in advance, of the date, time and station of this broadcast. The State must comply with this measure within six months of notification of the Judgment.

430. The two common interveners of the representatives asked that the Court order the State to make a "public acknowledgement of responsibility" and a public apology to the victims. The Court considers that the delivery of this Judgment, the measure to annul all the effects of the criminal judgments (*supra* para. 422), as well as the measures for the publication and publicity

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[415] *Cf. Case of the Las Dos Erres Massacre v. Guatemala,* para. 270, and *Case of Osorio Rivera and family members v. Peru*, para. 256.

[416] *Cf. Case of the 19 Tradesmen v. Colombia. Merits, reparations and costs.* Judgment of July 5, 2004. Series C No. 109, para. 278, and *Case of Osorio Rivera and family members v. Peru*, para. 256.

[417] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*, para. 79, and *Case of Liakat Ali Alibux v. Suriname*, para. 147.

[418] *Cf.* Case of the Yakye Axa Indigenous Community *v. Paraguay*, para. 227, and *Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, para. 308.

of this Judgment (*supra* paras. 428 and 429), are measures of reparation that are sufficient and adequate to remedy the violations against the victims in this case.

b) Award of scholarships

431. CEJIL asked that, in order to redress the non-pecuniary harm caused by the facts of this case, "additional compensation be provided by the award of scholarships [to the children of Víctor Manuel Ancalaf Llaupe] so that they may continue and/or complete their studies" if they so wish. The FIDH asked that the Court order the State to "adopt measures of educational reinsertion for the victims and their families, […] in particular, the Indigenous Peoples Scholarship for all the children of the victims, from the start of their education until their academic training has been completed, whether this be at the university, technical or professional level."

432. The Court has verified that the prosecution, arbitrary pre-trial detention and criminal conviction of the victims based on the application of a law that violates the Convention (*supra* paras. 168-177) meant that they could not contribute to the maintenance and care of their families as they were doing prior to the events of this case, and this had repercussions on the financial situation of their family unit and, consequently, on the possibility that their children could attend school or complete their studies.[419] Therefore, and taking the representatives' request into account, as it has in other cases,[420] the Court finds it appropriate to order, as a measure of satisfaction in this case, that the State award scholarships in Chilean public establishments to the children of the eight victims in this case that cover all the costs of their education until the conclusion of their advanced studies, whether these are of a technical or academic nature. The State's compliance with this obligation means that the beneficiaries must take certain steps in order to exercise their right to this measure of reparation.[421] Therefore, those who request this measure of reparation, or their legal representatives, have six months as of notification of this Judgment to advise the State of their scholarship requirements.

4. Guarantee of non-repetition: adaptation of domestic law in relation to the right of the defense to examine witnesses

433. Both the Inter-American Commission and the common interveners requested the adoption of measures relating to the adaptation of domestic law. The Court will now rule on the measure related to the right of the defense to examine witnesses and will then rule on other measures requested in relation to the adaptation of domestic law (*infra* paras. 455-464).

434. The Commission asked the Court to order the State to "[a]dapt domestic laws governing criminal procedure so that they are compatible with the right recognized in Article 8(2)(f)) […] of the American Convention." Meanwhile, the FIDH asked that the Court "order […] the adaptation of the Counter-terrorism Act to international standards" and "the elimination of anonymous or faceless witnesses, establishing ways to protect witnesses that are consistent with due process."

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[419] *Cf.* Affidavits prepared on May 14, 2013, by presumed victim Juan Ciriaco Millacheo Licán, by witnesses Freddy Jonathan Marileo Marileo and Gloria Isabel Millacheo Ñanco; on May 15, 2013, by expert witness Ruth Elizabeth Vargas Forman in relation to Víctor Manuel Ancalaf Llaupe and family, and in relation to Pascual Huantequeo Pichún Paillalao, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia and José Benicio Huenchunao Mariñán; on May 16, 2013, by witnesses Matías Ancalaf Prado, Karina del Carmen Prado Figueroa and Flora Collonao Millano; on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán, and written statement made on May 27, 2013, by Segundo Aniceto Norín Catrimán (file of statements of presumed victims, witnesses and expert witnesses, folios 29, 30, 82, 83, 109, 110, 197, 199, 200, 209, 213, 255, 256, 265, 418 and 637).

[420] *Cf. Case of the Gómez Paquiyauri Brothers v. Peru*, para. 237, *and Case of Osorio Rivera and family members v. Peru*, para. 267.

[421] *Cf. Case of Escué Zapata v. Colombia*, paras. 27 and 28, and *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010 Series C No. 216, para. 257.

435. When determining that Chile had violated the right of the defense to examine witnesses, protected in Article 8(2)(f) of the Convention, to the detriment of Pascual Huentequeo Pichún Paillalao, the Court noted that witness protection measures consisting of their anonymity were adopted without effective judicial control (*supra* para. 249), and testimony obtained under these conditions was used decisively to justify the guilty verdict. Also, even though, in the criminal proceedings against Mr. Pichún Paillalao, the protection measure of witness anonymity was accompanied in specific cases with counterbalancing measures (*supra* para. 250), the failure to regulate the latter led to legal uncertainty regarding their adoption.[422]

436. The Court finds that, in the context of the Chilean laws applied in this case, it is appropriate to order Chile to regulate clearly and rigorously the procedural measure of witness protection consisting in anonymity in order to avoid violations such as those declared in this Judgment. It must ensure that this is an exceptional measures, subject to judicial control based on the principles of necessity and proportionality, and that this type of evidence is not used decisively to justify a guilty verdict, and must also regulate the corresponding counterbalancing measures which ensure that the impairment of the right of defense is sufficiently offset, as established in this Judgment (*supra* paras. 242 to 247). In addition, the Court recalls that, in order to ensure the right of the defense to examine witnesses, the judicial authorities must apply the criteria or standards established by the Court (*supra* paras. 242 to 247) in exercise of conventionality control.

C) Compensation for pecuniary and non-pecuniary damage

437. In its case law the Court has established repeatedly that a judgment constitutes *per se* a form of reparation.[423] Nevertheless, considering the circumstances of the case *sub judice*, the consequences of the violations committed for the victims, in the personal, family and community spheres, as well as the change in their living conditions following their deprivation of liberty, the Court also finds it pertinent to analyze the payment of compensation, established on the basis of equity, for pecuniary and non-pecuniary damage.

438. The Commission asked the Court "[t]o award pecuniary and non-pecuniary reparation to the victims […] for the violations declared in the […] report."

439. Regarding the request to compensate the pecuniary damage, the common interveners of the representatives of the victims submitted the following arguments:

> **a)** CEJIL indicated that "[t]he prosecution, arrest and subsequent sentencing for 'terrorist' acts of *Werken* Ancalaf affected the family's production arrangements." The community to which Víctor Manuel Ancalaf Llaupe and his family belonged "carried out agricultural and cattle-raising activities" with a "family-based form of production," which was substantially affected by his deprivation of liberty, because "Víctor's absence reduced the family's participation in community production since he was unable to contribute to the workforce." It also affirmed that this situation meant that Mr. Ancalaf Llaupe's wife "not only had to take care of the children, […] but also had to try and occupy his role in the family and the community." Taking into account that, "[a]t the time of his arrest, the surplus production that Víctor sold at the market was around 7,600 dollars a month, and that "he was deprived of liberty for four years and four

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422 While, during the first trial, the identity of the anonymous witnesses was not revealed to either the accused or their defense, during the second trial – held owing to the annulment of the first one – the identity of these witnesses was revealed to the defense counsel with the express prohibition to communicate this information to their clients, which shows that the granting of this measure was subject to the criterion of the court that presided each trial.

423 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Liakat Ali Alibux v. Suriname*, para. 147.

months," CEJIL asked the Court to recognize "loss of earnings of 43,000 United States dollars." It stressed that this amount "had not been contested by the State."

b) The FIDH asked the Court to determine a "reparation in equity" corresponding to the compensation for pecuniary damage in this case that included: (i) loss of earnings;[424] (ii) consequential damage;[425] (iii) damage to the family wealth,[426] and (iv) the effects on the life project of the direct victims and the members of their family.[427]

440. Regarding the request for compensation for pecuniary damage, the common interveners of the representatives of the victims submitted the following arguments:

a) CEJIL affirmed that "[t]he violations committed by the State to the detriment of Víctor Ancalaf Llaupe and his family have caused adverse non-pecuniary effects that must be repaired." In this regard, it indicated that Mr. Ancalaf Llaupe "was subject to a criminal proceedings under an emergency law and criminal norms that violated guarantees of due process; he was deprived of his liberty in conditions that prevented contact with his family, affecting his relationship with his wife and children and with his community." In this regard, it stated that "the judicial proceedings changed the family roles and dynamics and led to a precarious financial situation for the family as well as harassment and discrimination […] owing to their stigmatization as terrorists." It also indicated that "as a *Werken* […] the stigmatizing effect of his conviction as a 'terrorist'" caused him "profound moral suffering." It also considered that the sentence "prejudiced his life project, because it curtailed his relationships with his community, within which he played a leading role […] affecting him particularly." It added that "the prosecution and sentencing of Víctor Ancalaf Llaupe resulted in a significant clinical ailment that he still suffers from, and he has been diagnosed with post-traumatic stress syndrome and major depression." Consequently, it asked the Court to award compensation for non-pecuniary damage in equity for Víctor Ancalaf Llaupe.

b) The FIDH affirmed that "[t]he sentencing under the Counter-terrorism Act with serious violations of due process, the discrimination, the years of imprisonment or remaining in hiding, the separation from family members and the community, the humiliation of being stigmatized as a terrorist and, in the case of the *Lonkos*, of being

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[424] The FIDH calculated the loss of earnings of Pascual Huentequeo Pichún Paillalao, Segundo Aniceto Norín Catrimán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán. To this end, it took into account "the day on which the victims were captured or sentenced and the income they failed to earn from that day until they were released," plus the "accrued interest" which could be added to the calculation made. In this regard, they indicated that: (i) Mr. Pichún Paillalao was deprived of liberty for 4 years and 2 months, and his loss of earnings was calculated at 9,100,000 Chilean pesos; (ii) Mr. Norín Catrimán was deprived of liberty for 4 years and a half, and his loss of earnings was calculated at 9,828,000 Chilean pesos; (iii) Florencio Jaime Marileo Saravia was deprived of liberty for 7 years and a half and his loss of earnings was calculated at 16,380,000 Chilean pesos; (iv) Juan Patricio Marileo Saravia was deprived of liberty for 7 years and 3 months and his loss of earnings was calculated at 15,834,000 Chilean pesos; (v) Mr. Huenchunao Mariñán was deprived of liberty for 7 years and 8 months, and his loss of earnings was calculated at 16,744,000 Chilean pesos, and (vi) Mr. Millacheo Licán was convicted and was "in hiding" for 7 years and a half, and his loss of earnings was calculated at 16,380,000 Chilean pesos.

[425] The FIDH requested compensation for consequential damages based on: (a) "the direct expenses arising from the violation suffered," which included the "important financial effort in order to seek justice and to publicize the violations they suffered"; (b) the "expenses incurred by the family members, such as expenses to visit" the victims in the detention centers, and (c) "future medical expenses […] for treatment related to the violations."

[426] Regarding the damage to the family wealth, the FIDH indicated that the families of Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Segundo Aniceto Norín Catrimán suffered "important financial losses" owing to their detentions, because the victims "contributed to the family income with their agricultural labors." It therefore asked the Court to "decide, in equity, based on the information in the expert appraisals and the information provided during the hearings."

[427] Regarding the "effects on the life project of the direct victims and the members of their family," it indicated that "the facts on which this case is based […] signified an interruption of their life projects and that of their family members."

unable to play their spiritual role, have caused profound suffering to Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Aniceto Norín [Catrimán]." It added that "almost 10 years have passed since […] they were first detained, without obtaining any acknowledgement of these violation, or any redress." It indicated also that "the life project" of these victims "was profoundly altered" because "it was a time during which people usually start a family life," or "they already had numerous children to educate." It affirmed that all this "also had serious consequences for the family unit" and, in this regard, referred "to the psychological impact it has had on each member of the families" and on the communities. In its brief with final arguments, the FIDH indicated that, in the case of the victim Pascual Huentequeo Pichún Paillalao, "his wives and children should be able to benefit from the reparation that he would have received […] if he was still alive."

441. The Court has developed in its case law the concept of pecuniary damage and has established that this supposes "the loss or detriment to the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."[428] The Court has also developed the concept of non-pecuniary damage and has established that this "may include both the suffering and afflictions caused to the direct victim and his family, the impairment of values that have great significance for the individual, as well as the changes of a non-pecuniary nature, in the living conditions of the victim or his family."[429]

442. With regard to the compensation requested by the common interveners for loss of earnings, the Court notes that, in their motions and arguments briefs, they included an estimate of the income that the victims failed to receive while they were deprived of liberty or in hiding (*supra* para. 439). In this regard, the Court observes that it has no probative elements that substantiate the said calculation, or information on the income that the victims received before the events that resulted in the human rights violations declared in this case. However, the Court notes, based on the statements made by the victims and by the members of their families that, prior to the events, the victims carried out agricultural and animal-raising activities, mainly in a collective manner with their communities, which were affected following their prosecution and deprivation of liberty, with a significant impact on the economy and subsistence of the families, who faced financial difficulties, a deterioration in their living conditions, and changes in the roles of family members.[430]

443. The Court observes that, owing to the activity carried out by the victims, it is not possible to determine their precise monthly income. However, bearing in mind the activity carried out by the victims as their means of subsistence, the particularities of the instant case, the violations declared in this Judgment, as well as the time the victims remained deprived of liberty or in hiding, it is possible to infer that, while the prosecution and deprivation of liberty lasted, they were unable to devote themselves to their usual remunerative activities or provide for their families as they did prior to the events.

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[428] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Liakat Ali Alibux v. Suriname*, para. 153.

[429] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Liakat Ali Alibux v. Suriname*, para. 156.

[430] *Cf.* Affidavits prepared on May 14, 2013, by witnesses Freddy Jonathan Marileo Marileo and Lorenza Saravia Tripaillán; on May 16, 2013, by witnesses Matías Ancalaf Prado, Karina del Carmen Prado Figueroa and Flora Collonao Millano, on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán and by witness Pascual Alejandro Pichún Collonao; written statement made on May 27, 2013, by Segundo Aniceto Norín Catrimán (file of statements of presumed victims, witnesses and expert witnesses, folios 29, 30, 82, 83, 213, 235, 237, 248, 255, 256 and 639), and statement made by Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

444. The common interveners also indicated that the victims' family members incurred expenses arising from the violations that affected the victims, particularly the expenses resulting from their visits to the victims while they were deprived of liberty. In this regard, the Court notes that it has no evidence to prove the exact amounts that the family members disbursed in this regard. However, the Court is able to determine, based on the statements made by the victims and their family members, that the latter incurred expenses when travelling to the prisons to visit the victims and to provide them with food and other necessary items.[431] The Court also considers it reasonable to presume that, owing to the facts of this case and, fundamentally, owing to the deprivation of liberty, the family members had to incur different expenses.

445. Regarding the non-pecuniary damage, the Court has verified the psychological and moral impact on the eight victims of this case owing to the prosecution and sentencing for offenses of a terrorist nature and to having to serve a prison sentence and comply with ancillary penalties based on criminal judgments delivered in application of a law that was contrary to the Convention, in violation of guarantees of due process, the principle of equality and non-discrimination, and the right to equal protection of the law. The Court has verified, by means of the statements of the victims and their family members and of the psychological appraisals prepared by Ms. Vargas Forman, the consequences for the victims of having been declared responsible as perpetrators of terrorist offenses in violation of the Convention on different aspects of their personal, community and family life,[432] the effects of which continue even after having served – most of them – their prison sentences.[433] At the personal level, the effects are related to personal changes, the suffering, and the consequences of the prosecution for terrorist offenses, as well as the time they remained in confinement. In addition, the arbitrary measures of pre-trial detention and the said criminal convictions had effects on the participation of the victims in their communities, especially in the case of Messrs. Norín Catrimán, Pichún Paillalao

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[431] *Cf.* Affidavits prepared on May 14, 2013, by presumed victims Juan Ciriaco Millacheo Licán and Juan Patricio Marileo Saravia, by witnesses Soledad Angélica Millacheo Licán and Juan Julio Millacheo Ñanco; on May 16, 2013, by witnesses Matías Ancalaf Prado, Karina del Carmen Prado Figueroa and Flora Collonao Millano; on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán, and on May 20, 2013, by witness Claudia Ximena Espinoza Gallardo (file of statements of presumed victims, witnesses and expert witnesses, folios 29, 31, 82, 83, 187, 188, 197, 231, 232, 238, 240, 255 and 260) and statement made por Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[432] *Cf.* Affidavits prepared on May 14, 2013, by presumed victims Juan Patricio Marileo Saravia and Juan Ciriaco Millacheo Licán, and by witnesses Soledad Angélica Millacheo Licán, Freddy Jonathan Marileo Marileo, Juan Julio Millacheo Ñanco and Gloria Isabel Millacheo Ñanco; on May 15, 2013, by expert witness Ruth Elizabeth Vargas Forman with regard to Víctor Manuel Ancalaf Llaupe and his family, in relation to Pascual Huentequeo Pichún Paillalao, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia and José Benicio Huenchunao Mariñán, in relation to Segundo Aniceto Norín Catrimán, and in relation to Patricia Roxana Troncoso Robles; on May 16, 2013, by witnesses Matías Ancalaf Prado, Karina del Carmen Prado Figueroa and Carlos Patricio Pichún Collonao, and on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán and by witness Mercedes Huenchunao Mariñán (file of statements of presumed victims, witnesses and expert witnesses, folios 96 to 33, 35, 84, 86, 99, 106 to 109, 192, 193, 197, 200, 205 to 210, 222, 233, 234, 256, 260, 267, 277, 416 to 424, 569 to 573, 589 to 592, 636 to 639, 657 and 658), and statements made by Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia and Juan Pichún Collonao before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[433] *Cf.* Affidavits prepared on May 14, 2013, by presumed victims Juan Patricio Marileo Saravia and Juan Ciriaco Millacheo Licán, by witnesses Soledad Angélica Millacheo Licán, Freddy Jonathan Marileo Marileo and Isabel Millacheo Ñanco; on May 15, 2013, by expert witness Ruth Elizabeth Vargas Forman in relation to Víctor Manuel Ancalaf Llaupe and family, in relation to Pascual Huantequeo Pichún Paillalao, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia and José Benicio Huenchunao, in relation to Segundo Aniceto Norín Catrimán, and in relation to Patricia Roxana Troncoso Robles; on May 16, 2013, by witnesses Matías Ancalaf Prado and Karina del Carmen Prado Figueroa; on May 17, 2013, by witness Mercedes Huenchunao Mariñán, and written statements prepared on May 27, 2013, by Segundo Ancieto Norín Catrimán and Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 33 to 35, 84, 96 to 99, 106 to 109, 192, 193, 199, 200, 233, 234, 267, 277, 416 to 424, 569 to 573, 589 to 592, 636 to 639, 657 and 658), and statements made by Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia and Juan Pichún Collonao before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

and Ancalaf Llaupe as regards the exercise of their role as indigenous leaders of Mapuche communities. In addition, at the level of the family, the statements of the victims and the members of their families reveal the breakdown of family ties as a result of the trials and the years of deprivation of liberty, added to the victims' concern and anguish because they could not provide for their families financially or fulfill their parental duties during the time they were imprisoned.

446. Based on all the above, the Court finds it pertinent to order compensation in favor of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, which includes both the pecuniary damage, and the non-pecuniary damage that has been verified and, to this end, determines, in equity, the sum of US$50,000.00 (fifty thousand United States dollars) or the equivalent in local currency, for each of them.

D) Costs and expenses

447. CEJIL argued that "[s]ince it incorporated the case as the representative of [Víctor Ancalaf Llaupe, it] had assumed a series of expenses connected with this task, which included travel, hotels, communications, photocopies, stationery and mailings," as well as those "corresponding to the time dedicated by the lawyers to specific attention to the case and to research, obtaining and presenting evidence, conducting interviews, and preparing briefs." In its motions and arguments brief, it asked the Court to order the State to reimburse US$10,899.99 for costs and expenses. With its final written arguments it presented "a list of the expenses incurred since the presentation of the [motions and arguments brief] and up until the public hearing at the seat of the Court," amounting to US$17,816.77. In total, CEJIL asked the Court for reimbursement of US$28,716.76 for costs and expenses. In addition, it asked the Court, "based on equity, […] to order the deposit of an additional amount" for future expenses that included "those related to compliance with the judgment," as well as "the expenses of trips from Argentina to Chile […], to advance compliance with the judgment, and the other expenses that the proceedings could entail […] following notification of the Judgment."

448. The FIDH described the expenses it had incurred by "accompany […] the victims in this case"; among these, it referred to expenditure on plane tickets, accommodation and *per diem* for "a visit to Washington to the Inter-American Commission by three lawyers and one representative of the FIDH," as well as "trips to Chile to inform the victims about the progress of the case; to hold meetings with Chilean lawyers, and to obtain evidence," and a trip to San José, Costa Rica, to attend the hearing before the Court. It calculated that these expenses amounted to US$32.000,00. In addition, it referred to the expenses "incurred by the lawyers and by the victims," because "two lawyers [Jaime Madariaga and Myriam Reyes] have represented the victims from the start of the proceedings on a voluntary basis" and it therefore asked the Court to recognize "honoraria for their work" because "[f]rom the moment that the FIDH incorporated the case, they began to provide technical and professional support, […] but have not receive any remuneration."[434] In addition, it asked that the State "pay the amount for costs and expenses directly to the representatives of the victims."

449. The Court reiterates that, in keeping with its case law,[435] costs and expenses form part of the concept of reparation established in Article 63(1) of the American Convention, because the activity deployed by the victims in order to obtain justice at both the domestic and the

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[434] In this regard, the FIDH indicated that this case "has required a significant effort [by the national lawyers], including the filing of the complaint, visits to the prisons to interview the victims, establishing trust and agreements that allowed the case to be constructed," all of which "has entailed personnel expenses" and time working on the case.

[435] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Liakat Ali Alibux v. Suriname*, para. 162.

international level entails disbursements that must be compensated when the international responsibility of the State has been declared in a judgment convicting it.

450. With regard to their reimbursement, it is for the Court to make a prudent assessment of their scope, which may include the expenses arising before the authorities of the domestic jurisdiction, as well as those generated during the proceedings before the Court, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that the *quantum* is reasonable.[436]

451. In this regard, the Court has indicated that "the claims of the victims or their representatives for costs and expenses, and the evidence that supports such claims must be presented to the Court at the first procedural opportunity granted them; that is, in the motions and arguments brief, without prejudice to those claims being updated subsequently based on the new costs and expenses incurred owing to the proceedings before this Court."[437] In addition, the Court reiterates that it is not sufficient merely to forward probative documents, but rather the parties must submit arguments that relate the evidence to the fact that it is considered to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly established.[438]

452. In the instant case, the Court takes into account that the common interveners incurred expenses during the processing of the case before the Inter-American Commission and before the Court. In this regard, it has verified that CEJIL presented vouchers for expenses for approximately US$26,425.00 (twenty-six thousand four hundred and twenty-five United States dollars) corresponding to travel, accommodation and transport. Meanwhile, the FIDH presented expense vouchers for approximately US$25,820.00 (twenty-five thousand eight hundred and twenty United States dollars) corresponding to travel, accommodation and transport. Consequently, the Court finds it appropriate to establish for reimbursement of costs and expenses in favor of the FIDH the sum requested of US$32,000.00 (thirty-two thousand United States dollars) or the equivalent in local currency, and in favor of CEJIL the amount requested of US$28,700.00 (twenty-eight thousand seven hundred United States dollars) or the equivalent in local currency. The State must pay these amounts within one year.

453. In addition, the Court considers that Ylenia Hartog, representative of the victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles, incurred expenses in the proceedings before the Court, and therefore decides to establish in her favor, in equity, for costs and expenses the sum of US$5,000.00 (five thousand United States dollars). With regard to the FIDH request to recognize a sum for "honoraria" to Jaime Madariaga and Myriam Reyes for having "represented the victims from the start of the proceedings" (*supra* para. 448), the Court has verified that they have intervened in the processing of the proceedings at both the domestic and the international level and, therefore, finds it pertinent to establish, in equity, the sum of US$5,000.00 (five thousand United States dollars) or the equivalent in local currency, for each of them, for costs and expenses. The State must pay these amounts within one year.

454. The Court considers that, during the proceeding on monitoring compliance with this Judgment, it may establish that the State must reimburse the victims or their representatives any reasonable expenses they incur during that procedural stage.

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436 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 82 and *Case of Osorio Rivera and family members v. Peru*, para. 293.

437 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 275, and *Case of J. v. Peru*, para.421.

438 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 277, and *Case of Liakat Ali Alibux v. Suriname*, para. 163.

E) Other measures of reparation requested

a) *Adaptation of domestic law in relation to the Counter-terrorism Act*

455. The Commission asked the Court to order the State to "[a]dapt the anti-terrorist legislation embodied in Law 18,314, so that it is compatible with the principle of legality recognized in Article 9 of the American Convention," and indicated that the 2010 reform of the Counter-terrorism Act did not entail a substantial modification that made it compatible with this article, because it was a structural change that kept the identical wording to the previous version, and that the changes were merely in phrases and connecting words used to unite the three hypotheses relating to the terrorist intent.

456. The FIDH asked that the Court order the "repeal of Law 18,314" or, "[s]ubsidiarily," its adaptation "and that of other domestic laws to international standards," and indicated that it shared the Commission's opinion that the amendments to Law No. 18,314 had not been substantive as regards the principle of legality. CEJIL requested "the adaptation of the legal framework applicable to cases of presumed terrorist acts to the standards of international human rights law," and recognized the progress made by the amendments to the Counter-terrorism Act insofar as the legal presumption of terrorist intent had been eliminated and the non-applicability of this law to minors had been established. Nevertheless, it considered that the obstacles as regards international standards had not been overcome, "especially [those related to] the definition of the offenses included in the law."

457. The State indicated that, in 2010, a reform of the Counter-terrorism Act was approved in which its articles 1 and 2 were amended, eliminating the presumption of terrorist intent and the applicability of this law to minors. It indicated that "[t]he definition of terrorist offense […] complies with the principle of legality" and that "[t]here are no references in this law that could lead to an erroneous interpretation of the offense by either the general population or the courts of justice."

458. The Court has determined that the State maintained in force a criminal norm included in the Counter-terrorism Act that was contrary to the principle of legality and the principle of the presumption of innocence, as indicated in paragraphs 168 to 177. This norm was applied to the victims in this case to determine their criminal responsibility as authors of terrorist offenses and, consequently, the Court found that Chile had violated the principle of legality in criminal matters (Article 9) and the principle of the presumption of innocence (Article 8(2)), in relation to the obligation to respect and ensure rights (Article 1(1)) and the obligation to adopt domestic legal provisions (Article 2), to the detriment of Víctor Manuel Ancalaf Llaupe, Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, all in the terms established in this Judgment.

459. The Court notes that the case file reveals that, under Law No. 20,467,[439] the legal presumption of terrorist intent that was applied to the presumed victims in this case was eliminated. Since it has been proved by the State that the said provision is not in force, it is not necessary to order a measure concerning the adaptation of domestic law on this specific point. The Court will not make abstract considerations on Chilean laws in relation to the current definition of offenses contained in the Counter-terrorism Act. The fact that, when ruling on the merits, the Court did not consider it pertinent to analyze, in this case, other alleged violations derived from the regulation of other aspects of the subjective element of the definition of the

[439] *Cf.* Law No. 20,467 of October 8, 2010, which "[a]mends provisions of Law No.18,314 that define terrorist acts and establish the corresponding punishments" (file of annexes to the Merits Report 176/10, annex 2, folios 12 to 15, file of annexes to the CEJIL motions and arguments brief, annex B.1.3, folios 1759 to 1774, file of annexes to the FIDH motions and arguments brief, annex 32, folios 883 to 1309, and file of annexes to the answering brief of the State, annex 4, folios 84 to 87).

offense or those supposedly derived from the objective element of the definition (*supra* para. 178), does not preclude Chile, if it considers it necessary, from amending its legislation to take into account the relevant aspects indicated by international experts and organs.

b) Adaptation of domestic law in relation to the right to appeal the judgment before a higher court

460. The Commission asked the Court to order that the State "[a]dapt its domestic procedural laws to make them compatible with [the] right established in Article 8(2)(h)) […] of the American Convention." The FIDH requested "an amendment of the Criminal Procedural Code in order to ensure the right of those convicted to appeal, either by amending the current remedy, or by establishing a new remedy that guaranteed a full review of judgments convicting the accused." The State indicated that the appeals system of the Criminal Procedural Code "complies with all the international standards," and indicated that "an unjustified order to amend the criminal procedural system, would only, paradoxically, weaken due process, allowing a less appropriate court to examine the facts outside the context of the oral hearing – which is the highest expression of the guarantees of the public, immediate and adversary nature of the proceedings – and to take a decision, free of the scrutiny of the interested parties, on no less than the possibility of the criminal conviction of an individual."

461. In view of the fact that, in the instant case, the Court concluded that a violation of Article 2 of the Convention had not been proved, but rather that the violation of the right to appeal an adverse criminal judgment was a result of the actions of the courts in the specific cases (*supra* paras. 275 to 297), the Court does not find it necessary to order Chile to adapt its domestic laws in this regard. However, the Court recalls the importance that the judicial authorities apply the criteria or standards established in the Court's case law in relation to the content of the right to appeal a criminal judgment in exercise of control of conventionality in order to ensure this right (*supra* para. 298).

c) Adaptation of domestic law in relation to the grounds for pre-trial detention

462. CEJIL affirmed, with regard to the adaptation of the norms on pre-trial detention, that "Chilean regulations […] retain the grounds of a danger to society in force that […] are incompatible with the procedural criteria established in the Convention." It indicated that both the grounds and their interpretation by the courts "tend towards the automatic application of this coercive measure," "without the need to justify precisely how, in the specific case that is the object of a decision on liberty, the accused would be a danger to the security of society." In this regard, it mentioned that this way of interpreting the grounds "is supported […] by the administrators of justice and was reinforced by the National Congress by the promulgation of Law No. 20,253," which establishes "a system of presumptions of danger to the security of society" "increasing the automatic nature of the establishment […] of pre-trial detention" on these grounds. It considered that the following norms should be amended: (a) article 19.7.e of the Constitution of the Republic of Chile; (b) article 363.1 and 3 of the Code of Criminal Procedure (Law No 1853), and (c) article 140.c of the Criminal Procedural Code (Law No. 19,696). The FIDH requested "the modification of the law on pre-trial detention, in order to eliminate the grounds of danger to the security of society, retaining only those relating to the danger to the investigation and the risk of flight."

463. The State indicated that it was "irresponsible to alleged that measures of protection should not be taken in cases where proven past events indicate that a person could, if at liberty, not only flee or affect the investigation, but also endanger the victim of the offense investigated or other persons" and that it "did not see why the security of the investigation would be a sufficiently important right to justify […] a precautionary measure involving the pre-trial detention of an accused, but not the security of individuals."

464. When ruling on the violations verified in this case in relation to the measures of pre-trial detention to which the victims were subject, the Court took into account that the grounds of danger to "the security of society" stipulated in article 363 of the former Code of Criminal Procedure and in article 140.c of the Criminal Procedural Code of 2000, which are open-ended, were applied to the eight victims without an analysis of the need that justified the measure based on a procedural risk in the specific case (*supra* paras. 363 and 364). Consequently, the Court does not find it pertinent to order Chile to adapt its domestic law, because the violations of the right to personal liberty verified in this Judgment resulted from the judicial interpretation and application of the said norms. Nevertheless, the Court recalls that the judicial authorities should apply the criteria and standards established in the Court's case law (*supra* paras. 307 to 312) in exercise of control of conventionality, in order to ensure that the measure of pre-trial detention is always adopted in keeping with these parameters.

d) Other measures requested

465. The Commission asked the Court to order the State to "[a]dopt 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." CEJIL asserted that, given that "[s]ome of the violations […] in this case are explained by the unfamiliarity with the standards of international law of the administrators of justice," the State should "increase substantially the training offered to the agents of the security forces – in particular, the members of the Investigative Police of the *Carabineros* – the members of the Judiciary and the Public Prosecution Service, and other State officials, on the rights of the indigenous peoples in order to avoid the repetition of discriminatory biases in the application of the law." In addition, it requested "that the legal reforms be complemented by education and training activities on the implications of the Judgment and the standards derived from it, for the different agents involved in the protection of rights," and that this "should include the National Human Rights Institute as the State agency responsible for the design and implementation of this measure." It alleged that one way of reversing "[t]he historical situation of disadvantage of the indigenous peoples in Chile in general, and the Mapuche People in particular," as well as the prejudices and stereotypes that exist in the State with regard to the members of indigenous peoples, "is the design and implementation of an effective public policy that instills respect for the contribution of the indigenous peoples [and the Mapuche culture] to national development. To this end, it ask[ed] the Court to require the State to design and implement an awareness-raising campaign on the issue, including the National Human Rights Institute in its execution." The FIDH asked that the State be order to implement a "communication campaign that underscores the value of the Mapuche People and the importance of their survival."

466. The FIDH also asked the Court to order the State "to restitute the ancestral lands to the Mapuche people" in order "not to perpetuate the State's actions aimed at condemning representatives of the Mapuche people for their political demands."[440] It also asked that Chile be ordered "to investigate and sanction those responsible for these violations"; specifically, that it "sanction the judges and prosecutors who participated in the violation of the human rights of the victims." In addition, the FIDH, among its arguments on non-pecuniary damage, affirmed that "the only way to repair the consequences of [the] violations [in this case] is to seek measures that considers the Mapuche community as a whole," and to this end, it requested the "creation of a fund to be administered by the communities to which the petitioners belong, destined for the education of Mapuche children," because it considered that the harm to the cultural and moral integrity of the community "can be repaired by the transfer of ancestral knowledge to the children as a way of maintaining the cultural integrity of the people."

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[440] Specifically, they "requested the establishment of a plan for the restitution of land" to the José Guillón, José Millacheo, José María Cabul, Temulemu and Norín Communities, to which the victims and their families belong.

467. The Court considers that the delivery of this Judgment and the reparations ordered in this chapter are sufficient and adequate to remedy the violations declared and does not find it admissible to order additional measures.[441]

F) Reimbursement of the expenses of the Victims' Legal Assistance Fund

468. Both CEJIL and the FIDH presented, in representation of three of the presumed victims, requests for support from the Victims' Legal Assistance Fund of the Court to cover certain expenses relating to the presentation of evidence. In Orders of the President of the Court of May 18, 2012, and of April 30, 2013 (*supra* paras. 10 and 13), and a decision of May 24, 2013, the financial assistance of the Fund was authorized to cover the necessary travel and accommodation expenses for presumed victims Víctor Manuel Ancalaf Llaupe and Florencio Jaime Marileo Saravia, witness Juan Pichún Collonao and expert witness Jorge Andrés Contesse Singh to appear before the Court to testify at the public hearing.[442]

469. The State was given the opportunity to present its observations on the disbursements made in this case, which amounted to US$7,652.88 (seven thousand six hundred and fifty-two United States dollars and eighty-eight cents). Chile did not present observations in this regard. In application of article 5 of the Rules for the Operation of the Fund, it is for the Court to evaluate the admissibility of ordering the defendant State to reimburse the Legal Assistance Fund for any disbursements made.

470. Based on the violations declared in this Judgment, the Court orders the State to reimburse this Fund the sum of US$7,652.88 (seven thousand six hundred and fifty-two United States dollars and eighty-eight cents) for the expenditure incurred. This amount must be reimbursed to the Inter-American Court within ninety days of notification of this Judgment.

G) Method of complying with the payments

471. The State must pay the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this Judgment directly to the persons or organizations indicated herein, within one year of notification of this Judgment, in accordance with the following paragraphs. If any of the beneficiaries of the compensation are deceased (as in the case of the victim Pascual Huentequeo Pichún Paillalao) or die before they receive the respective compensation, this shall be delivered directly to their heirs, pursuant to the applicable domestic law.

472. The State must comply with the monetary obligations by payment in United States dollars or the equivalent in Chilean pesos, using the exchange rate between the two currencies in force on the New York Stock Exchange (United States of America) the day before the payment to make the respective calculation.

473. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs it is not possible to payment the specified amounts within the indicated time frame, the State shall deposit these amounts in their favor in an account or a certificate of deposit in a solvent Chilean financial institution, in United States dollars, and in the most favorable conditions allowed by banking law and practice. If, after ten years, the sum allocated has not been claimed, it shall be returned to the State with the interest accrued.

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441 *Cf. Case of Radilla Pacheco v. Mexico*, para. 359, and *Case of Gutiérrez and family v. Argentina. Merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 271, para. 198.

442 In addition, the President *ex officio* approved assistance for the reasonable expenses entailed by providing the statements of the presumed victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles by affidavit. The representative of these victims did not provide the Court with any voucher for expenses incurred in the preparation of these statements.

474. The amounts allocated in this Judgment as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses must be delivered to the persons indicated in full, as established in this Judgment, without any reductions arising from eventual taxes or charges.

475. If the State should fall in arrears, it must pay interest on the amount owed corresponding to banking interest on arrears in Chile.

476. In accordance with its consistent practice, the Court reserves the power inherent in its attributes and also derived from Article 65 of the American Convention to monitor full compliance with this Judgment. The case will be closed when the State has complied fully with all aspects of this Judgment.

477. Within one year of notification of this Judgment, the State must provide the Court with a report on the measures adopted to comply with it.

478. Therefore,

THE COURT

DECLARES,

unanimously that:

1. The State violated the principle of legality and the right to the presumption of innocence, established in Articles 9 and 8(2) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 159 to 177 of this Judgment.

unanimously that:

2. The State violated the principle of equality and non-discrimination and the right to the equal protection of the law, established in Article 24 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 222 to 228 and 230 of this Judgment.

unanimously that:

3. The State violated the right of the defense to examine witnesses, established in Article 8(2)(f) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe, in the terms of paragraphs 241 to 260 of this Judgment.

unanimously that:

4. The State violated the right to appeal the judgment before a higher court, established in Article 8(2)(h) of the American Convention on Human Rights, in relation to Article 1(1) of this

instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 268 to 291 of this Judgment.

unanimously that:

5. The State violated the right to personal liberty, established in Article 7(1), 7(3) and 7(5) of the American Convention on Human Rights, and the right to the presumption of innocence, established in Article 8(2) thereof, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles, in the terms of paragraphs 307 to 358 of this Judgment.

unanimously that:

6. The State violated the right to freedom of thought and expression, established in Article 13(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe, in the terms of paragraphs 370 to 378 of this Judgment.

unanimously that:

7. The State violated the political rights established in Article 23(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 379 to 386 of this Judgment.

unanimously that:

8. The State violated the right to the protection of the family established in Article 17(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Víctor Manuel Ancalaf Llaupe, in the terms of paragraphs 401 to 410 of this Judgment.

unanimously that:

9. It has insufficient evidence to allow it to conclude that the State violated the right to the protection of the family established in Article 17(1) of the American Convention on Human Rights, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraph 411 of this Judgment.

by four votes to two, that:

10. It is not incumbent on the Court to rule on the alleged violation of the right to an impartial judge or court, established in Article 8(1) of the American Convention on Human Rights, in the terms of paragraphs 193 and 229 of this Judgment.

Judges Ventura Robles and Ferrer Mac-Gregor Poisot dissenting.

unanimously that:

11. It is not incumbent on the Court to rule on the alleged violation of the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention on Human Rights, in relation to the right of the defense to examine witnesses, protected in Article 8(2)(f) of this instrument, in the terms of paragraph 261 of this Judgment.

unanimously that:

12. The State did not violate the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention on Human Rights, in relation to the right to appeal the judgment before a higher court, established in Article 8(2)(h) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 292 to 298 of this Judgment.

unanimously that:

13. The State did not violate the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention on Human Rights, in relation to the right to personal liberty, established in Article 7 of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 360 to 364 of this Judgment.

unanimously that:

14. The State did not violate the right to personal integrity, established in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 387 to 400 of this Judgment.

AND ESTABLISHES

unanimously that:

15. This Judgment constitutes *per se* a form of reparation.

16. The State must adopt all the administrative, judicial, or any other type of measures required to annul all aspects of the criminal judgments convicting Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles regarding which the Court has ruled in this Judgment, in the terms of paragraph 422 of this Judgment.

17. The State must provide, free of charge and immediately, medical and psychological or psychiatric treatment to the victims in this case who request this, as established in paragraphs

425 and 426 of this Judgment.

18. The State must broadcast and make the publications of the Judgment indicated in paragraphs 428 and 429 of this Judgment, as indicated in these paragraphs.

19. The State must award scholarships in Chilean public establishments to the children of the eight victims in this case who request this, in the terms of paragraph 432 of this Judgment.

20. The State must regulate, clearly and precisely, the procedural measure of witness protection involving anonymity, ensuring that this is an exceptional measures, subject to judicial control based on the principles of necessity and proportionality, and that this evidence is not used in a decisive manner as grounds for a conviction, and also to regulate the corresponding counterbalancing measures, in the terms of paragraphs 242 to 247 and 436 of this Judgment.

21. The State must pay each of the eight victims in this case the amount established in paragraph 446 of this Judgment, as compensation for pecuniary and non-pecuniary damage, in the terms of paragraphs 471 to 475 of this Judgment.

22. The State must pay the amounts established in paragraphs 452 and 453 of this Judgment as reimbursement of costs and expenses in the terms of the said paragraphs and of paragraphs 471 to 475 of this Judgment.

23. The State must reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, as established in paragraph 470 of this Judgment.

24. The State must provide the Court with a report on the measures adopted to comply with this judgment within one year of its notification.

25. The Court will monitor full compliance with this Judgment, in exercise of its powers and pursuant to its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot advised the Court of their joint dissenting opinion which accompanies this Judgment.

DONE, at San José, Costa Rica, on May 29, 2014, in the Spanish language.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Diego García-Sayán Alberto Pérez Pérez

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Secretary

JOINT DISSENTING OPINION OF JUDGES
MANUEL E. VENTURA ROBLES AND EDUARDO FERRER MAC-GREGOR POISOT

CASE OF NORÍN CATRIMÁN *ET AL.* (LEADERS, MEMBERS AND ACTIVIST OF THE MAPUCHE INDIGENOUS PEOPLE) *v.* CHILE

JUDGMENT OF MAY 29, 2014
(Merits, reparations and costs)

1. We issue this dissenting opinion in order to provide the grounds for the reasons we disagree with what was decided in operative paragraph 10 of the Judgment of May 29, 2014, in the *Case of Norín Catrimán et al. v. Chile* (hereinafter "the Judgment"), delivered by the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), in which it declared that it was "not incumbent on the Court to rule on the alleged violation of the right to an impartial judge or court established in Article 8(1) of the American Convention on Human Rights" (hereinafter "the American Convention" or "the Pact of San José, Costa Rica"), based on the considerations in paragraph 229 of the Judgment.

2. In this opinion we will set out the reasons why we consider that the Court should have established that Chile incurred in a violation of Article 8(1) of the American Convention owing to the lack of impartiality of the courts that delivered criminal convictions against the victims in this case; above all, because these convictions were based on negative ethnic prejudices and stereotypes that had a decisive impact on the analysis of elements of the criminal responsibility.

3. For greater clarity, we will divide this opinion into the following sections: (1) object of the disagreement (paras. 4 to 11); (2) the right to an impartial judge or court in accordance with international case law (paras. 12-32); (3) the lack of impartiality of the judges who heard the criminal proceedings against the victims in this case (paras. 33-41), and (4) conclusion (paras. 42-45).

1. Object of the disagreement

4. First of all, we believe that the reason given by the majority opinion in paragraph 229 of the Judgment is insufficient, when it considers "that it is not necessary to rule" on the alleged violation of the right to an impartial judge. The reason given in the judgment is that the allegations of a violation "are closely linked to the presumption of the terrorist intent 'to instill fear [...] in the general population' (a subjective element of the definition), that as the Court has declared (*supra* paras. 168 to 177) violates the principle of legality and the guarantee of presumption of innocence established in Articles 9 and 8(2) of the Convention, respectively." On the basis of this reason, the majority opinion affirms that "[t]he alleged violation of Article 8(1) should be considered subsumed in the previously declared violation of Articles 9 and 8(2)."

5. In this regard, we consider it necessary to recall that the Court examined whether the legal presumption of the subjective element of the offense established in article 1 of the Counter-terrorism Act (Law No. 18,314) entailed a violation of the principle of legality and the principle of the presumption of innocence, by establishing that "[t]he objective of instilling fear in the general population shall be presumed,

save evidence to the contrary," when the offense is committed using the means or devices indicated in this same law (including "explosive or incendiary devices").[1] The Court concluded that the said presumption that the intent exists "to instill fear in the general population" when certain objective elements exist violates the principle of legality recognized in Article 9 of the American Convention and the presumption of innocence established in its Article 8(2); and concluded that its application in the judgments that determined the criminal responsibility of the eight victims in this case violated these rights protected in Articles 9 and 8(2) of the Convention.

6. The motive for our disagreement with regard to the said paragraph 229 of the Judgment is that it does not contain a reasoning of how that legal presumption, which is not even alleged to be discriminatory, had a negative impact on the impartiality of the judges. To the contrary, we consider that the impartiality of the judges who heard these criminal trials is indisputably called in question as regards their decisions in the judgments convicting the victims regarding which the Court declared the violation of Article 24 of the American Convention.

7. Indeed, the observations of the Inter-American Commission on Human Rights (hereinafter "the Commission") in its Merits Report should be recalled in relation to the violation of impartiality that occurred because the judges who delivered the guilty verdicts convicting the eight presumed victims "assessed and classified the facts on the basis of prefabricated concepts about the context that surrounded them, and […] convicted the defendants on the basis of those biases." According to the Commission, "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 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 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."[2]

8. Similarly, in its motions and arguments brief, the International Federation for Human Rights (hereinafter "the FIDH") argued that "there was subjective impartiality *(sic*) in the judgments convicting the accused in the case of the *Lonko*s and in the Poluco Pidenco case" and that it endorsed the Commission's conclusion in its Merits Report, to which it added that "the application of an undue punishment to the *Lonkos* also reveals prejudice."[3] In its final arguments, the FIDH affirmed that "the use of concepts such as "well-known and notorious,' 'it is well-known' as basic elements to justify the serious conflict between the Mapuche ethnic group and the rest of the population, contained in the judgments in both the case of the *Lonkos* and the Poluco Pidenco Case, reveal that the victims were not tried by an impartial court, because the case was approached with a bias or a stereotype." Furthermore, it affirmed that "[t]hese preconceived notions […] are also reflected in the fact that the Angol Oral Court copied the judgment that it had delivered in the first trial against the *Lonkos* Pichún and Norín, in which it handed down an acquittal and then, in the judgment of August 24, 2004, delivering a guilty verdict against the victims in the Poluco Pidenco case, it copied

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1 Paras. 168 to 177 of the Judgment.

2 Merits Report No. 176/10, paras. 282 and 283.

3 The FIDH brief with motions, arguments and evidence (merits file, tome I, folios 497 and 498).

precisely the part relating to why it considered that the acts it was examining were terrorist offenses."

9. Therefore, we consider it contradictory that the Court did not rule on these allegations of the violation of the right to an impartial court, but did rule — in paragraphs 226, 227, 228 and 230 and in the second operative paragraph of the Judgment — on "the terms […] indicated, in particular, as being discriminatory [that], with some variations, appear in the different judgments"; concluding that "the mere use of this reasoning, which reveals stereotypes and prejudices, as grounds for the judgments constituted a violation of the principle of equality and non-discrimination and the right to equal protection of the law, recognized in Article 24 of the American Convention, in relation to Article 1(1) of this instrument,"[4] to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe (underlining added).

10. We consider that, similarly, it is necessary to examine the allegation that the conduct of the judges entailed a lack of impartiality, analyzing whether these expressions and the reasoning in the guilty verdicts, which the Court itself indicated "reveal stereotypes and prejudices as grounds for the judgments," also constitute a violation of the guarantee of judicial impartiality in this case. This analysis is particularly important because these were criminal proceedings in which the accused were sentenced and convicted. In addition, the Judgment does not provide any reasoning as to how the said legal presumption could have had a negative influence on the aspect of the impartiality of the judges on which the alleged violation is centered, especially as it was not even alleged that it was discriminatory.[5]

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[4] Para. 228 of the Judgment.

[5] In its Merits Report No. 176/10 the Inter-American Commission stated, in both paragraph 283 and in the seventh conclusion (para. 289.7), that Chile had violated the right to an impartial judge or court to the detriment of the eight presumed victims in this case. Despite the fact that, in the said paragraph 283, the Inter-American Commission does not include arguments to support the alleged violation with regard to Víctor Ancalaf Llaupe and that the Center for Justice and International Law (hereinafter "CEJIL") — Víctor Ancalaf's representative — did not argue that his client's guarantee of impartiality had been violated in relation to the decisions made based on prejudices, we consider that its analysis would have been admissible in application of the *iura novit curia* principle, which has solidly support in international case law. This principle allows the Court to examine possible violations of the norms of the American Convention that have not been alleged by either the Commission or the victims or their representatives, provided that the latter have been able to express their respective positions in relation to the facts that support them. Thus, the Court has used this principle since its first judgment on merits and on other occasions to declare the violation of rights that had not been directly alleged by the parties, but that were revealed from the analysis of the facts in dispute, because this principle authorizes the Inter-American Court, provided that the factual framework of the case is respected, to classify the juridical situation or relation in dispute in a different way than the parties did. For example, the violation of rights that had not been cited by the parties was declared, in application of the *iura novit curia* principle in the following cases, *inter alia*: (i) in the Case of *Velásquez Rodríguez v. Honduras* the violation of Article 1(1) of the Convention was declared; (ii) in the Case of *Usón Ramírez v. Venezuela* the violation of Article 9 of the American Convention was declared; (iii) in the Case of *Bayarri v. Argentina* the violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture was declared; (iv) in the Case of *Heliodoro Portugal v. Panama* the violation of Article I of the Convention on Forced Disappearance, in relation to Article II of this instrument was declared; (v) in the Case of *Kimel v. Argentina* the violation of Article 9 of the American Convention was declared; (vi) in the Case of *Bueno Alves* the violation of Article 5(1) of the American Convention was declared to the detriment of the next of kin of Mr. Bueno Alves; (vii) in the Case of the Ituango Massacres *v. Colombia* the violation of Article 11(2) of the Convention was declared, and (viii) in the Case of the Sawhoyamaxa Indigenous Community *v. Paraguay* the violation of Article 3 of the American Convention was declared. *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits*. Judgment of July 29, 1988. Series C No. 4, para. 163*; Case of Furlan and family members*

11. Hence, we consider that, in this case, when declaring the violation of the principle of legality and the guarantee of the presumption of innocence, the Court ruled on aspects that differed from those that substantiated the alleged lack of judicial impartiality, because it is alleged that the latter occurred owing to the supposed exteriorization of prejudices in relation to the so-called "Mapuche conflict" that prevailed in the criminal judgments against the victims. Thus, it can be seen that the alleged causes of the lack of impartiality do not refer to the existence of the legal presumption or to its application in the guilty verdicts, *but rather to the exteriorization of negative ethnic prejudices and with regard to the so-called "Mapuche conflict" to found the decision in the guilty verdicts.*

2. The right to an impartial judge or court in international case law

12. The importance, in a democratic society, of the judges inspiring confidence should be emphasized and, particularly, that in the case of criminal proceedings they inspire the confidence of the accused.[6] Accordingly, in this case, it is necessary to analyze the questions raised about whether the criminal proceedings in which the victims were convicted violated the right to be tried by an impartial court, a fundamental guarantee of due process of law protected in Article 8(1) of the American Convention, which stipulates that: "*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*."

13. Based on the contents of this provision, the Court has determined that the right to a competent, independent, and impartial judge or court has several different facets. When the State has been obliged to protect the judiciary as a system, there is a tendency to guarantee its external independence. When it is obliged to provide protection to the person of a specific judge, there is a tendency to guarantee its internal independence.

14. Thus, independence and impartiality not only result in a right in favor of the individual who is being tried, but also as a guarantee for the judges; in other words, to ensure that they have the institutional and personal conditions to ensure compliance with this mandate. Thus, in its case law, the Inter-American Court has analyzed the issue of judicial independence and impartiality from both the *institutional* and the *personal* perspective.

15. With regard to the *institutional facet*, the Court has indicated that, in order to achieve the independence and impartiality of judges, it is essential that they have institutional guarantees. These guarantees include tenure in office, a secure remuneration, and the method and form of appointment to, and termination of, their

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v. Argentina, para. 55, *and Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 70.

[6] Among others, ECHR, *Case of Gregory v. The United Kingdom*, Judgment (Merits), Court (Chamber), Judgment of 25 February 1997, Application No. 22299/93, para. 43; and *Case of Sander v. The United Kingdom*, Judgment (Merits), Court (Third Section), Application No. 34129/96, Judgment of 9 May 2000, para. 23.

functions.[7] Likewise, it should be pointed out that judicial independence is inherent in the principle of the separation of powers established in Article 3 of the Inter-American Democratic Charter. Thus the separation and independence of the public powers is a fundamental element of the rule of law.

16. The Court has established that "one of the main purposes of the separation of public powers is to guarantee the *independence* of judges."[8] This autonomous exercise must be guaranteed by the State in both the previously mentioned institutional facet – in other words, in relation to the Judiciary as a system – and also in relation to its *individual* aspect – that is, in relation to the person of the specific judge.[9] The objective of protection is to prevent the judicial system in general, and its members in particular, from possibly being subject to undue constraints in the exercise of their function from organs outside the Judiciary or even from those judges who occupy functions relating to review or appeal.[10]

17. Closely related to the foregoing is the *principle of impartiality,* which "requires that the judge who intervenes in a specific dispute approach the facts of the case without any subjective prejudice, and also offering sufficient guarantees of an objective nature that allow any doubt that the accused or the community may have regarding the absence of impartiality to be eliminated."[11] On this basis, the Inter-American Court has indicated that "judges, contrary to other public officials, have greater guarantees owing to the necessary independence of the Judiciary."[12] In this regard, the Court has heard cases relating to Peru,[13] Venezuela,[14] and more recently, Ecuador.[15] The Court has emphasized that personal impartiality "is presumed unless

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7 Ernst, Carlos, "*Independencia judicial y democracia",* in Jorge Malem, Jesús Orozco and Rodolfo Vázquez (comps.), *La función judicial. Ética y democracia*, Barcelona, Gedisa, 2003, p. 236.

8 *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 73, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2013. Series C No. 268, para.188.

9 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*. *Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182. para. 55.

10 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*. *Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182. para. 55, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, paras. 188 and 198.

11 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No.182, para. 43, para. 56, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, para. 182.

12 *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 67.

13 *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71.

14 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182; *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197; and *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227.

15 *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C No. 266; and *Case of the*

there is proof to the contrary consisting, for example, in the demonstration that a member of a tribunal or a judge has personal prejudices or biases against the litigants."[16] It has affirmed that "[t]he judge must appear to be acting without being subject to influences, incentives, threats or interference, either directly or indirectly, but only and exclusively in accordance with – and motivated by – the law."[17]

18. In cases concerning proceedings under the military justice system, the Court has explored the *guarantee of judicial independence and impartiality as an obligation of the State and a right of the individual*.[18] In these cases, it has determined that both the prosecution of civilians by military courts, and the prosecution of military and police personnel for human rights violations under this system violates the right to an ordinary judge established in Article 8(1) of the American Convention. In such cases, the Inter-American Court has focused its analysis on both the independence and impartiality of the judges who intervene, and also their lack of material competence to hear this type of case.[19]

19. Similarly, the Inter-American Court has ruled on alleged violations of judicial independence and impartiality, over and above the concerns relating to prosecution by military courts. In recent years, the Court has done this in the cases of: *Apitz Barbera et al. v. Venezuela*, *Barreto Leiva v. Venezuela, Atala Riffo and daughters v. Chile, the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, the Constitutional Tribunal (Camba Campos et al.) v. Ecuador,* and *J. v. Peru*.[20]

Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268.

16 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No.182, para. 56, and *Case of Atala Riffo and daughters v. Chile. Request for interpretation of the judgment on merits, reparations and costs*. Judgment of November 21, 2012. Series C No. 254, para. 189.

17 *Supra* footnote 16.

18 *Cf.,* among others*, Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52; *Case of Cantoral Benavides v. Peru. Merits*. Judgment of August 18, 2000. Series C No. 69; *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135; *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, and Case of *Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs.* Judgment of October 24, 2012. Series C No. 251.

19 In particular, see the "Foreword" by Diego García-Sayán, which provides an overview of the Inter-American Court's most important case law on this matter, in the volume by Ferrer Mac-Gregor, Eduardo and Silva García, Fernando, *Jurisdicción Militar y Derechos Humanos. El Caso Radilla ante la Corte Interamericana de Derechos Humanos,* Mexico, Porrúa-UNAM, 2011.

20 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, paras. 189 to 192 and 234 to 238; *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs*. Judgment of November 17, 2009. Series C No. 206, paras. 94 to 99 and sixth operative paragraph; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, paras. 54 to 67; *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2013. Series C No. 266, paras. 143 to 180 and third operative paragraph; *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, paras. 219 to 222 and second and third operative paragraphs, and *J v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, paras. 181 to 189 and third operative paragraph.

20. The Court has emphasized that one of the main purposes of the separation of public powers is the guarantee of the independence of judges, which is intended to avoid the judicial system in general, and its members in particular, possibly being subject to undue constraints in the exercise of their function from organs outside the Judiciary or even from those judges who occupy functions of review or appeal. The Inter-American Court has understood that the independence of the Judiciary is "essential for the exercise of the judicial function." In accordance with its consistent case law, the Inter-American Court has considered that the following guarantees arise from judicial independence: an adequate appointment procedure; tenure in office, and a guarantee against external pressure. The Court has referred to the right to an independent judge established in Article 8(1) of the Convention both with regard to the accused (right to be tried by an independent judge), and has also referred to the guarantees that the judge – as a public official – must have, in order to make judicial independence possible.[21]

21. In European case law, there is a close relationship between the guarantees of an "independent" court and an "impartial" court and, in some cases the two concepts have been dealt with as almost interchangeable.[22] Thus, without becoming analogous, for some experts the concepts of the independence and the impartiality of a court are evidently complementary, so that the European Court of Human Rights (hereinafter "the ECHR) has accepted this close relationship to the point of examining them together.[23]

22. The ECHR has recognized that judicial impartiality has two dimensions: one of a *personal character* related to the circumstances of the judge, to the formation of his own personal convictions in a specific case, and the other, of a *functional* nature, exemplified by the guarantees that should be offered by the court responsible for delivering judgment, and that are established based on organic and functional considerations.[24] The former must be presumed while the contrary has not been

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21 *Cf.* *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2013. Series C No. 268, paras. 188 to 196. See also: *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, paras. 66 to 85; *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, paras. 145 to 161; *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 55; *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, paras. 67 to 81; *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011, paras. 95 to 111, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 186.

22 García Roca, Javier and Vidal Zapatero, José Miguel, "*El derecho a un tribunal independiente e imparcial (art. 6.1): Una garantía concreta de mínimos antes que una regla de justicia*" in García Roca, Javier and Santolaya, Pablo, *La Europa de los Derechos. El Convenio Europeo de Derechos Humanos,* 2ª ed., Madrid, Centro de Estudios Políticos and Constitucionales, 2009, p. 377.

23 Casadevall, Josep. *El Convenio Europeo de Derechos Humanos, el Tribunal de Estrasburgo y su Jurisprudencia,* Valencia, Tirant lo Blanch, 2012, p. 279.

24 In the text, we use the following terms when referring to the two aspects of impartiality analyzed by the ECHR: *functional impartiality* and *personal impartiality*. Also, in order to analyze these aspects of impartiality, we use two tests: the *objective test* and the *subjective test*. We are making this clarification because, at times, legal doctrine indicates that the applicable expressions would be "s*ubjective impartiality*" and "*objective impartiality*" to refer to the sphere of impartiality; on this occasion, we have decided not to use those terms. *Cf.* Valldecabres Ortíz, Ma. Isabel. *Imparcialidad del juez y medios de comunicación*, Valencia, Tirant lo Blanch, 2004, pp. 148 to 150.

shown. The latter call for sufficient guarantees to exclude any legitimate doubt about impartiality.[25]

23. In the case of the *personal character* of impartiality, this means, in short, that the judge has the ability to take the necessary distance, and that he resists succumbing to any subjective influences.[26] In this regard, the ECHR ha indicated that judges must even be careful about any expressions that might suggest a negative assessment of the claims of one of the parties.[27] The notion of an impartial court, interpreted in the sense of the absence of prejudice or of preconceptions, includes, in the first place, a subjective analysis in order to delimit the personal conviction and conduct of a judge in a specific case and, then, an objective analysis to ensure that there are sufficient guarantees to allow the accused to eliminate any legitimate doubt.[28] Personal impartiality is presumed unless there is proof to the contrary; however, owing to the significant difficulty of obtaining this type of evidence[29] – a circumstance that, in our opinion, is not present in this case – the contrary cannot always be proved.

24. Meanwhile, with regard to the *functional nature* of impartiality, it is necessary to verify whether, regardless of the personal attitude of the judge, there are verifiable objective circumstances that could cast suspicions on his impartiality. The point of view of the interested person, without constituting an essential factor, should be taken into account; but the decisive factor consists in assessing whether the accused's misgivings about the judge can be considered objectively justified.[30] With regard to impartiality, even appearances can have some importance and, consequently, "any judge regarding whom there is a legitimate reason to doubt his lack of impartiality should be disqualified."[31]

25. In European case law, the limits of both notions are open-ended, in view of the fact that a specific conduct of a judge — from the viewpoint of an external observer — may raise objectively justified doubts concerning his impartiality, but may also raise such doubts with regard to his personal conviction. Thus, in order to distinguish them, it should be understood that the first situation (the objective one) is of a functional nature and includes the hypothesis in which the personal conduct of the judge, without being called into question, shows signs that could raise justified doubts about the impartiality of the court that must try the case.[32] In this regard, appearances can be

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25 García Roca, Javier and Vidal Zapatero, José Miguel, *op. cit.* p. 378.

26 Casadevall, Josep, *op. cit.*, p. 282.

27 *Cf.* ECHR. *Case of Lavents v. Latvia*, Judgment (Merits and Just Satisfaction) Court (First Section), Application No. 58442/00, Judgment of 28 November 2002, para. 118.

28 *Cf.* ECHR. *Case of Piersack v. Belgium,* Judgment (Merits), Court (Chamber), Application No. 8692/79, Judgment of 1 October 1982, para. 30.

29 García Roca, Javier and Vidal Zapatero, José Miguel, *op. cit.* p. 381.

30 Casadevall, Josep, *op. cit*., p. 282.

31 ECHR. *Case of Piersack v. Belgium,* Judgment (Merits), Court (Chamber), Application No. 8692/79 8692/79, Judgment of 1 October 1982, para. 30; and *Case of Castillo Algar v. Spain*, Judgment (Merits and Just Satisfaction), Court (Chamber) Application No. 28194/95 28194/95, Judgment of 28 October 1998, para. 45.

32 Casadevall, Josep, *op. cit.* p. 286.

important, owing to the confidence that the courts of justice should inspire in the accused.[33]

26. Appearances are important in order to assess whether or not a court is "impartial." Thus, the ECHR has reiterated the famous aphorism "justice must not only be done; it must also be seen to be done."[34]

27. Likewise, the Human Rights Committee, in its General Comment on Right to equality before courts and tribunals and to a fair trial," stated that:

> 21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.[35]

28. In addition, the ECHR has underscored that, in order to prove that there has been a violation of the right to an impartial judge, it is not sufficient to make an analysis in abstract and *a priori* and, especially, a general analysis; rather, it is essential to analyze each specific case.[36]

29. Also, in the European sphere it has been determined that States parties are obliged to organize their legal system so as to ensure compliance with the requirements of Article 6.1 of the European Convention.[37]

30. In summary, the analysis of an alleged lack of judicial impartiality may include, on the one hand, the sphere of functional impartiality which refers to aspects such as the functions assigned to the judge within the judicial proceedings.[38] Then, on the

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[33] ECHR, *Case of Castillo Algar v. Spain*, Judgment (Merits and Just Satisfaction), Court (Chamber) Application No. 28194/95 28194/95, Judgment of 28 October 1998, para. 45.

[34] ECHR, *Case of Morice v. France*, Judgment (Merits and Just Satisfaction), Court (Fifth Section), Application No. 29369/10, Judgment of 11 July 2013, para. 71; and *Case of De Cubber v. Belgium*, Judgment (Merits), Court (Chamber), Application No. 9186/80, Judgment of 26 October 1984, para. 26. The existence of impartiality, for the purposes of Article 6.1, must be ascertained based on a subjective test; that is, on the basis of a personal conviction of a specific judge in a particular case, and also based on an objective test; that is, determining whether a judge offers sufficient guarantees to exclude any legitimate doubt in this regard. Personal impartiality may be presumed, unless there is proof to the contrary. Under the objective test, it should be considered whether, over and above the personal conduct of the judge, there are certain facts that could raise doubts about his impartiality. In this regard, even appearances could have a certain importance. What is at stake is the confidence that the courts should inspire in a democratic society in the population and, above all, in the case of criminal proceedings, in the accused. This means that, in order to examine whether a specific judge lacks impartiality, the point of view of the accused is important, although not decisive. The significant factor is whether the misgivings can be considered objectively justified. García Roca, Javier and Vidal Zapatero, José Miguel, *op. cit.* p. 382 and 383.

[35] Human Rights Committee, General comment No. 32. *Article 14.* ***Right to equality before courts and tribunals and to a fair trial,*** ninetieth session, Geneva, 9 to 27 July 2007

[36] García Roca, Javier and Vidal Zapatero, José Miguel, *op. cit.* p. 385.

[37] ECHR. *Case of Guincho v. Portugal*, Judgment (Merits and Just Satisfaction, Court (Chamber), Application. 8990/8Judgment of 10 July 1984, para.38.

[38] In this regard, see: ECHR, *Case of Kyprianou v. Cyprus*, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01), Judgment of 15 December 2005, para. 121: "An analysis of the Courts case law discloses two possible situations in which the question of a lack of judicial

other hand, there is the aspect of personal impartiality, which refers to the conduct of the judge in relation to a specific case. The European Court of Human Rights has indicated that these aspects of impartiality may be analyzed from a subjective point of view *(*subjective test*)* or from an objective point of view *(*objective test*).* The question of the personal aspect of impartiality may be assessed by both tests and the question of the functional aspect of impartiality may be analyzed from the objective viewpoint. The Inter-American Court has stipulated that recusal is a procedural instrument that protects the right to be tried by an impartial and independent court.[39] It has also affirmed that the personal impartiality of a judge must be presumed, unless there is proof to the contrary.[40] Based on a subjective analysis, the proof requires endeavoring to ascertain the personal conviction or interest of a given judge in a particular case,[41] so that it may be addressed at establishing, for example, whether a judge has displayed any hostility, prejudice or personal bias or whether he has arranged to have the case assigned to himself for personal reasons.[42] Furthermore, the European Court has indicated that the personal impartiality of a judge can be ascertained, according to the specific circumstances of the case, from the conduct of the judge during the proceedings, the content, arguments and language used or the reasons to conduct the investigation, which indicate a lack of professional distance from the decision.[43]

31. Thus, the sphere or aspect of impartiality that may be called into question (personal or functional) and the type of analysis to be made (subjective or objective) will depend in each situation on the circumstances of the case and the causes of the misgivings of the interested party.

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impartiality arises. The first is functional in nature: where the judge's personal conduct is not at all impugned, but where for instance, the exercise of different functions within the judicial process by the same person (see Piersack, cited above), or hierarchical or other links with another actor in the proceedings […] objectively justify misgivings as to the impartiality of the Tribunal, which thus fails to meet the Convention standard under the objective test […]. The second is of a personal character and derives from the conduct of the judges in a given case. […]".

39 *Cf. Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, paras. 182 and 186.

40 *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 234. Similarly, in European case law, see: ECHR, *Case of Kyprianou v. Cyprus*, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01, Judgment of 15 December 2005, para. 119. ("In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary"), citing ECHR, *Case of* Hauschildt v. Denmark , Judgment (Merits and Just Satisfaction), Court (Plenary) Application No. 10486/83, Judgment of 24 May 1989, para. 47.

41 *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs. Judgment of February 24, 2012. Series C No. 239*, para. 234. *Cf.* ECHR, *Case of Kyprianou v. Cyprus,* Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01, Judgment of 15 December 2005, para. 118 ("a subjective approach, that is endeavoring to ascertain the personal conviction or interest of a given judge in a particular case").

42 Case of *Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 234. *Cf.* ECHR, *Case of Kyprianou v. Cyprus*, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01, Judgment of 15 December 2005, para. 119 ("As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill-will or has arranged to have a case assigned to himself for personal reasons"). See also, ECHR, *Case of Bellizzi v. Malta*, Judgment (Merits and Just Satisfaction), Court (Third Section), Application No. 46575/09, Judgment of 21 June 2011, para. 52, and *Case of De Cubber v. Belgium*, Judgment (Merits), Court (Chamber), Application No.9186/80, Judgment of 26 October 1984, para. 25.

43 *Cf.* ECHR, *Case of Kyprianou v. Cyprus*, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01, Judgment of 15 December 2005, paras. 130 to 133.

32. In the instant case, the analysis of impartiality is related to [the aspect of] personal impartiality, because it concerns the conduct of the judges in the specific cases in which it is alleged that they explicitly based conclusions of the judgments on prejudices. This makes it essential to assess whether the courts exteriorized negative prejudices in the adverse judgments, which had a significant or decisive influence on the reasoning of the conclusions of the ruling. For the purpose of this analysis, when we refer to a "prejudice," we are referring to its negative connotation in the sense of a generalized unfavorable notion, perception or attitude towards individuals who belong to a group, owing to their membership in this group, which is characterized negatively. Thus, it is not related to the more general meaning relating to the ideas, notions and perceptions that a judge, like any other person, has acquired through experience and that do not exclude him from assessing, analyzing and reaching a rational conclusion in the specific case that he is deciding in the course of his jurisdictional functions.

3. The lack of impartiality of the judges who heard the criminal proceedings of the victims in this case

33. The eight victims in this case before the Inter-American Court were convicted in the domestic sphere as perpetrators of terrorist offenses in application of Law 18,314 that "[d]efines terrorist acts and establishes the punishments" (known as the "Counter-terrorism Act"). This case involves three criminal trials for events that occurred in 2001 and 2002 in Chile's Regions VIII and IX. None of the events for which they were tried harmed anyone's physical integrity or life. In summary, the result of these criminal proceedings was:

> c) *Lonkos Segundo Aniceto Norín Catrimán* and *Pascual Huentequeo Pichún Paillalao* were convicted – in a trial held after a previous trial in which they had been acquitted had been declared null and void – by the Angol Oral Criminal Trial Court in a judgment of September 27, 2003, as perpetrators of the offense of threat of terrorist arson.[44] In a judgment of December 15, 2003, the Second Chamber of the Supreme Court of Justice denied the appeals for annulment that had been filed;[45]
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> d) *Juan Ciriaco Millacheo Lican, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia* and *Patricia Roxana Troncoso Robles* were convicted by the Angol Oral Criminal Trial Court in a judgment of August 22, 2004, as perpetrators of the offense of terrorist arson.[46] In a judgment of October 13, 2004, the Temuco Court of Appeal denied the appeals for annulment that had been filed,[47] and

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44 *Cf.* Judgment delivered by the Angol Oral Criminal Trial Court on September 27, 2003 (file of annexes to the Merits Report of the Commission 176/10, Annex 15, folios 509 to 554).

45 *Cf.* Judgment delivered by the Second Chamber of the Supreme Court of Justice of Chile on December 15, 2003 (file of annexes to the Merits Report of the Commission 176/10, Appendix 1, folios 58 to 68).

46 *Cf.* Judgment delivered by the Angol Oral Criminal Trial Court on August 22, 2004 (file of annexes to the Merits Report 176/10 of the Commission, Annex 18, folios 608 to 687).

47 *Cf.* Judgment delivered by the Temuco Court of Appeal on October 13, 2004 (file of annexes to the Merits Report of the Commission 176/10 of the Commission, Annex 19, folios 689 to 716).

c) *Víctor Manuel Ancalaf Llaupe* was convicted by the investigating judge of the Concepción Court of Appeal in a judgment of December 30, 2003, of three criminal acts as perpetrator of the terrorist act consisting in to "[t]o place, send, activate, throw, detonate, or fire bombs or explosive or incendiary devices of any type, weapons or devices of great destructive power, or with toxic, corrosive or infectious effects" (article 2.4 of Law 18,314).[48] On June 4, 2004, the Concepción Court of Appeal issued judgment in second instance, partially revoking the judgment; acquitting Mr. Ancalaf of two of the criminal acts, and confirming the conviction with the regard to one criminal act.[49]

34. As the Court has indicated in this Judgment, at the actual stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The whole legal structure of national and international public order rests on it, and it permeates the whole legal system.[50] In this regard, Article 24 of the American Convention prohibits *de facto* or *de jure* discrimination, not only with regard to the rights recognized in this instrument, but with regard to all the laws adopted by the State and to their application. In other words, it does not merely repeat the provisions of Article 1(1) of this instrument as regards the obligation of State to respect and ensure the rights recognized in this treaty without discrimination, but it establishes a right that also entails the State's obligation to respect and ensure the principle of equality and non-discrimination in the safeguard of other rights and in all the domestic laws that it adopts, because it protects the right to "equal protection of the law" so that it also prohibits discrimination resulting from any inequality derived from domestic law or its application.[51] Article 1(1) of the American Convention proscribes discrimination, in general, and includes prohibited categories of discrimination. Taking into account the criteria developed previously, the Court established that the *ethnic origin* of an individual is a category protected by the American Convention. This also means that, under Article 24 of this instrument, unequal treatment based on ethnic origin under domestic law or its application is also prohibited.[52]

35. In the following paragraphs, we analyze the criminal judgments convicting the victims that we consider contain a language and reasoning that reveal that what is involved is not the application of the presumption of the terrorist intent defined in the Counter-terrorism Act in force at the time; rather, it is verified that these judgments contain *expressions or reasoning based on negative ethnic stereotypes and prejudices* and that this constitutes a violation of the guarantee of judicial impartiality.

A) The criminal judgment convicting Messrs. Norín and Pichún

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48 *Cf.* Judgment delivered by the investigating judge of the Concepción Court of Appeal on December 30, 2003 (file of annexes to the Merits Report of the Commission 176/10 of the Commission, Annex 20, folios 718 to 759).

49 *Cf.* Judgment delivered by the Concepción Court of Appeal on June 4, 2004 (file of annexes to the CEJIL brief with motions, arguments and evidence, annex A.6, folios 1723 to 1733).

50 Para. 197 of the Judgment. *Cf. Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010, Series C No. 214, para. 269.

51 Para. 199 of the Judgment.

52 Para. 206 of the Judgment.

36. When analyzing the elements of the offense in the thirteenth *considerandum* of the criminal judgment that convicted the *Lonkos* Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao as perpetrators of the offense of threat of terrorist arson, the criminal court inferred the terrorist intent from stereotypes and prejudices concerning the violence of the Mapuche land claims and from witness statements concerning their "feeling of fear" resulting from acts other than those for which the victims were tried in those proceedings.[53] Here, the domestic court accorded fundamental worth to evidence that did not refer to the acts that were being prosecuted in the criminal proceedings, but to other acts that, moreover, were not attributed to the accused, and no reference is made to whether criminal judgments had been delivered with regard to them. When assessing the terrorist intent, the court substantiated its decision on the testimony of individuals who were referring to other supposed acts, without analyzing whether or not these were true, as well as on newspaper articles, without referring to the sources on which these were based, but rather indicating that the said information "had not been disproved."[54]

37. In our opinion, this assessment of the evidence, which gave rise to a prejudice as regards the terrorist intent based on the analysis made by the courts in the judgments, was decisive in the ruling on the terrorist nature of the offenses. Both in this regard, and when ruling on the participation of the two accused as perpetrators of

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53 *Cf.* para. 227 of the Judgment.

54 When analyzing the elements of the definition (objective and subjective) of the offense of threat of terrorist arson, in the judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, in the thirteenth *considerandum* it was affirmed that:

> […] the actions that resulted in these wrongful acts reveal that the form, methods and strategies used had the criminal purpose of causing a generalized state of fear in the region.
>
> The wrongful acts referred to above are inserted in a process of recovery of lands of the Mapuche people, that has been carried out by acts of violence, without respecting the institutional framework and the laws in force, resorting to previously planned acts of violence, coordinated and prepared by radicalized groups that seek to create a climate of insecurity, instability and fear in different sectors of Regions XIII and IX. These actions can be summarized by excessive demands that violent groups make of owners and landholders, warning them of the different consequences they will face if they do not accede to the groups' demands. Many of these threats have materialized in the form of assaults, robberies, theft, arson, vandalism and land occupation, which have affected individuals and also the property of various landowners and logging activities in this part of the country.
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> The objective sought is to instill in the population a justified fear of falling victim to similar attacks and, thereby, to oblige the owners to desist from exploiting their properties and, ultimately, force them abandon these properties. The feeling of insecurity and unease that these attacks cause has led to a reduction in the availability of labor and an increase in its cost, an increase in costs and loans both for hiring machinery for exploiting the properties and in the cost of policies to insure the land, installations, and crops. It is increasingly frequent to see workers, machinery, vehicles and operations in the different properties with police protection to safeguard operations, all of which affects rights guaranteed in the Constitution.
>
> The above emerges, although not necessarily with the same characteristics, from the corroborative testimony of [twelve deponents], who stated that they had been direct victims or were aware of threats and attacks on individuals or property perpetrated by individuals belonging to the Mapuche ethnic group; witnesses who stated in different ways the feeling of fear that these acts caused. [The foregoing is related to …] information that has not been disproved and that is contained in section C, pages 10 and 11, of the March 10, 2002, edition of the newspaper *El Mercurio*, on the number of conflicts caused by Mapuche groups by terrorist acts; online publications of *La Tercera*, *La Segunda El Mercurio* published on March 26, 1999, December 15, 2001, March 15 and June 15, 2002, respectively, and three tables taken from the web page of the Chile's Foreign Investment Committee, divided into sectors and by regions, based on the political and administrative division of the country, which allow comparisons to be made between dollars invested in the other regions and in the Ninth, and shows that private investment in the region has decreased.

the said offenses, the domestic court developed a reasoning that contains an assessment that delegitimizes the indigenous claims and associates them with planned actions carried out by means of violent and illegitimate acts, presuming a terrorist intent and establishing a relationship between the Mapuche origin of the accused, and the legal definition of the conduct. In addition, when the court ruled, in the fifteenth *considerandum*, on the participation of the two accused as perpetrators of the said offenses, it substantiated an important part of its legal arguments by references to contextual facts classified as of a "well-known and notorious" nature in relation to the so-called "Mapuche conflict," as well as to their ethnic origin and status as traditional leaders without specifically and explicitly relating this to the acts presumably committed by the accused, so that it made a causal nexus between the ethnic origin of the *Lonkos* as Mapuche leaders and their participation in the offenses of which they were accused.

38. Furthermore, it is particularly noteworthy that, in the said fifteenth *considerandum* analyzing the victims' participation, the criminal court affirmed that "[it] has not been sufficiently proved that these acts were committed by individuals from outside the Mapuche communities," referring in general terms to the "Mapuche problem." The acts and the responsibility of the accused were examined within the framework of land claims in the context of which the perpetration of violent acts was presumed, without further justification. In addition, the judgment considered as an element to establish the participation of the presumed victims in the offenses of terrorist threat, their membership in the *Coordinadora de Comunidades en Conflicto Arauco* Malleco (CAM) which the court referred to as "having violent tendencies." No objective evidence or proof was offered to confirm this organization's character or nature.[55] In this regard, it should be recalled that, in another proceeding, the

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[55] See the fifteenth *considerandum* of the judgment issued by the Angol Oral Criminal Trial Court on September 27, 2003, in which the domestic Court made an analysis: "[r]egarding the participation of the two accused" as authors of offenses "of terrorist threats":

> […] Regarding the participation of both accused, the following must be considered:
>
> 1. As general background information and from the evidence provided during the trial by the Public Prosecution Service and the private complainants, it is a well-known and notorious fact that *de facto* organizations have been operating have existed in the area for some time that commit acts of violence or incite violence on the pretext of their land claims. Their methods include different types of acts of violence against logging companies, and small- and medium-scale farmers, all of whom have in common that they are owners of land that adjoins, is next to or near indigenous communities who claim to have historical rights to these properties. The said actions are aimed at reclaiming lands considered to be ancestral, and the illegal occupation is a means used to achieve the more ambitious goal: thereby recovering part of their ancestral lands and strengthening the territorial identity of the Mapuche people. […]
>
> 2. It has not been sufficiently proved that these acts were caused by individuals who do not belong to the Mapuche communities, because their purpose is to create a strong climate of harassment of the property owners in the sector in order to instill fear in them and, thus, force the owners to accede to their demands. The rationale relates to the so-called "Mapuche problem," because the perpetrators were aware of the areas claimed or because no Mapuche community or property has been harmed.
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> 3. It has been proved that the accused, Pascual Pichú, is *Lonko* of the "Antonio Ñirripil" community and Segundo Norín is *Lonko* of the "Lorenzo Norín" community, and this signifies status in the community and a certain degree of leadership and control over it.
>
> 4. It should also be emphasized that the accused Pichún and Norín have been convicted of other offenses involving land occupation committed prior to these events against forested properties near their respective communities, […].
>
> 5. The Mapuche communities of Didaico and Temulemu adjoin the Nancahue forest farm, and

presumed victims were acquitted of the offense of "conspiracy to commit a crime" in relation to their supposed membership "in a terrorist organization that operated under the aegis of this indigenous organization."[56]

B) The criminal judgment convicting Messrs. Marileo Saravia, Huenchunao Mariñán and Millacheo Licán, and Ms. Troncoso Robles

39. In the criminal judgment that convicted Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles as perpetrators of the offense of terrorist arson, the criminal court, when analyzing both the participation and the terrorist nature of the offense, followed a line of reasoning in which, once again, it circumscribed conclusions regarding the special subjective element of the criminal responsibility of the presumed victims to contextual facts regarding which it makes no direct probative or legal connection to the accused.[57] Regarding the terrorist intent, in the nineteenth *considerandum*, the oral court resorted to references to the "Mapuche land conflict" and to the context of the land claims of the Mapuche indigenous people including reflections that make general observations on the use of violence and its illegal nature, by asserting that the process of land recovery of the Mapuche people "has been carried out by acts of violence, without respecting the institutional framework and the laws in effect, resorting to the use of force […]."[58] These contextual elements were not presented in a neutral

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6. According to the testimony of Osvaldo Carvajal, both of the accused belong to the *Coordinadora Arauco Malleco* C.A.M, a violent *de facto* organization.

56 *Cf.* para. 215 of the Judgment.

57 In the sixteenth *considerandum* of the judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, when referring to the "participation as direct authors of the fire at the Poluco Pidenco property," the Court affirmed:

> […] it has been proved that José Benicio Huenchunao Mariñan, Patricia Roxana Troncoso Robles, Juan Patricio Marileo Saravia, Juan Ciricao Millacheo Lican and Florencio Jaime Marileo Saravia, participated as direct perpetrators of the said fire at the Poluco Pidenco property because they acted immediately and directly in the execution of this fire, an illegal act inserted in the so-called Mapuche land conflict, committed with the intent of instilling a justified fear in the population of being victims of similar crimes.

58 When examining the terrorist nature of the offense of arson, the Angol Oral Criminal Trial Court stated the following in the nineteenth *considerandum*:

> NINETEENTH: Regarding the defense's assertion that the acts were not of a terrorist nature, it should be noted that the statements mentioned in the preceding considerations, provided by persons who were directly connected to the events or who knew about them for different reasons, are coherent with the expert opinions and documentary evidence provided by the claimants during the hearing. They constitute background information that, taken as a whole and freely assessed, lead these judges to establish that the fire which occurred at the Poluco Pidenco property 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 well-known and notorious fact that these judges cannot ignore; this is a serious conflict between part 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 offense established in *Considerandum* 16 must be viewed against the backdrop of a process of the recovery of Mapuche lands, in which the perpetrators took direct action, without respecting the existing legal and institutional order and by resorting 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 incidents, and the most violent ones, have occurred in communes of that province. These actions can be summarized as follows: excessive demands that violent groups make of owners and

manner, and created a causal nexus between the Mapuche origin of the presumed victims and the determination of their criminal responsibility. In the nineteenth *considerandum*, the terrorist intent was inferred from stereotypes and prejudices relating to the violence of the Mapuche land claims and from the testimony of witnesses concerning the "fear" they felt owing to actions other than those that were being tried in the proceedings.

40. The domestic court accorded fundamental significance to evidence that was unrelated to the acts that were being prosecuted in these criminal proceedings, but rather concerned other acts that, furthermore, were not even attributed to the accused. In addition, it did not mention whether criminal convictions had been handed down in relation to those acts. In our opinion, this evidence created a prejudgment as regards the terrorist intent and, based on the analysis made by the court in the judgment, it was decisive in the ruling that the act was a terrorist offense. The criminal court used expressions such as a "well-known and notorious" or it is "public knowledge" in order to found its reasoning. The use of the said expressions relates to more general reflections affirming that violent acts and crimes had been committed in the region where the criminal act was perpetrated in relation to the Mapuche claims. The undersigned consider that the domestic court used the said expressions as a substantial argument to establish that the members of the Mapuche community who were claiming ancestral lands were necessarily violent or that they had a greater propensity to commit offenses than the rest of the population.

C) The criminal judgment convicting Mr. Ancalaf Llaupe

41. In the criminal judgment that convicted Víctor Ancalaf as perpetrator of the offense established in article 2.4 of Law 18,314, the Court of Appeal included considerations on the fact that the acts occurred in the context of resistance to the construction of the hydroelectric plant, and the "Pehuenche conflict"[59] in order to

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landholders, under pressure, warning them of the different consequences they will face if they do not accede to the demands. Many of these threats have materialized in the form of attacks on physical integrity, robberies, theft, arson, vandalism and land occupation, which have affected both the personnel and property of various owners of agricultural properties and logging companies in this part of the country; during the oral proceedings the court heard numerous pieces of testimony and learned some of the background to this situation, notwithstanding the fact that this 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 to force the owners to cease any further exploitation of their properties and ultimately to force them to abandon their properties, because the feeling of insecurity and unease that these attacks cause has led to a decrease in the availability of labor and an increase in its cost, an increase in the costs of leasing farm equipment and insuring the properties, the installations and the crops. Furthermore, it is becoming increasingly common to see workers, machinery, vehicles and operations on the different properties under police protection, to safeguard operations, all of which affects rights protected by the Constitution.

The court's conclusion is a result of the testimony given by witnesses […] all of whom told the court that they were direct victims or knew of threats and attacks on persons or property perpetrated by individuals of Mapuche origin. Albeit in different ways, these witnesses all expressed the feeling of fear that those acts have instilled. This background information is in the report of the meeting of the Senate's Constitutional, Legislative and Justice Committee, paragraphs of which were read during the hearing

[59] According to the Report of the Commission on the Historical Truth and New Deal for the Indigenous Peoples, "at one point of the long [historical] process, the ancestral Pehuenche communities were part of a larger social community: the Mapuche People." This was "the result of the development of the different peoples and cultures that, for thousands of years, peopled the actual territory of Chile." *Cf.* Report of the

classify the offense attributed to Víctor Ancalaf as a terrorist offense, without referring to other more precise evidence concerning the conduct of the accused. Thus, instead of considering setting fire to a truck an ordinary offense, it was deemed to be a terrorist offense, since it was analyzed in the context of considerations regarding opposition to the construction of a hydroelectric plant by members of indigenous communities.[60] This revealed a certain prejudgment in relation to the actions taken by the indigenous peoples to resist the construction of a hydroelectric plant.

4. Conclusion

42. The authors of this opinion consider that this reasoning – established by the Court in paragraphs 227 and 228 of the Judgment — which is based on negative ethnic stereotypes and prejudices, reveals that the judges had personal prejudices with regard to the accused that were decisive in the establishment of their criminal responsibility (essentially their participation in the criminal act or the special terrorist

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Historical Truth and New Deal Commission, First part. *Historia de los Pueblos Indígenas de Chile y su relación con el Estado, IV. Pueblo Mapuche, Capítulo Primero: Los mapuche en la historia y el presente*, page 424, footnote 3 (file of annexes to the final written arguments of the State of Chile, folio 62, link: http://www.corteidh.or.cr/tablas/27374.pdf)

[60] The fifteenth *considerandum* of the judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, when analyzing the terrorist intent (subjective element of the definition) of the offense established in article 2.4 of Law No 18,314, in relation to article 1 of that law, included the following reasoning:

> FIFTEENTH: That the facts described in the preceding *considerandum* constitute the terrorist offense established in article 2.4 of Law No 18,314, in relation to article 1 of that law. This is because they reveal that actions were taken in order to instill in some of the population a justified fear of falling victim to such crimes, bearing in mind the circumstances, and also the nature and effects of the means employed, as well as the evidence that they were the result of a premeditated plan to attack the property of third parties engaged in work relating to the construction of the Ralco Power Plant of Alto Bío Bío, all with the purpose of forcing the authorities to take decisions that would prevent the construction of this plant.

In second instance, the Concepción Court of Appeal, in its judgment delivered on June 4, 2004, considered that the subjective element of the terrorist offense had been proved, based on the following considerations:

> 19. That the evidence relating to the first, seventh and thirteenth conclusions of the first instance ruling constitute judicial presumptions that, carefully assessed, prove that the trucks and the backhoe were set on fire in the context of the Pehuenche conflict, in Region 8, province of Bío Bío, Santa Bárbara commune, in the sector of the cordillera known as Alto Bío Bío, which is related to the opposition to the construction of the Ralco Hydroelectric Plant, and where, also, it is well-known that the sisters, Berta and Nicolasa Quintremán Calpán are opposed to the Endesa project, because their land – which contains their ancestors, their origins, their culture and their traditions – will be flooded when the Plant is built.
> The acts took place in this context as a way of compelling the authorities to take decisions or of imposing demands to halt the construction of the Plant.
> 20. That, to this end, on September 29, 2001, and March 3 and 17, 2002, two trucks and a backhoe were set on fire and, subsequently, two more trucks; all vehicles working for Endesa. The first incident involved several individuals all except one of whom wore hoods; they fired a shotgun and hit the truck driver with a stick. The second incident involved at least two individuals with their faces covered, one of them, armed with a shotgun, fired two shots into the air. On the third occasion, a group of hooded individuals was involved, one of whom carried a firearm and fired shots into the air. In all these incidents, inflammable fuel, such as gasoline or a similar product, was used.
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> The illegal acts described above were carried out violently without observing the legal and institutional order in force, resorting to previously planned acts of violence. Considering how the events occurred, the place and the *modus operandi*, they were perpetrated to create situations of insecurity, instability and anxiety, instilling fear in order to present demands to the authorities under criminal pressure imposing conditions in order to achieve their objectives.

intent). In other words, these personal prejudices had a decisive impact on the analysis of the evidence of criminal responsibility. The facts described in the Judgment reveal that those judicial decisions were reached in a context in which the social media and segments of Chilean society had adopted unfavorable stereotypes and notions of what they called "the Mapuche question," the "Mapuche problem" or the "Mapuche conflict" that delegitimized the land claims of the Mapuche indigenous people and, in general, classified their social protest as violent or presented it as a cause of conflict between the Mapuche indigenous people and the other inhabitants of the region.[61]

43. This reasoning set out by the courts in the judgments, which reflects the said context, proves that the judges based their decisions on prejudices against the defendants relating to their Mapuche indigenous ethnic origin and how the judges perceived their social protest to claim their rights. This confirms that it was reasonable for the defendants to have the impression that the courts that convicted them in the specific cases lacked impartiality when handing down the guilty verdicts. In the instant case, we are faced with a discriminatory difference in treatment that has no objective and reasonable justification, does not seek a legitimate purpose and, in addition, there is no proportionality between the means used and the end sought; all of which violates the due process protected by Article 8(1) of the American Convention.

44. In the context of dispensing justice, the discrimination against the eight victims in this case — who were discriminated against based on negative ethnic stereotypes and prejudices in relation to the Mapuche indigenous people and their territorial claims — represents a serious violation of due process, because it deprived them of an impartial judge. Thus, it is inconsistent that, having made a thorough analysis of the content of the verdicts in the criminal trials and having verified these discriminatory attitudes in the Judgment — by declaring the violation of Article 24 of the Pact of San José — the majority opinion of the Inter-American Court did not proceed to conclude that these same proven facts also entailed an autonomous violation of Article 8(1) of the American Convention. We therefore consider that the Court should not have subsumed this violation in the violation of the principle of legality and the right to the presumption of innocence established in Articles 9 and 8(2) of this instrument.

45. For these reasons, we consider that the Inter-American Court should have declared the international responsibility of the Chilean State, by considering that the right to an impartial judge or court, protected by Article 8(1) of the American Convention, in relation to Article 1(1) of this instrument, had been violated to the detriment of the victims in this case.

Manuel E. Ventura Robles
Judge

Eduardo Ferrer Mac-Gregor Poisot
Judge

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61 *Cf.* para. 93 of the Judgment.

Pablo Saavedra Alessandri
Secretary