

Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile

ABSTRACT¹

This case is about an indigenous community (the Mapuche), in Chile, and their struggle to defend their lands from encroachment by logging companies. Several members and leaders of the Mapuche communities were charged with terrorism for arson and destruction of property of the logging companies. Eventually, the Court found violation of several articles of the American Convention.

I. FACTS

A. Chronology of Events

1. Events Pertaining to All Victims:

1984: Law 18,314 (“Counter-Terrorism Act”) defines different types of terrorist acts and their punishments.² Article 1 of the Counter-Terrorism Act establishes a presumption of instilling fear in the general population when an act is committed with an explosive or incendiary device.³ Article 2 of the Counter-Terrorism Act establishes a list of ordinary offenses that, when coupled with “special intent or purpose,” are deemed terrorist offenses.⁴ Arson is listed as an ordinary offense under Article 2.⁵ Arson is defined in Article 476.3 of the Criminal Code of Chile as an act of setting fire to “forests, standing crops, pastures, woodland, hedges or plantations.”⁶ Article 2 of the Counter-Terrorism Act establishes an ob-

1. Jessica McCormick, Author; Zach Tripodes, Editor; Kathryn Benson, Chief IACHR Editor; Cesare Romano, Faculty Advisor.

2. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 279, ¶¶ 98, 159 (May 29, 2014).

3. *Id.* ¶ 159(a).

4. *Id.* ¶ 159(b).

5. *Id.* ¶ 159(b)(i).

6. *Id.*

jective element that, when combined with the subjective element established in Article 1, amounts to a terrorist offense.⁷

Late 1990s: Forestry companies exploit lands owned by the Mapuche indigenous communities by developing construction projects.⁸ As a result, the Mapuche communal lands become smaller.⁹ Additionally, these construction projects cut off access from private properties to the woods, thereby affecting the Mapuche's ability to access their traditional food sources.¹⁰ Due to the construction of the Ralco hydroelectric plant in Region VIII of the Bío Bío province, some of the Mapuche are forced to move communities after thousands of hectares of land are flooded.¹¹

Beginning of 2000: The members of the Mapuche indigenous communities are involved in numerous demonstrations and social protests in Regions VII, IX and X of Chile.¹² The Mapuche seek recovery of the use and enjoyment of their ancestral lands, and the ability to use the lands' natural resources.¹³

At the same time, Law 19,253 ("Indigenous Peoples Act") enters into force.¹⁴ The law recognizes that Chilean indigenous peoples have lived on national territory for centuries.¹⁵ Under the Indigenous Peoples Act, Chile recognizes the Mapuche indigenous people as a main indigenous ethnic group in Chile.¹⁶ The law establishes "norms for the protection, promotion and development of the indigenous peoples."¹⁷ It also establishes mechanisms for access to lands and waters.¹⁸ The law creates the National Corporation of Indigenous Development (Corporación Nacional de Desarrollo Indígena; "CONADI"), which is responsible for administering the indigenous peoples' land and water fund.¹⁹ The fund

7. *Id.* ¶ 159(b)(i).

8. *Id.* ¶ 80.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* ¶ 79.

13. *Id.*

14. *Id.* ¶ 88.

15. *Id.* ¶ 205.

16. *Id.*

17. *Id.* ¶ 88.

18. *Id.*

19. *Id.*

enables and subsidizes the purchase of disputed lands.²⁰

Between 2000 and 2013: According to the Public Prosecution Service, there are nineteen proceedings under the Counter-Terrorism Act relating to land claims of the Mapuche indigenous people.²¹

January 18, 2001: A decree by President Ricardo Lagos Escobar creates the Commission for the Historical Truth and New Deal with Indigenous Peoples (“Historical Truth Commission”) to advise the President on the indigenous peoples’ perspectives, as well as recommend new State policies for better treatment of the State’s indigenous population.²² To carry out its task, the Historical Truth Commission organizes groups, including the Autonomous Mapuche Commission, to research and help resolve land disputes.²³

2001: The number of Mapuche individuals investigated and tried for committing offenses increases drastically.²⁴

2001–2002: A series of alleged criminal events occurs in Chile’s VIII and IX Regions.²⁵ The individuals who allegedly committed these criminal acts are Mr. Segundo Aniceto Norín Catrimán, Mr. Pascual Pichún Paillalao, Mr. Victor Manuel Ancalaf Llaupe, Mr. Juan Ciriaco Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. José Benicio Huenchunoa Mariñán, Mr. Juan Patricio Marileo Saravia, and Ms. Patricia Roxana Troncoso Robles, the eight victims in this case.²⁶ All eight victims are Chilean nationals and members of the Mapuche indigenous group, except for Ms. Troncoso Ronles, who is an indigenous rights activist.²⁷

2003: After receiving a mandate from the Chilean Senate, the Constitutional, Legislative and Justice Committee submits a report on public order and security in Regions VIII and IX regarding alleged violent acts

20. *Id.*

21. *Id.* ¶ 83.

22. *Id.* ¶ 86.

23. *Id.*

24. *Id.* ¶ 83.

25. *Id.* ¶ 74.

26. *Id.*

27. *Id.*

committed by Mapuche indigenous people.²⁸ The Committee concludes, among other things, that the Mapuche indigenous people are peaceful, honest, law-abiding, and hardworking citizens.²⁹

The Historical Truth Commission submits a report recommending creating mechanisms to provide restitution of their lands to the Mapuche people.³⁰ It additionally finds that it is the State's duty to evaluate and meet the demands of the Mapuche indigenous people by "settling the claims of the indigenous peoples while respecting the integrity of the personal assets of the actual owners" and to deal with the Mapuche land claims promptly.³¹

November 2003: Mr. Rodolfo Stavenhagen, the United Nations's Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous People, visits the State in 2003.³² Mr. Stavenhagen states that the current situation the indigenous people face is due to a long history of discrimination and inclusion, originating from the oppression and plundering of indigenous land starting from the sixteenth century.³³ The indigenous population in the State continues to be ignored and excluded, both socially and economically.³⁴ Another issue affecting the indigenous communities is the exploitation of forests.³⁵ Moreover, according to Mr. Stavenhagen, "the issue of the right to land becomes more complicated when it concerns access by indigenous people to underground resources."³⁶ As a result, social conflicts arise due to the negative impact on human rights of Mapuche indigenous peoples.³⁷ The Special Rapporteur reports that most of the conflicts of the Mapuche land claims involve three kinds of protests: (1) groups acting on behalf of others who have unsuccessfully applied for additional land or for restitution of their land; (2) occupation of the disputed land; or (3) clashing with the police after setting fires to forest plantations, buildings and equipment, or

28. *Id.* ¶ 84.

29. *Id.*

30. *Id.* ¶ 87.

31. *Id.*

32. *Id.* ¶ 82.

33. Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Jul. 18, 2003-Jul. 29, 2003, ¶ 8, U.N. Doc. E/CN.4/2004/80/Add.3, 16th Sess., No. 15 (2003).

34. *Id.* "Executive Summary" ¶ 3.

35. *Id.* ¶ 22.

36. *Id.* ¶ 26.

37. *Id.* ¶ 24.

blocking communication routes.³⁸

September 15, 2008: The State ratifies Convention 169 of the International Labour Organization concerning Indigenous and Tribal Peoples of Independent Culture to guide the State's public policies in order to guarantee rights of indigenous groups.³⁹

2009: Mr. James Anaya, the successor of Mr. Stavenhagen to the position of United Nations Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous People, submits a report indicating that the Mapuche indigenous peoples suffer "serious inequality" in terms of economic rights and that there is "significant discrimination between the income of indigenous people and non-indigenous persons" in the State.⁴⁰ The Special Rapporteur concludes that the State's law enforcement agencies are physically and verbally violent towards the Mapuche people, including children, women and the elderly.⁴¹ This force has sometimes been deadly.⁴² The Special Rapporteur also states that this violence is a "usual and even systematic practice" in the State and that law enforcement agents are not held accountable.⁴³

December 2011: CONADI pays the agreed upon price for acquisition of 2,500 hectares of land that was divided amongst three indigenous communities: the Ricardo Nahuelphi Ñu Choyun community, the Antonio Ñirripil community (led by Mr. Norín Catrimán), and the Didaico community (led by Mr. Pichún Paillalao).⁴⁴

2. Events Pertaining to Mr. Norín Catrimán, Mr. Pichún Paillalao, and Ms. Troncoso Robles:

2001: Mr. Norín Catrimán, Mr. Pichún Paillalao, and Ms. Troncoso Robles are accused of threatening to commit terrorist arson at the Nancahue plantation⁴⁵ and the San Gregorio plantation.⁴⁶

38. *Id.* ¶¶ 28(a)–(c).

39. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 89.

40. *Id.* ¶ 76.

41. *Id.* ¶ 85.

42. *Id.*

43. *Id.*

44. *Id.* ¶ 91.

45. *Id.* ¶ 81(d).

December 12, 2001: A fire breaks out at the administrator's house on the Nancahue forest farm.⁴⁷ Mr. Norín Catrimán, Mr. Pichún Paillalao and Ms. Troncoso Robles are accused of committing terrorist arson.⁴⁸

December 16, 2001: A fire breaks out on the San Gregorio forestry plantation.⁴⁹ Mr. Norín Catrimán, Mr. Pichún Paillalao and Ms. Troncoso Robles are accused of committing terrorist arson.⁵⁰

December 21–24, 2001: Mr. Pichún Paillalao is temporarily detained.⁵¹

January 3, 2002: Mr. Norín Catrimán is temporarily detained.⁵²

January 11, 2002–April 9, 2003: Mr. Norín Catrimán is subjected to pretrial detention.⁵³

March 4, 2002–April 9, 2003: Mr. Pichún Paillalao is subjected to pretrial detention.⁵⁴

August 24, 2002: The Public Prosecution ends its investigation into Mr. Norín Catrimán, Mr. Pichún Paillalao, and Ms. Troncoso Robles.⁵⁵ Thereafter, the Public Prosecution Service presses charges against Mr. Norín Catrimán, Mr. Pascual Pichún Paillalao, and Ms. Troncoso Robles.⁵⁶ The Public Prosecution Service requests that Mr. Norín Catrimán, Mr. Pascual Pichún Paillalao and Ms. Troncoso Robles receive the following punishment: (1) serve ten years and one day in a mid-level prison, (2) pay the legal penalties and costs for the offense of terrorist arson of the San Gregorio plantation, (3) serve five years and one day in a low-level prison, and (4) pay the penalties and costs for the offense of threat of terrorist arson against the owners of the San Gregorio planta-

46. *Id.* ¶ 106.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* ¶ 108.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* ¶ 107.

56. *Id.* ¶ 109.

tion.⁵⁷

September 13, 2002–February 21, 2003: Ms. Troncoso Robles is subjected to pretrial detention.⁵⁸

March 31, 2003: The trial begins before the Angol Oral Criminal Trial Court (“Angol Trial Court”).⁵⁹ Counsel for Mr. Norín Catrimán, Mr. Pichún Paillalao, and Ms. Troncoso Robles argue that the prosecution lacked factual grounds for the charges, that it is unclear in what capacity each defendant participated in the acts, and that the prosecution cannot meet the legal requirements of the Counter-Terrorism Act.⁶⁰

April 14, 2003: The Angol Trial Court acquits Mr. Norín Catrimán, Mr. Pichún Paillalao, and Ms. Troncoso Robles.⁶¹

April 23–24, 2003: The Public Prosecution Service files an appeal to annul the acquittal.⁶²

June 3, 2003: The Supreme Court of Chile deems the appeal admissible.⁶³

July 2, 2003: The Second Chamber of the Supreme Court renders its decision on the appeal.⁶⁴ By a majority vote, the Supreme Court declares a new trial.⁶⁵ The Supreme Court holds that the Angol Trial Court’s decision did not comply “even remotely” with the proper standards for analyzing evidence and providing grounds for a decision.⁶⁶

September 27, 2003: The Angol Trial Court hears the retrial of Mr. Norín Catrimán, Mr. Pichún Paillalao, and Ms. Troncoso Robles.⁶⁷ The trial court is composed of three different judges than those who decided

57. *Id.*

58. *Id.* ¶ 108.

59. *Id.* ¶ 110; *see id.* n.112.

60. *Id.* ¶ 110.

61. *Id.* ¶ 112–13.

62. *Id.* ¶ 114.

63. *Id.*

64. *Id.* ¶ 115.

65. *Id.*

66. *Id.*

67. *Id.* ¶ 116.

the April 14, 2003 acquittal.⁶⁸ The trial court finds that Ms. Troncoso Robles is not guilty of all charges because there is no evidence directly connecting her to the offenses.⁶⁹ It finds that Mr. Pichún Paillalao is not guilty of terrorist arson but is guilty of threatening to commit arson at the Nanchahue forest farm.⁷⁰ Finally, the trial court finds that Mr. Norín Catrimán is not guilty of terrorist arson but is guilty of threatening to commit arson at the San Gregorio plantation.⁷¹ The Angol Trial Court imposed the following punishments: (1) five years and one day in prison, (2) disqualification for fifteen years from any political or media position or profession, and (3) to pay trial costs.⁷²

Between September 27, 2003 and December 15, 2003: Mr. Norín Catrimán and Mr. Pichún Paillalao file an appeal to annul the September 27, 2003 judgment.⁷³ They additionally request that the appeals court issue an acquittal, declare that the offenses were not terrorist in nature, and amend the punishment.⁷⁴

December 15, 2003: The Second Chamber of the Supreme Court denies the appeal to annul the September 27, 2003 judgment.⁷⁵

January 14, 2004–March 4, 2007: Mr. Pichún Paillalao serves his sentence.⁷⁶

January 16, 2004–January 13, 2007: Mr. Norín Catrimán serves his sentence.⁷⁷

March 20, 2013: Mr. Pichún Paillalao passes away.⁷⁸

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* ¶¶ 117(a)–(d).

73. *Id.* ¶ 118, n.125.

74. *Id.*

75. *Id.* ¶ 118.

76. *Id.* ¶ 119.

77. *Id.*

78. *Id.* ¶ 12.

3. Events Pertaining to Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Ms. Troncoso Robles:

December 19, 2001: A fire breaks out on the Poluco Pidenco property, owned by forestry company Mininco, S.A.⁷⁹ The fire burns for two days and destroys over 108 hectares of land, but no one is hurt.⁸⁰ The Public Prosecutor's Office assesses the property damage at \$600,000.⁸¹ Ms. Troncoso Robles, Mr. Juan Marileo Saravia, Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, and Mr. Florencio Marileo Saravia are accused of committing this offense.⁸²

January 28, 2003: The State opens an investigation into Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Ms. Troncoso Robles.⁸³

January 28, 2003–February 13, 2004: Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, and Ms. Troncoso Robles are held in pre-trial detention.⁸⁴

March 16, 2003–February 13, 2004: Mr. Huenchunoa Mariñán and Mr. Juan Patricio Marileo Saravia are held in pretrial detention.⁸⁵

June 23, 2003: The Public Prosecution Service brings charges against Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Ms. Troncoso Robles for terrorist arson for the fire that occurred on December 19, 2001.⁸⁶ The prosecution requests that they be sentenced to ten years and one day in a mid-level prison.⁸⁷

79. *Id.* ¶ 120.

80. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Report on Merits, Report No. 176/10, Inter-Am. Comm'n. H.R., Case Nos. 12.576, 12.611, & 12.612, ¶ 87 (Nov. 5, 2010).

81. *Id.*

82. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 120.

83. *Id.* ¶ 121.

84. *Id.* ¶ 125.

85. *Id.*

86. *Id.* ¶ 122.

87. *Id.*

February 2004–February 2013: Mr. Millacheo Licán is a fugitive until he is arrested in Argentina and extradited to Chile.⁸⁸

July 29 and 30, 2004: The trial is held before the Angol Trial Court.⁸⁹

August 2004–March 2007: Mr. Huenchunoa Mariñán is a fugitive.⁹⁰

August 22, 2004: The Angol Trial Court convicts Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Ms. Troncoso Robles of terrorist arson.⁹¹ The Angol Trial Court sentences them to ten years and one day in prison, plus ancillary penalties including the permanent disqualification from public office positions and the disqualification from titled professions during the length of their sentences.⁹² The Angol Trial Court also admits a civil complaint and requires them to jointly pay the sum of \$637,447⁹³ to Forestal Mininco, S.A.⁹⁴ The court credits to the sentences of Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Ms. Troncoso Robles their time served since August 17, 2004.⁹⁵

Between August 22, 2004 and October 13, 2004: Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Ms. Troncoso Robles appeal the Angol Trial Court's decision.⁹⁶ They request that the court annul the judgment and set a new trial, or that the court annul the judgment and issue a judgment declaring the arson they committed was not a terrorist act.⁹⁷

October 13, 2004: The Temuco Court of Appeal upholds the Angol Tri-

88. *Id.* ¶ 132.

89. *Id.* ¶ 124.

90. *Id.* ¶ 131.

91. *Id.* ¶ 126.

92. *Id.*

93. Based on an exchange rate of one Chilean peso to 0.0015 United States dollars, *see* OANDA: HISTORICAL EXCHANGE RATES, <http://www.oanda.com/currency/historical-rates/> (last visited Dec. 30, 2015).

94. *Id.*

95. *Id.* ¶¶ 129–30.

96. *Id.* ¶ 127.

97. *Id.*

al Court's conviction for terrorist arson.⁹⁸

March 20, 2007: Mr. Huenchunoa Mariñán begins his prison sentence.⁹⁹ He is scheduled to complete the sentence on March 4, 2016.¹⁰⁰

July 1, 2011: Ms. Troncoso Robles is released from prison.¹⁰¹

September 10, 2011: Mr. Florencio Jaime Marileo Saravia and Mr. Juan Patricio Marileo Saravia are released from prison.¹⁰²

February 27, 2013: In a hearing, the Judge of the Collipulli First Instance Court of Guarantees decides that since half of the statute of limitations had already passed, and since the time frame for the case had expired, Mr. Millacheo Licán is subject to modified punishment granting him the benefit of a conditional sentence.¹⁰³ Mr. Millacheo Licán has to appear monthly to sign in before the prison authorities during the remainder of his prison sentence.¹⁰⁴

4. Events Pertaining to Mr. Ancalaf Llaupe:

September 29, 2001: In the Las Juntas sector of Alto Bío Bío, a group of six individuals stop two trucks owned by the Fe Grande Company, force the drivers out of the trucks, and set the trucks on fire.¹⁰⁵ Mr. Ancalaf Llaupe is accused of the terrorist offense of setting fire to these trucks.¹⁰⁶

March 3, 2002: Two hooded men, one carrying a shotgun, stop a truck owned by the Fe Grande Company in Alto Bío Bío.¹⁰⁷ One of the men shoots into the air, force the driver out of the truck, and then set the

98. *Id.* ¶ 128.

99. *Id.* ¶ 131.

100. *Id.*

101. *Id.* ¶ 130.

102. *Id.* ¶ 129.

103. *Id.* ¶ 132.

104. *Id.*

105. Víctor Manuel Ancalaf Llaupe v. Chile, Admissibility Report, Report No. 33/07, Inter-Am. Comm'n. H.R., Case No. 12.611, ¶ 9(2) (Apr. 23, 2007).

106. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 133(a).

107. Víctor Manuel Ancalaf Llaupe v. Chile, Admissibility Report, ¶ 9(3).

truck on fire.¹⁰⁸ Mr. Ancalaf Llaupe is again accused of the terrorist offense of setting a truck on fire.¹⁰⁹

March 17, 2002: Five individuals, all of whom are wearing hoods and one of whom is carrying a firearm, throw a Molotov cocktail inside a truck owned by Brotec, S.A. driving through Alto Bío Bío.¹¹⁰ Mr. Ancalaf Llaupe is again accused of the terrorist offense of setting fire to a truck.¹¹¹

November 19, 2001: An investigation is opened to ascertain Mr. Ancalaf Llaupe's involvement in the September 29, 2001 fire.¹¹² The Santa Bárbara Criminal Court summons Mr. Ancalaf Llaupe to make a statement before the court.¹¹³

February 26, 2002: Mr. Ancalaf Llaupe appears before the Santa Bárbara First Instance Court to make a statement that he was “unaware of the reason why he had been summoned” and that he played no part in the events.¹¹⁴

March 19, 2002: The Provincial Governor of Bío Bío files a complaint against Mr. Ancalaf Llaupe with the Concepción Court of Appeal for acts of terrorism under the Counter-Terrorism Act.¹¹⁵

October 17, 2002: The Concepción Court of Appeal issues an indictment against Mr. Ancalaf Llaupe for the fires that occurred on September 29, 2001, March 3, 2002, and March 17, 2002.¹¹⁶

November 6, 2002: Mr. Ancalaf Llaupe is arrested and taken to El Manzano Prison.¹¹⁷

108. *Id.*

109. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 133(b).

110. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Report on Merits, ¶ 100.

111. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 133(c).

112. *Id.* ¶ 134.

113. *Id.*

114. *Id.*

115. *Id.* ¶ 135.

116. *Id.* ¶ 137.

117. *Id.*

January 8, 2003: Mr. Ancalaf Llaube's counsel asks the Concepción Court of Appeal to examine the case file; the request is denied because the preliminary proceedings are confidential.¹¹⁸

January 13, 2003: Mr. Ancalaf Llaube's counsel appeals the Concepción Court of Appeal's January 8, 2003 decision to deny review of the case file.¹¹⁹

January 21, 2003: Mr. Ancalaf Llaube's wife, Mrs. Karina Prado, requests that Mr. Ancalaf Llaube be transferred to a prison closer to where she lives due to financial constraints.¹²⁰

January 24, 2003: The judge of the Concepción Court of Appeal denies Mrs. Prado's request.¹²¹

February 5, 2003: The Concepción Court of Appeal confirms the decision to deny examination of the case file.¹²²

April 24, 2003: Mr. Ancalaf Llaube's counsel lodges another request to examine the case file because the preliminary proceedings have concluded.¹²³ On the same day, the appellate judge refuses the request.¹²⁴

May 23, 2003: The First Prosecutor's Office files formal charges against Mr. Ancalaf Llaube before the Concepción Court of Appeal for criminal charges under the Counter-Terrorism Act.¹²⁵

June 12, 2003: Mr. Ancalaf Llaube's counsel makes another request to examine the case file.¹²⁶ The petition is granted, allowing Mr. Ancalaf Llaube's counsel to review the case file, with the exception of the confidential testimony by an anonymous witness.¹²⁷

118. *Id.* ¶ 138.

119. *Id.*

120. *Id.* ¶ 139.

121. *Id.*

122. *Id.* ¶ 138.

123. *Id.* ¶ 140.

124. *Id.*

125. *Id.* ¶ 142.

126. *Id.*

127. *Id.*

July 7, 2003: Mr. Ancalaf Lluape's defense counsel submits an answer to the indictment requesting an acquittal on all charges.¹²⁸

December 30, 2003: The Concepción Court of Appeal issues a judgment convicting Mr. Ancalaf Lluape of a terrorist act under the Counter-Terrorism Act.¹²⁹ Mr. Ancalaf Lluape is sentenced to ten years and one day in prison, is required to pay trial costs, and is disqualified from holding numerous offices and professions.¹³⁰ The court credits Mr. Ancalaf Lluape's prison sentence with time served since November 16, 2002.¹³¹

January 3, 2004: Mr. Ancalaf Lluape's defense counsel appeals the conviction.¹³²

June 4, 2004: The Concepción Court of Appeal annuls the conviction and acquits Mr. Ancalaf Lluape of the charges related to the events that occurred on September 29, 2001 and March 3, 2002.¹³³ However, the Concepción Court of Appeal confirms the conviction against Mr. Ancalaf Lluape for the events that occurred on March 17, 2002, and sentences him to five years and one day in prison.¹³⁴

June 22, 2004: Mr. Ancalaf Lluape's counsel files an appeal for annulment of the June 4, 2004 decision.¹³⁵

August 2, 2004: The Second Chamber of the Supreme Court of Justice declares Mr. Ancalaf Lluape's appeal from June 22, 2004 inadmissible.¹³⁶

March 7, 2007: Mr. Ancalaf Lluape is released from prison.¹³⁷

128. *Id.* ¶ 143.

129. *Id.* ¶ 144.

130. *Id.*

131. *Id.* ¶ 152.

132. *Id.* ¶ 145.

133. *Id.* ¶ 147(a).

134. *Id.* ¶ 147(b).

135. *Id.* ¶ 150.

136. *Id.*

137. *Id.* ¶ 152.

B. Other Relevant Facts

The Mapuche indigenous people are the largest indigenous group in Chile consisting of 600,000 people.¹³⁸ According to census data taken in 2002, slightly more than four percent of Chile's total population consists of Mapuche indigenous people.¹³⁹ At the time of the events, the Mapuche indigenous people, as a whole, are categorically below average in socio-economic status in Chile, are at the poverty line, and experience difficulties accessing education and health care.¹⁴⁰ Most Mapuche indigenous people live in Southern Chile, especially in Region VIII (Bío Bío), Region IX (Araucanía), Region X (Los Lagos), and the metropolitan area of Santiago.¹⁴¹

Lonkos and *werken* are leaders of the Mapuche communities who are elected to represent a particular Mapuche community.¹⁴² Specifically, the *lonkos* are leaders of administrative and spiritual matters.¹⁴³ The *lonkos* oversee decision-making, supervise religious ceremonies, and are considered "depositories of ancestral wisdom."¹⁴⁴ The *werken* are the messengers who assist the *lonkos*.¹⁴⁵ Specifically, the *werken* act as spokespeople before both the Mapuche communities and non-Mapuche people on political and cultural issues.¹⁴⁶ Mr. Ancalaf Llaupe was a *werken*, and Mr. Norín Catrimán and Mr. Pichún Paillalao were *lonkos*.¹⁴⁷ "Together, the *werken* and *lonkos* comprise the local Mapuche indigenous leadership and as such are critical nodes in this indigenous people's sociocultural structure."¹⁴⁸

In terms of State law, Article 9 of the State Constitution establishes criminal prosecution for acts of terrorism.¹⁴⁹ Under Article 9, "terrorism,

138. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Report on Merits, ¶ 41.

139. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 75.

140. *Id.* ¶ 76.

141. *Id.* ¶ 75.

142. *Id.* ¶ 78.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Report on Merits, ¶ 5.

149. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 95.

in any of its forms, is intrinsically contrary to human rights.”¹⁵⁰ Article 19(7) of the Chilean Constitution ensures everyone the right to safety and personal liberty.¹⁵¹ Under Article 19(7)(e), pre-trial release is granted unless a judge finds detention necessary for ongoing investigations or the safety of victims or society at large.¹⁵² Article 78 of the Code of Criminal Procedure of Chile establishes that the identity of a witness may remain confidential if needed to protect the safety of the witness.¹⁵³ Similarly, Article 15 of the Counter-Terrorism Act establishes that the Public Prosecution Service may order “special measures of protection” for witnesses.¹⁵⁴ Article 16 of the Counter-Terrorism Act allows a judge to reveal the identity of anonymous witnesses if the rights of the accused are not respected.¹⁵⁵

II. PROCEDURAL HISTORY

A. *Before the Commission*

August 15, 2003: Two petitions are submitted to the Inter-American Commission on Human Rights.¹⁵⁶ Mr. Norín Catrimán files the first.¹⁵⁷ Mr. Pichún Paillalao files the second.¹⁵⁸ The petitions are joined under Petition No. 619/03.¹⁵⁹

April 13, 2005: Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Ms. Troncoso Robles present Petition No. 429/05 to the Commission.¹⁶⁰

May 20, 2005: Mr. Ancalaf Llaupe presents Petition No. 581/05 to the

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* ¶ 104.

154. *Id.*

155. *Id.*

156. Aniceto Norín Catrimán and Pascual Pichún Paillalao v. Chile, Admissibility Report, Report No. 89/06, Inter-Am. Comm’n. H.R., Case No. 12.576, ¶ 5 (Oct. 21, 2006).

157. *Id.*

158. *Id.*

159. *Id.*

160. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 2(a)(iii).

Commission.¹⁶¹

October 21, 2006: The Commission approves Admissibility Report No. 89/06 (in relation to Petition No. 619/03), declaring the case admissible regarding alleged violations of Articles 8 (Right to a Fair Trial) and 9 (Freedom from *Ex Post Facto* Laws) in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention.¹⁶²

April 23, 2007: The Commission approves Admissibility Report No. 33/07 (in relation to Petition No. 581/05), declaring the case admissible regarding alleged violations of Articles 8 (Right to a Fair Trial), 9 (Freedom from *Ex Post Facto* Laws), and 24 (Right to Equal Protection) in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention.¹⁶³

April 23, 2007:¹⁶⁴ The Commission approves Admissibility Report No. 32/07 (in relation to Petition No. 429-05), declaring the case admissible regarding alleged violations of Articles 8 (Right to a Fair Trial), 9 (Freedom from *Ex Post Facto* Laws), and 24 (Right to Equal Protection) in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention.¹⁶⁵

November 5, 2010: The Commission issues Report on the Merits No. 176/10 in regard to all three petitions.¹⁶⁶ The Commission concludes that the victims were tried and convicted of terrorist crimes under laws that were ambiguous, imprecise, and incompatible with the principle of

161. *Id.* ¶ 2(a)(iv).

162. Aniceto Norín Catrimán and Pascual Pichún Paillalao v. Chile, Admissibility Report, ¶ 4; *see also* Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Report on Merits, ¶ 2.

163. Víctor Manuel Ancalaf Laupe v. Chile, Admissibility Report, ¶ 4.

164. Some Court documents state that this report is dated May 2, 2007, *see* Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Report on Merits, ¶ 7.

165. Juan Patricio Marileo Saravia et al. v. Chile, Admissibility, Report No. 32/07, Inter-Am. Comm'n. H.R., Case No. 12.612, ¶ 4 (Apr. 23, 2007) (Available only in Spanish).

166. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 2(c).

legality.¹⁶⁷ The victims were convicted of these terrorist crimes because of their ethnic origin as members, leaders, or activists of the Mapuche indigenous people.¹⁶⁸ The Commission notes that the State's courts made the decision to convict the petitioners based on the characterization of the "Mapuche conflict" as an illegitimate and violent conflict waged by the Mapuche against the State.¹⁶⁹

The Commission concludes that the State is responsible for violating the principle of legality under Article 29, the right to equal protection and non-discrimination under Article 24, the right to freedom of expression and political rights under Articles 13 and 23, the presumption of innocence under Articles 8(1)–(2) and 9, the right to question witnesses under Article 8(2)(f), the right to appeal a judgment under Article 8(2)(h), and the right to an impartial judge under Article 8(1) in relation to the individual petitioners.¹⁷⁰ The Commission also finds that the State violated Articles 8 (Right to a Fair Trial), 9 (Freedom from *Ex Post Facto* Laws), 13 (Freedom of Thought and Expression), 23 (Right to Participate in Government), and 24 (Right to Equal Protection), in relation to the "socio-cultural integrity of the Mapuche people as a whole."¹⁷¹ The Commission concludes that the State did not violate Articles 8(1) (Right to a Hearing Within Reasonable Time and By a Competent and Independent Tribunal) and 8(4) (Prohibition of Double Jeopardy).¹⁷²

The Commission recommends that the State eliminate the effects of the terrorism convictions imposed on the petitioners, enable the petitioners to have their convictions reviewed, make reparations to the petitioners, amend the Counter-Terrorism Act to conform with Article 9 (Freedom From *Ex Post Facto* Laws) of the American Convention, amend domestic criminal procedure laws to conform with Articles 8(2)(f) (Right of Defense to Obtain the Appearance of Witnesses and Examine Them) and 8(2)(h) (Right to Appeal) of the American Convention, and adopt measures to eliminate discrimination based on ethnic or-

167. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People), Report on Merits, ¶ 5.

168. *Id.*

169. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People), Report on Merits, ¶ 5.

170. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 2(c).

171. *Id.*

172. *Id.*

igins in both the public power and administration of justice.¹⁷³

B. Before the Court

August 7, 2011: The Commission submits the case to the Court after the State failed to adopt its recommendations.¹⁷⁴

1. Violations Alleged by Commission¹⁷⁵

Article 8(2)(f) (Right of Defense to Obtain the Appearance of Witnesses and Examine Them)

Article 9 (Freedom from *Ex Post Facto* Laws)

both in relation to:

Article 1(1) (Obligation to Respect Rights)

Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention.

Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal)

Article 8(2) (Right to Be Presumed Innocent)

Article 8(2)(h) (Right to Appeal)

Article 13 (Freedom of Thought and Expression)

Article 23 (Right to Participate in Government)

Article 24 (Right to Equal Protection)

all in relation to:

Article 1(1) (Obligation to Respect Rights) of the American Convention.

2. Violations Alleged by Representatives of the Victims¹⁷⁶

173. *Id.*

174. *Id.* ¶¶ 2(e), 3.

175. *Id.* ¶ 2(c).

176. Mr. Jaime Madariaga De la Barra, Ms. Myriam Reyes, and Ms. Ylenia Hartog represent Mr. Norín Catrimán and Mr. Pichún Paillalao; the International Federation for Human Rights (“FIDH”) and Mr. Alberto Espinoza Pino represent Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravía, Mr. Juan Patricio Marileo Saravía, and Ms. Troncoso Robles; and Mr. José Aylwin Oyarzún, Mr. Sergio Fuenzalida, and the Center for Justice and International Law (“CEJIL”) represent Mr. Ancalaf Llaupe. *Id.* ¶¶ 2(e), n.8. The petitioners failed to reach an agreement on representation, therefore both CEJIL and FIDH were designated as representatives for all of the victims. *Id.* ¶ 4.

i. Violations Alleged by CEJIL¹⁷⁷

Same Violations Alleged by Commission, plus:

Article 5 (Right to Humane Treatment)

Article 8(2)(c) (Right to Adequate Time and Means to Prepare Defense)

Article 8(5) (Criminal Proceedings Must Be Public)

Article 17 (Rights of the Family)

all in relation to:

Article 1(1) (Obligation to Respect Rights)

Article 2 (Domestic Legal Effects)

ii. Violations Alleged by FIDH¹⁷⁸

Same Violations Alleged by Commission, plus:

Article 5 (Right to Humane Treatment)

Article 17 (Rights of the Family)

all in relation to:

Article 1(1) (Obligation to Respect Rights)

March 2, 2012: Mr. Bárzana Yutronic, a lawyer, files an amicus curiae brief.¹⁷⁹

May 18, 2012: The President of the Court issues an Order allowing three of the presumed victims, Mr. Pichún Paillalao, Mr. Ancalaf Lluape, and Mr. Florencio Jaime Marileo Saravia, access to the Victims' Legal Assistance Fund due to lack of financial resources.¹⁸⁰

May 24, 2012: Minority Rights Group International files an amicus curiae brief.¹⁸¹

June 14, 2013: The Human Rights Center of the Universidad Diego

177. *Id.* ¶ 7.

178. *Id.* ¶ 8.

179. *Id.* ¶ 17.

180. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Provisional Measures, Order of the President, Inter-Am. Ct. H.R. (ser. E), ¶¶ 5–7, 11 (May 18, 2012).

181. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 17.

Portales files an amicus curiae brief.¹⁸² Ms. Claudia Gutiérrez Olivares, Professor of Ethics and Political Philosophy at the Universidad de Chile, additionally files an amicus curiae brief.¹⁸³ Finally, Mr. Osvaldo Javier Solís Mansilla, a lawyer and researcher, files an amicus curiae brief.¹⁸⁴

III. MERITS

*A. Composition of the Court*¹⁸⁵

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

Pablo Saavedra Alessandri, Secretary
Emilia Segares Rodríguez, Deputy Secretary

B. Decision on the Merits

May 29, 2014: The Court issues its Judgment on Merits, Reparations and Costs.¹⁸⁶

May 29, 2014: The Court declined CEJIL's and FIDH's request to consider adding members of the petitioners' families as victims because the Commission did not include these individuals as victims in its Merits Reports.¹⁸⁷ The Court stated that it is not possible to add new victims following the Merits Report unless there are "exceptional circumstances," as established in Article 35(2) of the Court's Rules of Procedure.¹⁸⁸

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* ¶ 1. Because he is a national of the respondent State, Judge Vio Grossi did not partake in the examination and deliberation of the Judgment in accordance with on Article 19(1) of the Court's Rules of Procedure. *Id.* ¶ 1, n.1.

186. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs.

187. Victims must be indicated in the Merits report pursuant to Article 50 of the Convention. *Id.* ¶ 29.

188. Article 35(2) allows the Court to decide whether to consider additional victims if the

The Court stated that Article 35(2) is not applicable to this case.¹⁸⁹ Furthermore, the Court noted, “[t]he 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.”¹⁹⁰ However, the Court reserved the right to award reparations in their favor.¹⁹¹

The Court found unanimously that the State had violated:

Article 9 (Freedom from *Ex Post Facto* Laws) and Article 8(2) (Right to Be Presumed Innocent), in relation to Articles 1(1) and 2 of the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunoa Mariñán, Mr. Mil-lacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Mr. Ancalaf Llaupe,¹⁹² because:

*The principle of legality under Article 9 (Freedom from Ex Post Facto Laws) ensures that “no one shall be convicted of any act or omission that did not constitute a criminal offense under the applicable law at the time it was committed.”*¹⁹³ *The illegal act must be codified prior to the occurrence of the act, otherwise individuals do not have notice that their actions are unlawful.*¹⁹⁴ *Criminal acts must be clearly defined and include all elements.*¹⁹⁵ *When defining terrorist offenses, the principle of legality requires that there be a clear distinction between the definitions of terrorist offenses and ordinary offenses because terrorist offenses result in harsher punishments and the “restriction of certain rights during investigation and prosecution stages.”*¹⁹⁶ *Moreover, “[t]he 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.”*¹⁹⁷ *Accordingly, when states establish laws to prevent and punish terrorism, they must respect the principle of legality.*¹⁹⁸ *States should not enable broad inter-*

case concerns “massive or collective violations.” *Id.* ¶ 29, n.29.

189. *Id.* ¶ 29.

190. *Id.* ¶ 36.

191. *Id.* ¶ 34.

192. *Id.* ¶ 478(1).

193. *Id.* ¶ 161.

194. *Id.*

195. *Id.* ¶ 162.

196. *Id.* ¶ 163.

197. *Id.* ¶ 164.

198. *Id.* ¶ 165.

pretations of terrorist laws that punish conduct that does not meet the nature and gravity of a terrorist offense.¹⁹⁹

In this case, seven of the victims were convicted of terrorist arson or threat of arson.²⁰⁰ Chilean Criminal Code Article 476.3 ranks the severity of arson.²⁰¹ Mr. Ancalaf Llaupe's conduct, for example, consisted of throwing a lighted rag into a truck.²⁰² The Court implies that Mr. Ancalaf Llaupe's action is a less severe act and is lower on the ranking of severity under Article 476.3.²⁰³ The Court noted that the acts leading to the victims' convictions did not result in harm to anyone,²⁰⁴ further implying that they do not amount to terrorist acts and should have been tried as ordinary arson offenses.²⁰⁵

Article 1 of the Counter-Terrorism Act creates a presumption that an offense is a terrorist offense if there is evidence of the alleged wrongdoers' intent to instill fear in the general population by using an explosive or incendiary device.²⁰⁶ The fear requirement of the Counter-Terrorism Act should not be presumed because it is a fundamental element that distinguishes a terrorist offense from an ordinary offense.²⁰⁷ The accuser must establish the burden of proof, rather than the accused.²⁰⁸ The Court held that the Counter-Terrorism Act does not coincide with the presumption of innocence because Article 1's presumption of instilling fear establishes a *prima facie* case for a terrorist crime merely by the use of certain weapons; criminal intent cannot be presumed.²⁰⁹ Overall, the presumption of instilling fear in the general population, which was applied in the proceedings against the victims, violates Articles 9 (Freedom from Ex Post Facto Laws) and 8(2) (Right to Be Presumed Innocent) of the Convention.²¹⁰

Article 24 (Right to Equal Protection), in relation to Article 1(1) of

199. *Id.*

200. *Id.* ¶ 179.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* ¶¶ 180–81.

206. *Id.* ¶ 169.

207. *Id.* ¶ 171.

208. *Id.*

209. *Id.* ¶ 172.

210. *Id.* ¶ 178.

the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunoa Mariñán, Mr. Mil-lacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Mr. Ancalaf Llaupe,²¹¹ because:

*Article 24 (Right to Equal Protection) requires a state to guarantee equal protection to its citizens under its laws.*²¹² *The Court indicated that equality, as guaranteed to all persons, is “linked to the essential dignity of the individual.”*²¹³ *Therefore, any situation where one group is considered inferior to another, or is treated with hostility, or is discriminated against, violates Article 24 (Right to Equal Protection).*²¹⁴ *If a state treats a group in a different manner than another with no objective or reasonable justification, then the state has discriminated against that group.*²¹⁵ *The Court noted that the Mapuche indigenous people in the State are recognized as an indigenous group*²¹⁶ *and that the State must not subject them to any form of discrimination.*²¹⁷

*In this case, the petitioners argued that there was “selective application of the Counter-Terrorism Act” towards the Mapuche indigenous people.*²¹⁸ *The Court referred to the fact that Chile’s Public Prosecution Service conducted nineteen proceedings under the Counter-Terrorism Act between 2000 and 2013, twelve of which related to land claims by Mapuche indigenous people.*²¹⁹ *The United Nations Special Rapporteurs and state bodies have considered this a disproportionate application to the Mapuche indigenous population.*²²⁰ *However, the Court stated that this information by itself is not enough to declare that there was selective application of the Counter-Terrorism Act to the Mapuche indigenous people.*²²¹

The Court then considered whether stereotypes or social prejudices were used in the State courts’ reasoning when finding the petitioners

211. *Id.* ¶ 478(2).

212. *Id.* ¶ 185.

213. *Id.* ¶ 197.

214. *Id.*

215. *Id.* ¶ 200.

216. *Id.* ¶ 205.

217. *Id.* ¶ 203.

218. *Id.* ¶ 211.

219. *Id.* ¶ 217.

220. *Id.* ¶ 218.

221. *Id.* ¶ 219.

guilty.²²² *The Commission and the representatives of the victims provided specific information from the different judgments to prove discrimination by the State courts.*²²³ *Specifically, the State courts were cited for saying the following, amongst other things, in reference to the victims' cases: (1) "... radicalized groups that seek to create a climate of insecurity, instability and fear in different sectors," (2) "excessive demands, made under pressure by belligerent groups to the owners and proprietors" [of the lands], and (3) "related to the so-called 'Mapuche problem,' because the perpetrators knew the territory that was claimed and no Mapuche community or property has been harmed."*²²⁴ *The Court considered these statements, along with the State courts' overall reasoning, to reflect stereotypes and biases towards the Mapuche indigenous peoples.*²²⁵ *Therefore, the State violated Article 24 (Right to Equal Protection).*²²⁶

Article 8(2)(f) (Right of Defense to Obtain the Appearance of Witnesses and Examine Them), in relation to Article 1(1) of the Convention, to the detriment of Mr. Pichún Paillalao and Mr. Ancalaf Llaupe,²²⁷ because:

*The identity of witnesses was kept secret from Mr. Pichún Paillalao and Mr. Ancalaf Llaupe during their criminal proceedings.*²²⁸ *Under Chilean Criminal Procedure Code Articles 307 and 308 and Counter-Terrorism Act Articles 15 and 16, witnesses must be identified and their personal information disclosed,*²²⁹ *unless "there is a real risk to the life or physical integrity of a witness" or to blood relatives or spouses of the witnesses.*²³⁰ *Article 8(2)(f) (Right of the Defense to Obtain the Appearance of Witnesses and Examine Them) of the Convention establishes a "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."*²³¹ *Anonymous witness-*

222. *See id.* ¶ 222.

223. *Id.* ¶ 227.

224. *Id.*

225. *Id.* ¶ 228.

226. *Id.*

227. *Id.* ¶ 478(3).

228. *Id.* ¶ 231.

229. *Id.* ¶ 232.

230. *Id.* ¶ 232(b).

231. *Id.* ¶ 242.

es restrict the exercise of this right.²³² The Court, by balancing all of the appropriate interests, analyzed whether witness anonymity was within proper judicial control.²³³ The Court considered whether the trial judge was aware of the anonymous witness's identity and was able to observe the witness's demeanor to determine reliability of the witness's testimony and whether the defense had the opportunity to examine the anonymous witness at some point during the proceedings on issues that did not relate to the witness's identity.²³⁴ The Court further stated that the use of anonymous witness testimony must be done with "extreme caution."²³⁵ Even if counterbalancing procedures are sufficient, a conviction should not be based solely on anonymous witness statements.²³⁶

With regard to Mr. Pichún Paillalao, although the counter-balancing measures were adequate because the defense had access to the anonymous witness statements,²³⁷ the Court held that the judicial control of witness anonymity was insufficient.²³⁸ The judicial decision gave no reason for the anonymity beyond merely stating that the Public Prosecution Service requested it based on the "seriousness" of the case.²³⁹ The judges were required to list "objective criteria" based on "reliable evidence" to support their reasoning for the decision.²⁴⁰ The Court then assessed whether the anonymous testimony had a "decisive impact" on Mr. Pichún Paillalao's conviction.²⁴¹ The Court held that Mr. Pichún Paillalao's conviction of terrorist arson was based heavily on the anonymous witness's testimony; without this testimony, there was insufficient evidence to convict Mr Pichún Paillalao.²⁴² Therefore, the State violated Article 8(2)(f) (Right of the Defense to Obtain the Appearance of Witnesses and Examine Them) as it pertains to Mr. Pichún Paillalao.²⁴³

In terms of Mr. Ancalaf Llaupe, the identity of witnesses was kept secret in his criminal proceedings, and the defense was restricted from view-

232. *Id.*

233. *Id.* ¶¶ 245–46.

234. *Id.* ¶ 246.

235. *Id.* ¶ 247.

236. *Id.*

237. *Id.* ¶ 250.

238. *Id.* ¶ 249.

239. *Id.*

240. *Id.*

241. *Id.* ¶ 248.

242. *Id.* ¶ 251(b).

243. *Id.* ¶ 252.

ing “secret files”²⁴⁴ and cross-examining the witnesses.²⁴⁵ The evidence used to convict Mr. Ancalaf Llaupe consisted of testimony from four witnesses, three of which were anonymous.²⁴⁶ The Court held that the State violated Article 8(2)(f) (Right of the Defense to Obtain the Appearance of Witnesses and Examine Them), as it pertains to Mr. Ancalaf Llaupe because the anonymous testimony was given strong significance in Mr. Ancalaf Llaupe’s conviction.²⁴⁷

Article 8(2)(h) (Right to Appeal), in relation to Article 1(1) of the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Pailalao, Ms. Troncoso Robles, Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, and Mr. Juan Patricio Marileo Saravia,²⁴⁸ because:

*Article 8(2)(h) (Right to Appeal) ensures the right to a fair trial and provides a minimum guarantee of the right to appeal a judgment to a higher court.*²⁴⁹ *The Convention requires that an appealed ruling be comprehensively examined.*²⁵⁰ *There are basic procedural guarantees, including: (1) the guaranteed right to file an appeal before the judgment becomes res judicata, (2) the right to an appeal shall not be so complex that it creates an obstacle for the appellant, (3) each state must have an “appropriate mechanism to rectify an erroneous conviction,” (4) a comprehensive examination includes analysis of the facts and legal issues that are contested, (5) the right to appeal is available to all who have been convicted and sentenced, and (6) each state’s appellate process must comply with Article 8 of the Convention.*²⁵¹

*The Court analyzed whether the Chilean Criminal Procedural Code was consistent with Article 8(2)(h) (Right to Appeal).*²⁵² *Article 364 of the Chilean Criminal Procedural Code establishes that all decisions issued by a criminal trial court are not appealable, but rather are subject to an appeal for annulment under Article 372; this is the only means to*

244. *Id.* ¶ 236.

245. *Id.* ¶ 237.

246. *Id.* ¶ 259.

247. *Id.* ¶ 260.

248. *Id.* ¶ 478(4).

249. *Id.* ¶ 268.

250. *Id.* ¶ 270.

251. *Id.* ¶¶ 270(a)–(f).

252. *Id.* ¶ 274.

*contest an oral trial court's final judgment.*²⁵³ *An appellant may appeal under Article 373 of the Chilean Criminal Procedural Code if the rights granted by the State Constitution or treaties have been violated or if there was an erroneous application of law.*²⁵⁴ *There are distinctions between the annulment and appeal processes.*²⁵⁵ *If both the oral trial and the judgment are invalidated, Article 386 of the Chilean Criminal Procedural Code is triggered and the case is forwarded to another court for a new trial.*²⁵⁶ *If the judgment alone is invalidated, then a higher court must deliver another judgment.*²⁵⁷

*Next, the Court analyzed whether the State courts' examination of the victims' appeals were consistent with the American Convention.*²⁵⁸ *With regard to Mr. Norín Catrimán's and Mr. Pichún Paillalao's appeals for annulment, the Court held that there was no evidence that the Second Chamber of the Supreme Court of Justice examined the facts or law of the case to determine whether there was convincing evidence to justify the convictions.*²⁵⁹ *Since the Supreme Court merely described the lower's court's arguments, the State violated Article 8(2)(h) (Right to Appeal) to the detriment of Mr. Norín Catrimán and Mr. Pichún Paillalao.*²⁶⁰

*With regard to the appeals of Ms. Troncoso Robles, Mr. Huenchunao Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, and Mr. Juan Patricio Marileo Saravia, the Court held that the Temuco Court of Appeal did not comprehensively examine the appealed decision because it did not analyze the facts or law of the case to determine whether there was convincing evidence to justify the convictions.*²⁶¹ *Therefore, the State violated Article 8(2)(h) (Right to Appeal) as it pertains to Ms. Troncoso Robles, Mr. Huenchunao Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, and Mr. Juan Patricio Marileo Saravia.*²⁶²

253. *Id.* ¶ 271.

254. *Id.* ¶ 272.

255. *Id.* ¶ 273(a).

256. *Id.* ¶ 273(b).

257. *Id.* ¶ 273(c).

258. *Id.* ¶ 274.

259. *Id.* ¶ 278.

260. *Id.* ¶ 279.

261. *Id.* ¶ 287.

262. *Id.* ¶ 290.

Article 7(1) (Right to Personal Liberty and Security), Article 7(3) (Prohibition of Arbitrary Arrest or Imprisonment), Article 7(5) (Right to Be Promptly Brought Before a Judge and Right to a Trial Within Reasonable Time), and Article 8(2) (Right to Be Presumed Innocent), all in relation to Article 1(1) of the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Mr. Ancalaf Llaupe,²⁶³ because:

Article 7(1) of the American Convention guarantees the right to personal liberty and security.²⁶⁴ Article 7(3) states that no one shall be deprived of physical liberty by arbitrary imprisonment.²⁶⁵ Article 7(5) states that detained individuals are entitled to a trial within reasonable time.²⁶⁶ Article 8 of the American Convention governs the right to a fair trial.²⁶⁷ Article 8(2) states that “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.”²⁶⁸ The general rule is that an accused individual is entitled to liberty while his criminal accusations are being decided.²⁶⁹ To adhere to the American Convention, the Court stated that pretrial detention must be a precautionary measure rather than punitive, must be justified by sufficient evidence, and must be “subject to periodic review.”²⁷⁰ Pretrial detention cannot be arbitrary, must have a purpose that is compatible with the Convention, and must be suitable, necessary, proportionate, and sufficiently justified.²⁷¹

With regard to Mr. Norín Catrimán and Mr. Pichún Paillalao, on January 11, 2002 and March 4, 2002, the Traiguén Guarantees Court ordered the pretrial detention of Mr. Norín Catrimán²⁷² and Mr. Pichún Paillalao,²⁷³ respectively. On January 14, 2002, Mr. Norín Catrimán appealed the pretrial detention ruling, but the court affirmed the deci-

263. *Id.* ¶ 478(5).

264. *Id.* ¶ 307.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* ¶ 310.

270. *Id.* ¶¶ 311(a)–(c).

271. *Id.* ¶¶ 312(a)–(e).

272. *Id.* ¶ 345.

273. *Id.* ¶ 347.

sion.²⁷⁴ On March 9, 2002, Mr. Pichún Paillalao also appealed the pre-trial detention ruling, but the court affirmed the decision.²⁷⁵ Both petitioners repeatedly requested review of their pretrial detention, but all appeals were denied.²⁷⁶ The Court held that the State violated Articles 7(1) (Right to Personal Liberty and Security), 7(3) (Prohibition of Arbitrary Arrest or Imprisonment), 7(5) (Right to Be Promptly Brought Before a Judge and Right to Trial Within Reasonable Time), and 8(2) (Right to Be Presumed Innocent) as it pertained to Mr. Norín Catrimán and Mr. Pichún Paillalao because the evidence used to determine detention was confidential, so the accused could not properly defend the pre-trial detention.²⁷⁷ Additionally, the reasoning that Mr. Norín Catrimán and Mr. Pichún Paillalao were a danger to society was an insufficient reason that lacked a legitimate objective,²⁷⁸ the appeals were not adequately reviewed,²⁷⁹ and the Traiguén Guarantees Court did not respect the victims' right to be presumed innocent.²⁸⁰

With regard to Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Ms. Troncoso Robles, on January 28, 2003, the hearing to open an investigation was held before the Collipullu Guarantees Court.²⁸¹ During this hearing, the judge ordered their pre-trial detention based on confidential testimony.²⁸² These petitioners, separately and together, requested release from pretrial detention, but the court denied the requests because allowing release would be dangerous to society.²⁸³ The court later replaced pretrial detention with other measures, including periodic appearances before the court, nighttime house arrest, and a prohibition on leaving the State.²⁸⁴ The Court held that the pretrial detention violated Articles 7(1) (Right to Personal Liberty and Security), 7(3) (Prohibition of Arbitrary Arrest or Imprisonment), 7(5) (Right to Be Promptly Brought Before a Judge and Right to Trial Within Reason-

274. The court confirmed the decision but eliminated the argument that pre-trial detention was essential for successful investigation. *Id.* ¶ 346.

275. *Id.* ¶ 347.

276. *Id.* ¶ 348.

277. *Id.* ¶ 350.

278. *Id.* ¶ 352.

279. *Id.* ¶ 353.

280. *Id.* ¶ 354.

281. *Id.* ¶ 328.

282. *Id.*

283. *Id.* ¶ 330.

284. *Id.* ¶ 332.

able Time), and 8(2) (Right to Be Presumed Innocent) because the decision lacked a legitimate purpose,²⁸⁵ the appeals were not adequately reviewed and merely stated that there was no new information to review,²⁸⁶ and the court did not respect the victims' right to be presumed innocent.²⁸⁷

With regard to Mr. Ancalaf Llaupe, the Court held that the Concepción Court of Appeal's determination that Mr. Ancalaf Llaupe was a danger to society was "open-ended" and could be interpreted as "illegitimate for ordering and maintaining pre-trial detention."²⁸⁸ Additionally, the Court found that the Concepción Court of Appeal's three denials of Mr. Ancalaf Llaupe's requests for release from pretrial detention left the defense with no knowledge as to why pretrial detention was maintained.²⁸⁹ Mr. Ancalaf Llaupe had the right to be presumed innocent under Article 8(2) prior to conviction, and as a result, the State was not allowed to restrict his liberty more than was necessary.²⁹⁰ Mr. Ancalaf Llaupe's indictment did not provide evidence regarding the need to deprive his liberty.²⁹¹ Overall, the State violated Mr. Ancalaf Llaupe's rights under Articles 7(1) (Right to Personal Liberty and Security), 7(3) (Prohibition of Arbitrary Arrest or Imprisonment), 7(5) (Right to Be Promptly Brought Before a Judge and Right to Trial Within Reasonable Time), and 8(2) (Right to Be Presumed Innocent) by unjustifiably detaining him and not presuming him innocent during the trial.²⁹²

Article 13(1) (Right to Seek, Receive, and Impart Information and Ideas), in relation to Article 1(1) of the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Paillalao, and Mr. Ancalaf Llaupe,²⁹³ because:

*The right to freedom of thought and expression protects "the right to seek, receive and impart information and ideas of all kinds."*²⁹⁴ Free-

285. *Id.* ¶ 339.

286. *Id.* ¶ 340.

287. *Id.* ¶ 342.

288. *Id.* ¶ 322.

289. *Id.* ¶ 324.

290. *Id.* ¶ 326.

291. *Id.* ¶ 321.

292. *Id.* ¶ 327.

293. *Id.* ¶ 378.

294. *Id.* ¶ 371.

dom of expression requires the ability to express one's own opinions.²⁹⁵ The Court reasoned that because the trial courts' decisions applied a State criminal law that violated the principle of legality and because the punishments were disproportionate to the crime, Mr. Norín Catrimán, Mr. Pichún Paillalao, and Mr. Ancalaf Llaupe were prevented from exercising their right to freedom of thought and expression.²⁹⁶ As leaders of the Mapuche indigenous people, Mr. Norín Catrimán, Mr. Pichún Paillalao, and Mr. Ancalaf Llaupe communicated the group's political and social interests, and their penalties prevented this.²⁹⁷ Additionally, their penalties could have resulted in self-censorship amongst other Mapuche indigenous people because of the fear of receiving a similar penalty.²⁹⁸ Therefore, the Court held that the State violated Article 13(1) (Right to Seek, Receive, and Impart Information and Ideas).²⁹⁹

Article 23 (Right to Participate in Government), in relation to Article 1(1) of the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Mr. Ancalaf Llaupe,³⁰⁰ because:

Article 23 (Right to Participate in Government) of the American Convention entitles every citizen to enjoy the rights to conduct public affairs, to vote, to be elected, and to have access to public service.³⁰¹ The penalties that the victims received included a fifteen-year prohibition from discharging public duties, from acting as educational directors, from directing social communications, and from being leaders of political, neighborhood, professional, student or trade organizations.³⁰² The Court held that these penalties violated the victims' political rights established in Article 23 (Right to Participate in Government).³⁰³ Since Mr. Norín Catrimán, Mr. Pichún Paillalao, and Mr. Ancalaf Llaupe were Mapuche leaders, the penalties they received not only violated

295. *Id.*

296. *Id.* ¶ 374.

297. *Id.* ¶ 375.

298. *Id.* ¶ 376.

299. *Id.* ¶ 378.

300. *Id.* ¶ 478(7).

301. *Id.* ¶ 380.

302. *Id.* ¶¶ 382–83.

303. *Id.* ¶ 386.

*their political rights, but their communities' political rights as well.*³⁰⁴

Article 17(1) (Family's Right to Be Protected), in relation to Articles 1(1) and 2 of the Convention, to the detriment of Mr. Ancalaf Llaupe,³⁰⁵ because:

Article 17(1) states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."³⁰⁶ The State is obliged to encourage strength and development of the family.³⁰⁷ In its analysis, the Court referenced Rule 37 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, which requires that prisoners be allowed to communicate with their families.³⁰⁸ States must transfer prisoners to prisons near the prisoners' families, if requested, and this is especially important for indigenous peoples.³⁰⁹ Mr. Ancalaf Llaupe was sentenced to a prison that was more than 250 kilometers from his family.³¹⁰ Since Mr. Ancalaf was held in a prison far from his family, and because the domestic courts repeatedly denied the transfer requests despite Mr. Ancalaf Llaupe's family's financial constraints, the Court held that the State violated Article 17(1) (Family's Right to Be Protected).³¹¹

The Court found unanimously that the State had not violated:

Article 17(1) (Family's Right to Be Protected), in relation to Articles 1(1) and 2 of the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, and Mr. Juan Patricio Marileo Saravia,³¹² because:

The Court found that it had insufficient evidence to make a finding with regard to Article 17(1) (Family's Right to be Protected)³¹³ because no

304. *Id.* ¶ 385.

305. *Id.* ¶ 410.

306. *Id.* ¶ 401.

307. *Id.* ¶ 404.

308. *Id.* ¶ 405.

309. *Id.* ¶ 408.

310. *Id.* ¶ 403.

311. *Id.* ¶¶ 408–410.

312. *Id.* ¶ 478(9).

313. *Id.*

violations were alleged.³¹⁴

Article 8(2)(f) (Right of Defense to Obtain the Appearance of Witnesses and Examine Them), in relation to Article 2 of the Convention, because.³¹⁵

*The Court found that it had insufficient evidence to examine the merits of the Commission's and FIDH's claims that the State violated the obligation to adopt domestic laws in relation to Article 8(2)(f) (Right of Defense to Obtain the Appearance of Witnesses and Examine Them) because neither the Commission nor the FIDH submitted legal arguments that the State had an obligation to adapt its domestic criminal procedure law to comply with Article 8(2)(f) of the Convention.*³¹⁶

Article 8(2)(h) (Right to Appeal), in relation to Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunua Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, and Mr. Juan Patricio Marileo Saravia,³¹⁷ because:

The Court found that the right to appeal is guaranteed under State law³¹⁸ and, as a result, the State was not required to adopt additional domestic laws to comply with Article 8(2)(h) (Right to Appeal).³¹⁹ However, the Court noted that it lacked evidence to conclude whether the right to appeal under State law provided an effective remedy, and thus, it could not find a violation of Article 8(2)(h) (Right to Appeal) in relation to Article (2) (Obligation to Give Domestic Legal Effect to Rights).³²⁰

Article 7 (Right to Personal Liberty), in relation to Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunua Mariñán, Mr. Millacheo Licán, Mr. Flor-

314. *Id.* ¶ 411.

315. *Id.* ¶ 478(11).

316. *Id.* ¶ 261.

317. *Id.* ¶ 478(12).

318. *Id.* ¶ 298.

319. *Id.* ¶ 292.

320. *Id.* ¶¶ 294, 297.

encio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Mr. Ancalaf Llaupe,³²¹ because:

Articles 363 and 140.c of the Chilean Code of Criminal Procedure, which established the grounds for pretrial detention of the victims, are not “per se contrary to the American Convention.”³²² Therefore, the State did not violate the obligation to adopt domestic laws relating to Article 7 (Right to Personal Liberty).³²³ Rather, the violations of personal liberty “resulted from the judicial interpretation and application of these norms.”³²⁴

Article 5(1) (Right to Physical, Mental, and Moral Integrity), in relation to Article 1(1) of the Convention, to the detriment of Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Mr. Ancalaf Llaupe,³²⁵ because:

Article 5(1) states that “every person has the right to have his physical, mental, and moral integrity respected.”³²⁶ A violation of this right would entail torture, abuse, or cruel, inhumane treatment.³²⁷ In this case, there was no torture, abuse, or cruel inhumane treatment.³²⁸ Therefore, the Court did not find a violation.³²⁹

Article 8(2)(f) (Right of Defense to Obtain the Appearance of Witnesses and Examine Them), in relation to Article 1(1) of the Convention, to the detriment Mr. Norín Catrimán,³³⁰ because:

Although the judge in the criminal proceeding against Mr. Norín Catrimán ordered that the identity of two of the witnesses be kept secret,³³¹ the anonymous witness testimony was not used as definitive grounds for

321. *Id.* ¶ 478(13).

322. *Id.* ¶ 364.

323. *Id.*

324. *Id.*

325. *Id.* ¶¶ 400, 478(14).

326. *Id.* ¶ 387.

327. *Id.* ¶ 388.

328. *Id.* ¶ 391.

329. *Id.* ¶ 400.

330. *Id.* ¶ 251(a).

331. *Id.* ¶ 232.

convicting Mr. Norín Catrimán.³³² In addition, the State court sufficiently weighed the counterbalancing measures.³³³ Therefore, the State did not violate Article 8(2)(f) (Right of Defense to Obtain the Appearance of Witnesses and Examine Them) as it pertains to Mr. Norín Catrimán.³³⁴

The Court found by four votes to two that the Court is not required to rule on Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal), because:³³⁵

Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal) requires that judges approach each case without any biases.³³⁶ The Court noted that impartiality is presumed unless contrary evidence is submitted to show that a judge or court has particular prejudices or biases towards the parties involved.³³⁷ Here, the Court held that Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal) should be analyzed alongside the violations of Articles 9 and 8(2).³³⁸ Therefore, the Court did not find it necessary to rule separately whether the State violated Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal).³³⁹

C. Dissenting and Concurring Opinions

1. Joint Dissenting Opinion of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot

In their Joint Dissenting Opinion, Judges Ventura Robles and Mac-Gregor Poisot disagreed with the Court's decision that it was not required to rule on Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal).³⁴⁰ Specifically, the

332. *Id.* ¶ 251(a).

333. *Id.*

334. *Id.*

335. *Id.* ¶ 478(10).

336. *Id.* ¶ 208.

337. *Id.*

338. *Id.* ¶ 229.

339. *Id.*

340. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, Joint Dissenting Opinion of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. (ser. C) No. 279, ¶ 1 (May 29, 2014).

dissenting judges believed it was contradictory for the Court not to rule on the alleged violations of the right to an impartial court, but to rule on, and find violation of, the principle of equality and non-discrimination and the right to equal protection.³⁴¹ The dissenting judges found the evidence sufficient to conclude that the judges in the domestic courts based their decisions on personal prejudices against the Mapuche indigenous peoples.³⁴² At the time, Chilean society was stereotyping these alleged terrorist claims against the Mapuche indigenous people as the “Mapuche problem.”³⁴³ Due to this prejudice, it was reasonable for the victims, as defendants in these cases, to feel that the courts lacked impartiality when finding them guilty.³⁴⁴ The dissenting Judges argued that the Court should have found that the State violated Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal).³⁴⁵

IV. REPARATIONS

The Court ruled unanimously that the State had the following obligations:

A. *Specific Performance (Measures of Satisfaction and Non-Repetition Guarantee)*

1. Implement Administrative and Judicial Reform

The Court required the State to adopt administrative, judicial, and any other measures to annul all criminal judgments convicting Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patricio Marileo Saravia, and Mr. Ancalaf Llaue.³⁴⁶ Specifically, the State must annul the declaration that the victims were convicted of terrorist offenses, annul the sentences (including prison time, penalties, any consequences, and associated civil penalties), and

341. *Id.* ¶ 9.

342. *Id.* ¶ 42.

343. *Id.*

344. *Id.* ¶ 43.

345. *Id.* ¶ 45.

346. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, ¶ 478(16).

release the victims from parole.³⁴⁷ The State must also eliminate judicial, administrative, criminal, and enforcement records, both national and international, against the victims, including those connecting the victims to terrorist acts.³⁴⁸

2. Provide Treatment to Victims

The Court required the State to provide free medical, psychological, and psychiatric treatment to the victims.³⁴⁹ It must provide any necessary medications or transportation related to the medical, psychological, or psychiatric treatment of the victims free of charge.³⁵⁰ This treatment must be provided in institutions that are closest to each victim's residence.³⁵¹ The State must also provide this treatment for as long as is necessary.³⁵² If the State does not have institutions that provide the requisite level of care, it must seek private institutions that do provide such care.³⁵³

3. Broadcast and Publish the Judgment

The Court required the State to broadcast and publish the official summary of the Judgment in the Official Gazette and in a national newspaper with widespread circulation and to publish the entire Judgment on an official State website for an entire year.³⁵⁴ The State must broadcast the official summary of the Judgment in both Spanish and Mapudungun³⁵⁵ on a radio station with "broad coverage" in Regions VIII and IX at least three times on the first Sunday of the month.³⁵⁶

4. Award Scholarships

The Court required the State to award scholarships to the children of the victims to cover the costs of education until the end of their ad-

347. *Id.* ¶ 422.

348. *Id.*

349. *Id.* ¶ 478(17).

350. *Id.* ¶ 425.

351. *Id.* ¶ 426.

352. *Id.*

353. *Id.*

354. *Id.* ¶ 428.

355. Mapudungun is the traditional language of the Mapuche people. *Id.* ¶ 427.

356. *Id.* ¶ 429.

vanced studies.³⁵⁷ The Court awarded this reparation because during the victims' detention, the victims were unable to fully provide for their families.³⁵⁸

5. Adapt Domestic Laws on Regulation of Witness Protection Procedures

The Court required the State to regulate procedural measures of witness protection, specifically regarding anonymity.³⁵⁹ The State must ensure that the counterbalancing reasons for anonymity are assessed and that anonymous testimony is not used decisively as the reason for justifying a guilty verdict.³⁶⁰

B. Compensation

The Court awarded the following amounts:

1. Pecuniary Damages and Non-Pecuniary Damages³⁶¹

The Court awarded \$50,000 each to Mr. Norín Catrimán, Mr. Pichún Paillalao, Ms. Troncoso Robles, Mr. Huenchunoa Mariñán, Mr. Millacheo Licán, Mr. Florencio Jaime Marileo Saravia, Mr. Juan Patriocio Marileo Saravia, and Mr. Ancalaf Llaupe.³⁶²

2. Costs and Expenses

The Court awarded \$32,000 to FIDH,³⁶³ \$28,700 to CEJIL,³⁶⁴ \$5,000 to Ms. Ylenia Hartog,³⁶⁵ \$5,000 to Mr. Jamie Madariaga De la Barra,³⁶⁶ and \$5,000 to Mr. Myriam Reyes.³⁶⁷ The Court also ordered the reimbursement of \$7,652.88 to the Victims' Legal Assistance Fund.³⁶⁸

357. *Id.* ¶ 431.

358. *Id.* ¶ 432.

359. *Id.* ¶ 478(20).

360. *Id.* ¶ 436.

361. The Court awarded pecuniary and non-pecuniary damages together. *Id.* ¶¶ 443, 478(21).

362. *Id.* ¶ 446.

363. *Id.* ¶ 452.

364. *Id.*

365. *Id.* ¶ 453.

366. *Id.*

367. *Id.*

368. *Id.* ¶ 470.

3. Total Compensation (including Costs and Expenses ordered):

\$483,352.88

C. Deadlines

The State must adopt administrative, judicial, or any other type of requisite measures to annul all criminal judgments convicting the victims within six months of notification of the Judgment.³⁶⁹ The State must also eliminate any domestic and international records naming the victims as terrorists within six months of notification of the Judgment.³⁷⁰

The State must provide the victims with free medical, psychological, or psychiatric treatment immediately upon request.³⁷¹ The victims must advise the State within six months of notification of the Judgment if they wish to receive such treatment.³⁷²

The State must comply with the publication and broadcast requirements within six months of notification of the Judgment.³⁷³ The State must also advise CEJIL and FIDH of the time, date, and radio station on which the announcements will be made, two weeks prior to airing.³⁷⁴

The victims must advise the State, within six months of notification of the Judgment, of the scholarship requirements of their children.³⁷⁵

The State must pay all pecuniary and non-pecuniary damages to the victims within one year of notification of the Judgment.³⁷⁶ The State must reimburse costs and expenses directly to the representatives and organizations within one year of notification of the Judgment.³⁷⁷ If the State does not make these payments on time, it will incur interest.³⁷⁸

The State must reimburse the Victims' Legal Assistance Fund within ninety days of notification of the Judgment.³⁷⁹

Within one year of notification of the Judgment, the State must

369. *Id.* ¶ 422.

370. *Id.*

371. *Id.* ¶ 425.

372. *Id.* ¶ 426.

373. *Id.* ¶ 429.

374. *Id.*

375. *Id.* ¶ 432.

376. *Id.* ¶ 471.

377. *Id.* ¶¶ 452–53, 471.

378. *Id.* ¶ 475.

379. *Id.* ¶ 470.

provide the Court with a report on compliance measures.³⁸⁰

V. INTERPRETATION AND REVISION OF JUDGMENT

[None]

VI. COMPLIANCE AND FOLLOW-UP

November 24–26, 2014: Inter-American Commissioner Rapporteur for Chile and for the Rights of Indigenous Peoples, Ms. Rose-Marie Belle Antoine, visited the State to assess the general human rights situation.³⁸¹ Ms. Belle Antoine examined development and investment projects for extraction of natural resources in Santiago and Temuco.³⁸² Ms. Belle Antoine met with several State officials, including the President Michelle Bachelet.³⁸³ After this visit, the Commission evaluated the State's compliance and found that the government established a "notion of a new deal with Chile's indigenous peoples" and was committed to establishing a council devoted exclusively to human rights for indigenous peoples.³⁸⁴ State authorities informed the Commission of measures taken to reform the Counter-Terrorism Act, specifically noting a reform to prevent the Act's application to cases involving social protests by the Mapuche indigenous people.³⁸⁵ The State also reported on its ratification of I.L.O. Convention 169, but the Commissioner Rapporteur received information that there were still "significant obstacles" for the State's indigenous people in receiving consultation on affected territories, subsistence, and sustainability.³⁸⁶ Specifically, indigenous peoples were not receiving free consultation regarding the development and extraction projects, including information regarding access to water and natural resources.³⁸⁷ The Commissioner Rapporteur was concerned about "major barriers in the process of granting property titles for ancestral lands."³⁸⁸

380. *Id.* ¶ 477.

381. Annual Report 2014, Ch. 3: Activities of the Rapporteurs' Offices, Thematic and Country Reports and Promotion, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 13, ¶ 3 (2015).

382. *Id.*

383. *Id.* ¶ 4.

384. *Id.* ¶ 6.

385. *Id.*

386. *Id.* ¶ 7.

387. *Id.*

388. *Id.*

January 26, 2015: The Court found that on October 17, 2014, pursuant to the Judgment, the State sent a check in the requisite amount of \$7,652 to reimburse the Victim’s Legal Assistance Fund, partially complying with its obligation to compensate the representatives’ costs and expenses.³⁸⁹

VII. LIST OF DOCUMENTS

A. Inter-American Court

1. Preliminary Objections

[None]

2. Decisions on Merits, Reparations and Costs

[Norín Catrimán et al. \(Leaders, Members and Activist of the Mapuche Indigenous People\) v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., \(ser. C\) No. 279 \(May 29, 2014\).](#)

[Norín Catrimán et al. \(Leaders, Members and Activist of the Mapuche Indigenous People\) v. Chile, Merits, Reparations and Costs, Joint Dissenting Opinion of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. \(ser. C\) No. 279 \(May 29, 2014\).](#)

3. Provisional Measures

[Norín Catrimán et al. \(Leaders, Members and Activist of the Mapuche Indigenous People\) v. Chile, Provisional Measures, Order of the President, Inter-Am. Ct. H.R. \(ser. E\) \(May 18, 2012\).](#)

4. Compliance Monitoring

[Norín Catrimán et al. \(Leaders, Members and Activist of the Mapuche Indigenous People\) v. Chile, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. \(ser. E\) \(Jan. 26, 2015\) \(Available only in Spanish\).](#)

389. Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (ser. E), ¶¶ 2–3 (Jan. 26, 2015) (Available only in Spanish).

[ble only in Spanish\).](#)

5. Review and Interpretation of Judgment

[None]

B. Inter-American Commission

1. Petition to the Commission

Aniceto Norín Catrimán and Pascual Pichún Paillalao v. Chile, Petition No. 619-03, Inter-Am. Comm'n H.R. (Aug. 15, 2003).

Juan Patricio Marileo Saravia et al. v. Chile, Petition No. 429-05, Inter-Am. Comm'n H.R. (Apr. 13, 2005).

Víctor Manuel Ancalaf Llaupe v. Chile, Petition No. 581-05, Inter-Am. Comm'n H.R. (Apr. 23, 2007).

2. Report on Admissibility

[Aniceto Norín Catrimán and Pascual Pichún Paillalao v. Chile, Admissibility Report, Report No. 89/06, Inter-Am. Comm'n. H.R., Case No. 12.576 \(Oct. 21, 2006\).](#)

[V́ctor Manuel Ancalaf Llaupe v. Chile, Admissibility Report, Report No. 33/07, Inter-Am. Comm'n. H.R., Case No. 12.611 \(Apr. 23, 2007\).](#)

[Juan Patricio Marileo Saravia et al. v. Chile, Admissibility, Report No. 32/07, Inter-Am. Comm'n. H.R., Case No. 12.612 \(Apr. 23, 2007\) \(Available only in Spanish\).](#)

3. Provisional Measures

[None]

4. Report on Merits

[Norín Catrimán et al. \(Leaders, Members and Activist of the Mapuche Indigenous People\) v. Chile, Report on Merits, Report No. 176/10, In-](#)

[ter-Am. Comm'n. H.R., Case Nos. 12.576, 12.611, & 12.612 \(Nov. 5, 2010\).](#)

5. Application to the Court

[Not Available]

VIII. BIBLIOGRAPHY

James Anaya, Informe del Relator Especial Sobre la Situación de los Derechos Humanos y las Libertades Fundamentales de los Indígenas, U.N. Doc. A/HRC/12/34/Add.6, 12th Sess., No. 3 (2009) (Available only in Spanish).

Annual Report 2014, “Ch. 3: Activities of the Rapporteurs’ Offices, Thematic and Country Reports and Promotion,” Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 13 (2015) (Available only in Spanish).

Report of the Special Rapportuer on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, July 18, 2003–July 29, 2003, U.N. Doc. E/CN.4/2004/80/Add.3, 16th Sess., No. 15 (2003).