



# **UNDUE PROCESS: TERRORISM TRIALS, MILITARY COURTS, AND THE MAPUCHE IN SOUTHERN CHILE**

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## I. SUMMARY

The strategy employed by the Chilean government to quell unrest sparked by land conflicts in the country's southern regions is apparently bearing fruit. The level of violence in the zone has decreased since 2002, and the organization the government holds responsible for the worst violence has apparently been disbanded.

Yet the government's successes come at a high price for the *Mapuche* people, who for centuries inhabited the region as an independent people. While the living standards of the rest of the country continue to improve, Mapuche in the south live in an impoverished enclave. On top of the discrimination from which they have suffered for years, many now feel the additional weight of political persecution.

The government of Chilean President Ricardo Lagos insists there is no terrorism in Chile. Yet that government's recourse to anti-terrorism statutes to deal with organized Mapuche communities has brought restrictions on due process rights that are not justified by the alleged offenses. At the same time, government use of military courts to address alleged police abuses against the Mapuche—courts which have a record of acting as guarantors of impunity for those who abuse the rights of indigenous peoples—prevents Mapuche whose rights are violated from gaining redress.

Since early 2002, seven Mapuche individuals and a pro-Mapuche activist have been charged and convicted under a modified version of the anti-terrorism statute left in place by the military government of Gen. Augusto Pinochet. All are serving prison sentences of up to ten years under the anti-terrorism law for arson or threats of arson committed against the properties of landowners and forestry companies. Sixteen, including five of those already convicted, are currently on trial for belonging to a group allegedly dedicated to terrorist acts ("illicit terrorist association"), with a possible sentence of fifteen years for those convicted of being a leader of the group. If convicted again some of those accused could go to prison for up to twenty-five years. Many other Mapuche activists and suspects, moreover, have been held in prolonged pre-trial detention under the anti-terrorism law, some for more than a year, before charges were dropped.

These prosecutions raise serious due process concerns. The unjustified use of terrorism charges keeps Mapuche leaders in pretrial detention for months. Investigations conducted by the public prosecutor can be kept secret for up to six months. At the trials themselves, key evidence may be admitted in oral hearings from "faceless" witnesses whose identity is withheld from the defense.

Apart from the due process problems presented by the use of the anti-terrorism law (such cases are heard in ordinary courts), Mapuche individuals accused of violence against the police are tried in military courts in proceedings that do not meet basic requirements of independence and impartiality. It is little wonder, then, that many Mapuche feel that Chile's progressive new criminal justice system, in force since 2000 in the region most affected by the conflicts, bestows its benefits on everyone but them.

Ever since land conflicts erupted in Chile in the mid-1990s, the Mapuche people have suffered abuses during police incursions into communities suspected of supporting the protests or harboring participants. Military courts exercise exclusive jurisdiction over abuses committed by *carabineros*, the uniformed police, which is a branch of the armed forces. In the past, military tribunals ensured that those responsible for violations of human rights under the military government escaped punishment. Today, continuing military jurisdiction over abuses committed by members of the police force still obstructs an impartial and transparent investigation of such incidents.

Chile's largest indigenous people, the Mapuche, mainly inhabit Bío Bío, Araucanía, and Los Lagos (Chile's Eighth, Ninth, and Tenth Regions, respectively). Over several decades, private owners and large forestry companies have converted much of the area into massive pine and eucalyptus plantations. The Mapuche communities are impoverished and discriminated enclaves whose living standards are well below the national average on all social indicators. Some have benefited from a government program that buys up and hands over contested land to indigenous peoples, but the resources available to the program have been insufficient to meet the needs of the Mapuche. Since the mid-1990s some communities have resorted to illegal action against forestry companies to draw attention to their claims, such as occupying concessions and burning forests and equipment. Although the number of communities allegedly involved in illegal acts is small (2.4 percent according to the minister of the interior), their grievances and demands are widely shared among the Mapuche people.

The use of the anti-terrorism statute against Mapuche began with the current government of President Lagos. The previous government of Eduardo Frei (1994-2000), which typically used the ordinary criminal code, initiated three prosecutions against Mapuche under the Law of State Security, a 1958 statute intended to combat subversion, rebellion, and political violence. As the number of violent incidents in the zone increased and pressure from landowners for a firmer government response mounted, the Lagos government turned to the anti-terrorism law as a more powerful instrument. To date, the

government has initiated at least six anti-terrorism prosecutions against leaders and participants alleged to have been involved in illegal actions.

The anti-terrorism law is a legacy of the military government (1973-1990). General Pinochet introduced it in 1984 to deal with the actions of armed political groups that carried out kidnappings, assassinations, and attacks on police stations using assault rifles and rocket-propelled grenades. It is the harshest law in the Chilean statute book, and in some ways its provisions have been toughened since the return to democracy. It doubles the normal sentences for some offenses, makes pretrial release more difficult, enables the prosecution to withhold evidence from the defense for up to six months, and allows defendants to be convicted on testimony given by anonymous witnesses. These witnesses appear in court behind screens so that the defendants and the public cannot see them.

Under Chile's Constitution, those convicted of terrorism are barred for fifteen years from holding public office, occupying teaching posts, exercising trade union or business responsibilities, or practicing journalism. Moreover, they are not eligible for a presidential pardon.

The worst acts for which the Mapuche are accused are indeed crimes contemplated in the criminal code. They involve the destruction of private property, such as incendiary attacks on woods, crops, buildings, logging company trucks and machinery, and, in some cases, inhabited homes, as well as threats to commit such acts. A few Mapuche have been convicted in the past of serious violence against individuals, such as the burning of forestry vehicles whose occupants narrowly escaped with their lives.

However, after ten years of land occupations and sporadic violence—including clashes between indigenous communities and police, forestry guards, and private landowners—actions by Mapuche have not claimed a single life. Many of the Mapuche on trial for terrorism are poor farmers and traditional leaders of their communities. Others are younger Mapuche who have lived in urban areas, studied in universities, and have returned to organize their communities around land claims that in many cases go back for generations. The weapons sometimes deployed are rudimentary, such as Mapuche-style slingshots (*boleadoras*), sticks and stones, and only in a few cases shotguns. The economic losses caused by the incendiary attacks are considerable. Nevertheless, the crimes committed in most cases are crimes against property and do not fit the characterization of terrorism contained in international treaties, including the Inter-American Convention against Terrorism, which requires grave violations against persons.



Mapuche confronting police with wetruves (boleadoras) in the fundo El Carmen of forestry company Arauco, Temuco. February 13, 2001.

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Although the international community has not agreed on a precise definition of terrorism, it is widely understood that the term applies only to the gravest crimes of political violence. This is conveyed eloquently, for example, in the working definition that terrorism expert A.P. Schmid gave to the United Nations Crime Branch in 1992: “[t]errorism is the peacetime equivalent of a war crime.” In the popular mind terrorism evokes images of innocent civilian hostages held captive in besieged buildings, suicide bomb attacks, and plane hijackings, not to mention the indiscriminate slaughter and destruction of the September 11, 2001, attacks. Chile’s use of the anti-terrorism law for crimes committed by Mapuche in the context of land conflicts, which do not approach this threshold of seriousness, is not only inappropriate but also reinforces existing prejudices against the Mapuche people.

In December 2000 a new code of criminal procedure designed to strengthen defendants’ rights was introduced in the Araucanía, the region most affected by the land conflict. The new code replaced the former inquisitorial procedure with an accusatorial one and written proceedings with oral trials in open court. It has greatly enhanced the fairness, impartiality, and transparency of criminal trials. However, by using anti-terrorism

legislation the government is able to sidestep many of the protections that should benefit Mapuche like all other defendants.

For a government under pressure to show results, use of the anti-terrorism law appears intended to remedy the low conviction rate that has characterized prosecutions of Mapuche under other laws. According to the Public Ministry and the government, working under ordinary laws, prosecutors found it difficult to obtain evidence sufficient to convict those believed responsible for these incendiary attacks, in part due to the reluctance of witnesses to testify because of intimidation or fear of reprisals. The special provisions of the anti-terrorism law allow prosecutors to overcome this obstacle by withholding the identity of witnesses from the defendants and their attorneys, as well as from the general public. They also give the public ministry up to six months to accrue evidence before turning it over to the defense. Prosecutorial expediency is no excuse for applying legislation that does not fit the crime and that seriously curtails the rights of defendants.

Human Rights Watch fears that the current international climate has provided support for the Lagos government's inappropriate use of the Chilean anti-terrorism law. The U.S.-led campaign against terrorism has, unfortunately, become a cover for governments who want to deflect attention away from their heavy-handed treatment of internal dissidents. Today, governments in countries around the world are attempting to use anti-terrorism or national security measures as a means of avoiding international scrutiny of dubious human rights practices.

Although the anti-terrorism law contains checks to prevent abuse of detainees' rights, it weakens some of the due process rights guaranteed to all defendants in any criminal proceedings. The use of "faceless" witnesses is one of its most troubling aspects. It affects the ability of the defense to rebut prosecution evidence, since the identity and demeanor of witnesses often has direct relevance to their credibility. Witnesses may themselves have criminal records or a personal grudge or political animosity against the defendants. Moreover, in the case of malicious testimony, the defense cannot accuse of perjury witnesses it is unable to identify. In a worst case scenario, witnesses could simply lie with impunity.

Art. 14(3)(e) of the International Covenant on Civil and Political Rights states that the accused shall be entitled "[t]o examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." According to General Comment 13 (21), an authoritative interpretation of the Covenant, the purpose of this provision is to



“[g]uarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.” It is a fundamental principle of fair trial that this principle of equality be applied throughout the criminal process.

Circumstances undoubtedly exist in which it may be legitimate to conceal the identity of prosecution witnesses from the press and the general public. There may be genuine concern for the physical and psychological well-being of witnesses, or a pressing need to protect them and their families from reprisals and shield them from the stigmatizing effect of public exposure. Under only the most exceptional circumstances, however, when there is a clear, specific danger to the witness and all other possible means of protection have been exhausted, may information on the identity of prosecution witnesses be withheld from the defendants and their lawyers.

Chile’s Supreme Court has further tilted the field in favor of the prosecution by countermanding judges who have upheld the due process rights of Mapuche defendants. In July 2003, it annulled a unanimous trial court verdict in the so-called “case of the *loncos*” in which the accused were Pascual Huentequero Pichún Paillalao and Segundo Aniceto Norín Catriman, two Mapuche community chiefs (“loncos”), and Patricia Troncoso, a sympathizer. The three were accused of burning woods and manor houses on two estates near Traiguén, one of which belongs to Juan Agustín Figueroa, a former minister of agriculture who is currently a member of the Constitutional Court. The trial court had rejected charges of terrorist arson against all three of the accused after finding flaws in the evidence, but the Supreme Court ordered a retrial, accepting an argument by Figueroa, the public prosecutor, and regional authorities, that key evidence had not been properly evaluated in the verdict. In September, 2003, another court later sentenced the two loncos to five years of imprisonment for “terrorist threat.”

In the Poluco Pidenco case, the Supreme Court disqualified and removed a judge who had insisted that the anti-terrorism law was not applicable and had ordered the prosecution to reveal to the defense the names of protected witnesses. Both of these highly questionable Supreme Court decisions cast doubt on the impartiality of this body in its handling of Mapuche cases.

In addition to the human rights violations inherent in using the anti-terrorism law in land conflict, Mapuche have frequently been victims of physical abuse and degrading treatment by the police. This has occurred during operations to evict occupiers of disputed land and during raids into communities to capture suspects and seize evidence, as well as during protests in the cities of the Araucanía, particularly Temuco. A

disturbing feature of these incidents has been the ill-treatment of women and old people, especially loncos and *machis* (spiritual healers, who are generally women). Some of the worst examples occurred in 1999 in Temulemu (the community of one of the loncos convicted in the “case of the loncos”) and in 2000 in the nearby community of Temucuicui. Beatings during arrests, disproportionate and indiscriminate use of riot control weapons such as shotguns, racist insults, and destruction or theft of domestic articles are still common occurrences during such operations. This report documents three such instances in 2004.

At present, the carabineros have no mechanism in place to monitor observance of human rights standards during police operations in the areas affected by land conflicts. Nor has the government progressed significantly with plans announced before the elections that ended the military government in 1989 to create a public advocate or human rights ombudsman. Such an office could make an important contribution to improving respect for human rights in regions affected by land conflicts, providing victims with an opportunity for redress that is independent of the courts and helping to mediate between the opposing sides.

As noted above, those seeking justice and redress for abuses committed by the police currently have no access to an independent and impartial court. Military courts still assert sole jurisdiction for abuses such as torture, homicide, or the unjustified use of force by carabineros, if committed while on duty or on military premises. Like the accused policemen, military judges are serving officers of the armed forces. They are not necessarily trained as lawyers, and they are also subject to the military chain-of-command. On the basis of these factors alone such courts lack the minimum independence that is essential to a fair hearing. In practice, the great majority of complaints against carabineros for ill-treatment or excessive force bring no result. In a typical case, the investigating prosecutor will turn the case over to a military official as soon as evidence emerges that police on active service were involved. Investigations then continue for years without resolution or are shelved, and those responsible are hardly ever prosecuted.

A clear example of this impunity is the case of Alex Lemún Saavedra, a seventeen-year-old Mapuche who in November 2002 was hit by a shotgun pellet fired by a carabinero officer during the occupation of a forestry estate near Ercilla. The pellet lodged in Lemún’s brain, and he died in a hospital five days later. Although a military prosecutor charged the policeman responsible, Maj. Marco Aurelio Treuer, with “unnecessary violence resulting in death,” the military appeals court accepted Major Treuer’s defense that he acted in self-defense and ordered the charges dropped. There was no credible evidence to support the officer’s claim that the police contingent had been fired on.

In addition, military tribunals exercise exclusive jurisdiction over civilians accused of violence against the police. Over the last two years the Temuco military prosecutor has instituted seven proceedings against Mapuche for assaulting carabineros during protests, clashes, and land occupations; the Angol military prosecutor has filed charges in six cases; the military prosecutor of Valdivia in three. Some of these investigations have dragged on for more than two years without a verdict. The use of military tribunals in such cases violates the fair trial guarantees of art. 14. of the International Covenant on Civil and Political Rights.

It is time that the Lagos government took seriously its obligation to ensure effective redress to victims of police abuse by ensuring that ordinary courts have jurisdiction over crimes that involve human rights violations. It must also take all the measures necessary to end the jurisdiction of military courts over all civilians. Reform of the system of military justice, a principle demand of human rights groups under the military government, is a task that should not be delayed any longer.

## II. RECOMMENDATIONS

### ***On Anti-Terrorism Trials***

Prosecutions for terrorism are an unjustified response to acts of criminal violence committed in the context of the land conflicts involving the Mapuche in Chile. Application of the anti-terrorism law has serious due process consequences for defendants and may gravely undermine the presumption of innocence that underlies the new code of criminal procedure. Rodolfo Stavenhagen, the United Nations special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, has stated: “Charges for offences in other contexts (‘terrorist threat,’ ‘criminal association’) should not be applied to acts related to the social struggle for land and legitimate indigenous complaints.”<sup>1</sup>

Human Rights Watch urges the government of President Lagos to:

- Refrain from opening new prosecutions of Mapuche under the anti-terrorism law unless serious crimes were committed against life, liberty, or physical integrity.

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<sup>1</sup> United Nations Economic and Social Council, Report of the special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, E/CN.4/2004/80/Add.3., November 17, 2003, para. 70.

- Carry out a full and independent review of the cases in which Mapuches have been tried and convicted on terrorism charges, in order to verify observance of due process, and, if necessary, order a new trial with full respect for fair trial guarantees.
- Propose amendments to the anti-terrorism law to ensure that only the gravest crimes of violence involving attacks on life, liberty, or physical integrity are considered terrorist crimes, and then only when the other conditions specified in the law are met.
- Prevent unwarranted use of the anti-terrorism law by reforming the present provisions of the Code of Criminal Procedure that allow any person to lodge an accusation for terrorism. Given the special severity of the anti-terrorism law, the government and the attorney general's office should have exclusive powers to open prosecutions for terrorism.

The names of prosecution witnesses, may, in exceptional circumstances, be kept confidential and their release to the press or the public may be prohibited. To ensure respect for due process and the right to defense, the political and judicial authorities should ensure that the following principles are applied regarding protected witnesses:

- Even when the court agrees to protect the identity of prosecution witnesses from the press and the public, their names should always be made available in confidence to the defendants and their counsel, except in the most extreme circumstances, when a clear and specific danger to the witness has been proven. The prosecution, however, must first exhaust other means of protecting the witness that do not undermine defendants' rights.
- All decisions concerning the protection of prosecution witnesses that affect the conduct of the trial must be subject to appeal.
- In instances where the court orders confidentiality, the accused, the prosecutor, and state parties should be strictly prohibited from violating the order by releasing confidential information to the press or public. This should include direct and indirect identification of witnesses.

Criminal acts should never be confused with legitimate protest activities or the expression of views on a conflict, however controversial. Consequently, the government should:

- Abide by the recommendation of the U.N. special rapporteur, that “[t]he necessary measures should be taken to avoid criminalizing legitimate protest activities or social demands.”<sup>2</sup>
- Seek to promote a public debate, with the participation of the interested parties, on ways to resolve the problems faced by Chile’s indigenous peoples.
- Introduce the legislative and political reforms that are necessary to achieve the same objective.

### ***On Military Justice***

Reform of the present, wide jurisdiction of military courts is a long overdue obligation of the Chilean state. The reform is necessary both to ensure due process and fair trials for those accused of offenses against the police, and to provide access to impartial justice for victims of abusive conduct by police or military officials. The government should:

- Introduce legislation to remove from the Code of Military Justice all offenses that allow the trial of civilians as defendants. Civilians should be judged solely and exclusively by ordinary criminal courts under the provisions of the Criminal Code and the Code of Criminal Procedure.
- Introduce the necessary reforms so that human rights abuses by carabineros, such as homicides, excessive or unjustified use of force, illegal arrest, and torture or ill-treatment of detainees, are investigated by ordinary prosecutors and judged in ordinary courts.
- Transfer to ordinary courts investigations of alleged human rights abuses by military courts that are still in progress.

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<sup>2</sup> Ibid., Executive Summary.

- Require military justice authorities to publish the results of military court investigations into alleged abuses committed by carabineros since the start of land-related conflicts in the regions of Bío Bío and the Araucanía.

### ***On Police Operations***

The government can take several measures to prevent abusive conduct by carabineros while conducting operations in Mapuche communities. For this purpose, we recommend that it:

- Issue strict instructions to carabineros to treat members of Mapuche communities with respect and severely sanction the unwarranted use of force and any verbal abuse or racist slurs by police officers.
- Conduct a review of police operating procedures and rules of engagement during operations in conflict areas, particularly regarding the use of lethal force. These procedures should be based on relevant international standards, such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and art. 3 of the Code of Conduct for Law Enforcement Officials.
- Consider the establishment of a human rights office in the regions of Bío Bío and the Araucanía under the auspices of carabineros to process complaints against the police and establish dialogue with Mapuche communities. Members of this office should participate as observers during police missions, with full guarantees of independence.
- Recommend to the central authority of carabineros that it periodically publish the results of internal inquiries into abusive practices by police officers and the measures taken.
- Propose legislation for the establishment of a human rights ombudsman's office as contemplated in the electoral program of the ruling coalition in 1989.

### III. BACKGROUND

The Mapuche people are among the poorest in Chile.<sup>3</sup> According to an official socioeconomic survey, 32 percent of Chile's indigenous population lives in poverty compared to 20 percent of the non-indigenous population.<sup>4</sup> Social and economic conditions in the Araucanía, where Mapuche unrest has been most acute, are among the worst in the country. Of all Chile's regions, it scores lowest on the Human Development Index.<sup>5</sup> Mapuche women from the region, who are often in the front line of protests, score lowest of all.<sup>6</sup>

Before the arrival of the *conquistadores*, the Mapuche people occupied an enormous swathe of territory reaching from the Limarí River in the north to the Island of Chiloé in the south, and from the Pacific Ocean in the west to the *pampas* (prairies) in what today is Argentine territory to the east. Those who lived north of the river Bío Bío accepted the Spanish presence and were quickly assimilated into the *encomienda* (tributary labor) system imposed by the crown. After Chile gained independence from Spain in 1810, most of the Mapuche in Chile worked as peons on the estates of private landlords. In the south, in contrast, the Mapuche fiercely resisted Spanish domination and by the end of the sixteenth century had expelled them from the Araucanía. For more than two hundred years this part of Chile was autonomous from the rest of the country and coexisted in an uneasy peace with the Chilean state.

A thirty-year military campaign to annex the territory ended in 1883 with the subjugation of the Mapuche. The inhabitants were eventually confined to about three thousand communal reserves (*reducciones*), which totaled some five hundred thousand hectares or approximately one-twentieth of the land they originally occupied. Alongside the communities, private owners accumulated large agricultural estates (*latifundios*), which they built up with the auction of public lands. Between 1931 and 1971, some 832 of the

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<sup>3</sup> Some 4.6 percent of Chile's population of fifteen million belongs to an indigenous people, and 87 percent of Chile's indigenous people is Mapuche. Their current number is estimated at around six hundred thousand.

<sup>4</sup> The facts cited in this background are taken from *Los Derechos de los Pueblos Indígenas en Chile: Report of the Program of Indigenous Rights*, Institute of Indigenous Studies, University of the Frontier (Santiago: LOM, 2003), ch. 6.

<sup>5</sup> The United Nations Development Program (UNDP) uses the Human Development Index (HDI) to rank countries on human development. The Human Development Index focuses on three measurable dimensions of human development: living a long and healthy life, being educated and having a decent standard of living. Thus, it combines measures of life expectancy, school enrolment, literacy, and income to allow a broader view of a country's development than does income alone. (Cited in UNDP, *Human Development Report 2004: Cultural Liberty in Today's Diverse World*) [online], [http://hdr.undp.org/reports/global/2004/pdf/hdr04\\_backmatter\\_1.pdf](http://hdr.undp.org/reports/global/2004/pdf/hdr04_backmatter_1.pdf) (retrieved September 27, 2004).

<sup>6</sup> *Los Derechos de los Pueblos Indígenas*, ch. 6 (4.4), pp. 265-274.

communities were divided up and much land was sold to or acquired by non-indigenous outsiders, representing a loss to the Mapuche of another one hundred thousand hectares, or a fifth of their remaining land.

The policy of dividing up indigenous land into individual plots reached its apex during the military government (1973-1990), when some two thousand Mapuche communities were affected. Rural Mapuche became even more impoverished, and many migrated to the cities.<sup>7</sup> In addition, some 415,000 hectares of land in the provinces of Arauco, Malleco, and Cautín that socialist President Salvador Allende's Agrarian Reform Institute had accumulated for redistribution were sold at ridiculously low prices to large forestry companies.

### **Government Policies**

With the return to democratic rule in March 1990, the government of Patricio Aylwin pursued three important initiatives to reshape the relationship between the state and the country's indigenous peoples. First, Law No. 19,253 of October 1993 made it the state's duty to respect, protect, and promote indigenous rights and culture and to safeguard indigenous lands. The law established priority "areas of indigenous development" and set up a National Corporation of Indigenous Development (CONADI). Among CONADI's functions are to administer an "Indigenous Land and Water Fund" (Fondo de Tierras y Aguas Indígenas), subsidizing the purchase of additional lands for communities affected by land scarcity, and to finance mechanisms to permit the solution of land conflicts and the provision of water.<sup>8</sup>

The other two early initiatives—a constitutional reform recognizing the existence of Chile's indigenous peoples and ratification of the International Labor Organization's Convention 169 concerning Indigenous and Tribal People in Independent Countries—never got off the ground. Both failed to surmount determined objections from the opposition benches of Congress that have continued to this day.<sup>9</sup>

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<sup>7</sup> At the time of the 1992 census some 80 percent of the Mapuche population was recorded as urban.

<sup>8</sup> CONADI's director is appointed by the president, and its sixteen-person governing council includes eight indigenous representatives proposed by indigenous communities and associations and designated by the president.

<sup>9</sup> Among the rights of indigenous peoples recognized under ILO Convention 169 are "[r]ights of ownership and possession of the peoples concerned over the lands which they traditionally occupy." Art. 7 (1) of the Convention states that "[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly." Mexico, Colombia, Bolivia, Costa Rica, Paraguay, Peru, Honduras, Guatemala, Ecuador, Argentina, Venezuela, and



Indigenous rights advocates say that the legal reforms actually implemented fell far short of the aspirations of Chile's indigenous peoples. The government's original bill was hedged and modified after the parliamentary opposition objected to several principles considered by indigenous people to be fundamental, such as the right to be consulted before being moved from their lands and the right to control natural resources in their territory. Instead of being considered peoples and holders of collective rights, which indigenous leaders had sought, the law referred to them only as "ethnic groups" (*etnias*) and communities.

Up to 2002, the most recent year for which statistics for the Mapuche are available, CONADI's land and water fund assigned resources to increase Mapuche land by about 50,000 hectares, benefiting about 4,617 families. It also secured Mapuche tenancy of 120,000 additional hectares of ancestral lands already long occupied by Mapuche, benefiting 3,697 families.<sup>10</sup> Despite these important achievements, the still unsatisfied need for land of the Mapuche is estimated to be at least 150,000 hectares. Parliamentary critics have accused the government of misguidedly granting land to groups that used violent pressure, a policy that they have insisted encourages violence. In March 2002, President Lagos warned that those who use violence or occupy land would in the future be excluded as beneficiaries.

### ***The Spread of Commercial Tree Plantations in Ancestral Mapuche Lands***

Important as they have been, government reform initiatives are insufficient to mitigate the negative effects of economic development schemes on Mapuche communities. During the 1990s Mapuche lands were profoundly affected by the expansion of investment in forestry, hydroelectric projects, and road construction. By the year 2000, an estimated 1.5 million hectares in ancestral Mapuche territory had been planted with commercial pine and eucalyptus. Two Chilean companies alone, Mininco and Arauco, accrued more than one million hectares of exotic trees, many of its plantations encircling Mapuche communities. Community members fiercely opposed encroachment by the forestry companies. They complained that the pine tree farms dried up their water sources, eroded the soil, and blocked the light needed to sustain the rich undergrowth of the native woods, on which Mapuche still rely for medicinal and ritual needs. At the same time, the Mapuche found only limited employment with the companies. For more than a decade, anger at what they considered the plunder of their livelihood exploded in

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Brazil have ratified the Convention. Chile is the only country in the Latin American region with a sizeable indigenous population that has still to do so.

<sup>10</sup> CONADI, May 2003, and MIDEPLAN (Ministry of Planning and Cooperation), 2003, in *Los Derechos de los Pueblos Indígenas*, p. 291.

public protests, occupations of forestry land, road blocks, and burning of trees, forestry vehicles, and equipment.

In response, the forestry companies denounced Mapuche leaders in the courts and invested in armed guards to protect their plantations and installations. Some communities reached agreements with government authorities to purchase forestry land through CONADI, regulate water rights, and institute bilingual education programs. However, in many areas the relationship between the communities and the forestry companies and government continued to deteriorate. These conflicts provide the backdrop to the prosecutions discussed in this report.

Another deeply conflictive development was the construction of a large scale hydroelectric project on the upper reaches of the river Bío Bío, ancestral lands of the *Mapuche-Pehuenche* people. The construction of a dam at Ralco, a project administered by the national electricity company Endesa, went ahead only after then-President Eduardo Frei intervened to secure its approval by the national environmental agency and by CONADI. Two CONADI directors who had opposed the Ralco dam were fired in quick succession. The project received a green light against the express wishes of the two indigenous communities directly affected, and of the Mapuche people in general.

Six Pehuenche families who refused to accept resettlement by the government led the protests against Ralco, gaining wide support from environmental and indigenous rights organizations across Chile.<sup>11</sup> Many of the protests were broken up by the security forces. In March 2002, carabineros violently routed a group of families from the community of Quepuca Ralco who were blocking an access road to a construction site. Carabineros indiscriminately hit children, women, and old people and arrested about fifty protestors, who were presented to the military prosecutor in Chillán. As a leading Chilean environmentalist has argued recently, approval of the Ralco project without sufficient consultation with the affected indigenous families has inflicted profound damage on the government's credibility with the Mapuche people.<sup>12</sup>

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<sup>11</sup> In December, five Pehuenche women presented a complaint to the Inter-American Commission on Human Rights. In October 2003, under the commission's auspices, Chile reached a friendly settlement with the Pehuenche families affected. The agreement included economic compensation to the plaintiffs and their families, as well as a variety of measures to strengthen the protection of indigenous rights in Chile, including the ratification of ILO Convention 169, which, as noted above, Chile has not yet done.

<sup>12</sup> Sara Larrain, "La lecciones de Ralco," *El Mostrador*, September 17, 2004 [online], [http://www.elmostrador.cl/modulos/noticias/constructor/noticia.asp?id\\_noticia=144471](http://www.elmostrador.cl/modulos/noticias/constructor/noticia.asp?id_noticia=144471) (retrieved September 17, 2004).

## **Mapuche Mobilization**

Since 1992, Mapuche communities and political groups have tried to draw national and international attention to their cause and to press for the return of lands they believe to have been grabbed illegally by the forestry companies and private owners. Protest activities have ranged from traditional non-violent demonstrations—such as marches, hunger-strikes, and occupation of public buildings—to acts involving the use of force, such as the blocking of roads, occupation of disputed land, felling of trees, setting fire to manor homes, woods, and crops, and sabotage of machinery and equipment.

The police often fail to distinguish peaceful protest from illegal actions that present a genuine threat to public order by clamping down equally hard on both, sometimes with indiscriminate violence and racist insults. We document some cases of police abuse in Chapter V of this report. With some notable exceptions, Mapuche activists often face an unsympathetic and uncomprehending attitude from government officials, politicians, and the press. They are often seen as violent agitators who are opposed to the economic development of the country and advocate secession of the Araucanía from the state.<sup>13</sup> In point of fact, the Mapuche seek greater autonomy in the administration of their affairs within their ancestral territory, but they do not advocate secession.

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<sup>13</sup> The clearest expression of this point of view can be found in a summary of the arguments presented by Alberto Espina, Senator of the Ninth Region, to the Senate's Committee on Constitution, Justice, and Rules. Comisión de Constitución, Legislación, Justicia y Reglamento, *Informe de la Comisión de Constitución, Legislación, Justicia y Reglamento, recaído en el encargo que le hiciera el Senado respecto del conflicto mapuche en relación con el orden público y la seguridad ciudadana en determinadas regiones*, Boletín No. S680-12, July 9, 2003 [online], [http://www.lyd.com/programas/comunicaciones/mapuche/informe\\_comision\\_c\\_map.pdf](http://www.lyd.com/programas/comunicaciones/mapuche/informe_comision_c_map.pdf) (retrieved June 31, 2004).



A carabineros (uniformed police) tank in the community of Temucucui, Province of Malleco. December 2001.  
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In the late 1990s the press reported that some of the leftist revolutionary groups that had led the armed resistance to the military government had gained entry to Mapuche organizations and were now orchestrating the illegal actions. In coverage of the land conflicts in leading newspapers and journals, writers continue to emphasize the “infiltration” of Mapuche communities, reinforcing a view of the Mapuche as subversives and terrorists.<sup>14</sup> Whatever the historical merits of such claims, nearly all of the scores of people now facing criminal prosecution are Mapuche from the communities directly affected by the conflicts.

### ***Pressure for Firmer Government Action***

As the number of violent incidents mounted, the governments of Eduardo Frei (1994–2000) and of current President Ricardo Lagos came under increasing pressure from the opposition in Congress, southern landowners, and the forestry companies to act with a firmer hand against Mapuche protesters.

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<sup>14</sup> In a special debate on the “Mapuche conflict” in the Chamber of Deputies in June 2002, a parliamentarian argued that “[t]errorism was expanding in rural sectors of the Ninth region and in the southern part of the Eighth region,” a product of the “instrumentalization” of the Mapuche by radicalized groups. (Intervention by Congressman Francisco Bayo, cited in *Los Derechos de los Pueblos Indígenas*), p. 225.



Carabineros (uniformed police) in the community of Temucuicui, Province of Malleco. December 2001.  
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Scores of Mapuche faced prosecution during the Frei government on charges like arson, theft, land grabbing, kidnapping, or wounding. In addition, public officials opened three separate proceedings under the Law of State Security (LSE).<sup>15</sup> Proceedings under this law are intended to be faster than ordinary criminal prosecutions. The minister of the interior or an *intendente* (regional local government official) initiates the prosecution, and an appeals court judge conducts the investigation and trial under special rules that apply to military courts in peacetime. These rules set fixed time limits for each stage of the trial, give judges greater discretion in evaluating evidence, and limit rights of appeal. Instead of using the LSE, the Lagos government has opted to prosecute those it sees as the ringleaders of the violent actions on terrorist charges.

In a March 2002 senate debate, the senator for the Araucanía, Alberto Espina, urged that violent Mapuche groups be combated “[w]ith the full rigor of the law, since their

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<sup>15</sup> In December 1997, at the formal request of the Arauco forestry company, the Intendente (regional government official) of the Araucanía, Oscar Eltit, ordered the prosecution under the LSE of the Mapuches responsible for the burning of three trucks laden with logs in an Arauco property in Lumaco. Twelve were arrested and five eventually convicted under the LSE and sentenced to three years in jail for the disorders.

conduct has created a state of insecurity and fear that is incompatible with the full functioning of the rule of law.”<sup>16</sup> Led by Espina, a specialized Senate committee met for more than a year to discuss the public security aspect of the Mapuche conflict. The result was a 160-page report issued on July 9, 2003. Fifteen prominent landowners whose properties had suffered repeated attacks testified to the committee, but only one Mapuche representative was invited. Rather than probe the roots of the conflict and examine strategies for dealing with it, in essence the report was a vehicle for the grievances of the landowners.

A draft published in May 2003 provoked debate because of its harshness and one-sidedness. At the recommendation of one of the committee members who disagreed with the report’s conclusions, Sen. Rafael Moreno, the committee agreed to hear some Mapuche leaders. While not justifying the violence, all of the Mapuche spoke of the plunder of their people’s lands and the refusal of the state to recognize their traditions and culture. Marcial Colín, a Mapuche leader from Villarica, put the problem in a nutshell. As summarized by the committee, Colín said that it was “[d]ifficult to analyze public security in the Araucanía because from the Mapuche point of view their security has been under threat for a long time.... That’s why a Mapuche understands the term security differently from how it is understood by the Chilean State.”<sup>17</sup>

Defending the government’s record, the minister of the interior, José Miguel Insulza, submitted a long list of the legal actions taken by the state against the perpetrators of the attacks, as well as police measures to protect the victims. As of October 2003, he explained, two hundred Mapuche were facing charges for crimes committed during the protest actions. The great majority (85 percent) were awaiting trial under some form of restrictive measure, such as bail, but were not in detention.<sup>18</sup>

### ***Chile’s “Terrorists”***

All but one of those sentenced or accused of terrorism are said to belong or have belonged to the Coordinadora de Comunidades en Conflicto Arauco Malleco (the Arauco Malleco Coordinating Group of Communities in Conflict, CAM), a Mapuche organization that can be traced back to a February 1998 meeting organized by the Lafkenche Territory Coordinating Group (Coordinadora Territorial Lafkenche) attended

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<sup>16</sup> Comisión de Constitución, Legislación, Justicia y Reglamento, p. 5.

<sup>17</sup> *Ibid.*, p. 79.

<sup>18</sup> *Los Derechos de los Pueblos Indígenas*, Appendix 2, “Situación Procesal de los mapuche imputados y/o condenados en el marco del conflicto territorial,” p. 419.

by many Mapuche organizations.<sup>19</sup> The CAM was set up at a second meeting held in 1998 in Tranakepe, Tirúa. Formed from communities defending or asserting land claims, the group undertook to support all communities in the region involved in conflicts over land and offered to incorporate them into the organization if they and their leaders approved.<sup>20</sup>



Mapuche demonstration in the community of Juan Maril de Puren. Demonstrators are demanding the withdrawal of police forces stationed in the fundo El Rincón, owned by the forestry company Mininco. November 13, 2001.

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The CAM draws most of its support from Mapuche communities in the districts of Collipulli, Traiguen, and Lumaco, in the Araucanía, as well as some parts of the Bío Bío Region. It calls for the “reconstruction of the Mapuche nation,” and has adopted a

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<sup>19</sup> Present at the gathering were the Council of Osorno Chiefs (Consejo de Caciques de Osorno), the Council of All the Lands (Consejo de Todas las Tierras) and the Coordinating Group of Mapuche Organizations and Institutions of Temuco (Coordinadora de Organizaciones e Instituciones Mapuche de Temuco), which includes various Mapuche groups, including Liwen, Xen Xen, Aukinco Domo, Nehuen Mapu, and the Asociación Ñancuqueo de Lumaco. Also present were members of Meli Witran Mapu and the Mapuche Coordinating Group (Coordinadora Mapuche), both based in the capital, Santiago, and Mapuche students from Temuco y Concepción. This list is from Weftun, the official publication of the CAM, November 2001.

<sup>20</sup> Weftun, January 2002.

strategy of “territorial control.”<sup>21</sup> In essence this involves what the CAM calls the “productive recovery” of disputed land, meaning that land occupations are intended to be permanent, rather than merely symbolic. The CAM’s hope is that this form of direct action will spread to other zones and change the balance of forces in favor of the Mapuche.<sup>22</sup>

Although some of its members are said to come from the Communist Party and radical left-wing groups that engaged in armed opposition to the Pinochet dictatorship, the CAM has also strongly questioned Chile’s left-wing parties, criticizing them for trying to manipulate it. It also criticizes more moderate Mapuche organizations, which it says have been “co-opted” by the state. The organization has been significantly weakened since 2002 by the imprisonment of its leaders.

Leaders of the CAM have admitted to engaging in some violent actions in “defense of the territory and self-defense of the communities.”<sup>23</sup> Clearly, some of what its members consider defensive actions is in fact criminal actions that warrant prosecution.

It was in this context of conflict that President Lagos created, in January 2001, the Commission of Historical Truth and a New Deal (Comisión de Verdad Histórica y Nuevo Trato). The commission, composed of about twenty indigenous and non-indigenous representatives and chaired by former president Patricio Aylwin, was set up to advise the government and propose a new policy to address the root problems faced by Chile’s indigenous peoples. In its final report, published in October 2003, the commission dealt with issues related to the history of the indigenous peoples and their relationship to the state and to Chilean society. It made a series of recommendations for the design of a new policy aimed at “advancing toward a new deal by Chilean society and its re-encounter with the indigenous peoples,” such as the introduction of legal and political reforms and the ratification of OIT Convention 169, steps that still remain to be taken. It did not, however, tackle the conflicts that have arisen since the promulgation of Law No. 19,253 of 1993 that are described here.

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<sup>21</sup> “La lucha mapuche es nacionalista, anticapitalista y revolucionaria” (interview by Osvaldo González with a leader of the Coordinadora Arauco Malleco, published in the magazine *Resumen Latinoamericano* No. 58, March-April 2002). From the official website of the Coordinadora Mapuche de Comunidades en Conflicto Arauco-Malleco, Weftun [online], <http://www.weftun.cjb.net/> (retrieved August 18, 2004).

<sup>22</sup> “Planteamiento Político-Estratégico de la Coordinadora de Comunidades en Conflicto Arauco-Malleco (CAM),” Weftun [online], <http://www.weftun.cjb.net/> (retrieved August 18, 2004).

<sup>23</sup> “Principales Razones de Arauco-Malleco: Recuperar ahora....el Territorio Usurpado,” Weftun [online] <http://www.weftun.cjb.net/> (retrieved August 18, 2004).



Concern over the continuing land conflicts also motivated a visit to Chile, in July 2003, by the United Nations special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen. In his report on his mission, the rapporteur noted that “[a]lthough significant progress has been made on indigenous questions in the country in the last ten years, indigenous people continue to live in a situation of marginalization and denial that leaves them cut off in significant ways from the rest of the country.” On the issue of justice, he recommended that “[u]nder no circumstances should legitimate protest activities or social demands by indigenous organizations and communities be outlawed or penalized.” He added that “[c]harges for offences in other contexts (‘terrorist threat,’ ‘criminal association’) should not be applied to acts related to the social struggle for land and legitimate indigenous complaints.” He further proposed that “[t]he Chilean Government should consider declaring a general amnesty for indigenous human rights defenders on trial for social and/or political activities in the context of the defense of indigenous lands.”<sup>24</sup>

### ***Chile’s New Criminal Justice System***

Each of the anti-terrorism trials completed or still underway has been conducted under Chile’s new code of criminal procedure. Approved in October 2000, the new code entered into force in December 2000 in the Araucanía and Coquimbo (Fourth Region, in northern Chile). The new system, however, will not be introduced in the capital, Santiago, until 2005. Under the new code, oral, public, and adversarial hearings protecting the due process rights of the defendant replace written, inquisitorial procedures.

The old system contained built-in limitations on rights to due process and a vigorous defense. The fact that a single judge conducted the investigation, formulated the charges, and pronounced the sentence and penalty greatly limited the possibilities of the defense. Pretrial detention was the norm rather than the exception. Trials were largely conducted in writing, the investigation was secret, the press had no direct access to the proceedings, and indigent defendants had virtually no access to competent legal representation. Under the new system, prosecutors attached to Chile’s autonomous Public Ministry conduct criminal investigations and face trained lawyers from the Public Defenders’ Office, who represent the defendants before a three-person court. Proceedings are open to the public and press.

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<sup>24</sup> *Report of the Special Rapporteur, Rodolfo Stavenhagen*, paras 56 and 87.

During the pre-trial phase a judge responsible for the pretrial hearings (*juez de garantía*) supervises the fairness of the criminal investigation and must ensure that defendants are not held in detention unless strictly necessary. Defendants may request their release pending trial and have their pretrial detention periodically reviewed. Most notably, the Public Defender's Office provides needy defendants for the first time with professional legal counsel. Attorneys attached to the Temuco-based Mapuche Defense Office (*Defensoría Penal Mapuche*) have defended the rights of Mapuche suspects and often litigated successfully on their behalf. Mapuche may at any time during the proceedings call for a bilingual interpreter. Not only has the institutional apparatus of Chilean justice been transformed, but there have also been substantial investments in infrastructure. The court, Public Prosecutor's Office, and public defenders' headquarters in the city of Temuco are all housed in new, elegant, and well-equipped modern buildings.

Unfortunately, the guarantees available to ordinary criminal defendants under the new system are denied, at least in part, to Mapuche accused of terrorist offences. Under the anti-terrorism law, the public prosecutor is allowed to conduct criminal investigations in secret for long periods; pretrial release is usually denied for months, sometimes for longer than the eventual sentence received; defendants are not allowed to know the names of many of their accusers; and judges are given wider powers to allow prosecutors to intercept their correspondence, inspect their computers, and tap their phones than in normal criminal investigations.

Prosecutors fervently deny discrimination. Yet the application of terrorist legislation to Mapuche involved in land conflicts constitutes selective and unequal treatment, in that criminal offenders responsible for homicide, rape, or other grave crimes against the person enjoy more guarantees than Mapuche defendants, and often receive lower sentences. Under art. 26 of the International Covenant on Civil and Political Rights, Chile must ensure that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

#### **IV. ANTI-TERRORISM TRIALS**

The use of the anti-terrorism law is inappropriate in land conflict cases and strips defendants of a range of due process protections. Some of its provisions violate essential fair trial guarantees protected by the International Covenant on Civil and Political Rights and the American Convention on Human Rights, such as the right of defendants to cross-examine witnesses under the same conditions as the prosecution.

General Pinochet introduced Chile's anti-terrorism law (Law No.18,314) in 1984 to provide a comprehensive legal weapon for dealing with mounting violent as well as non-violent opposition to the military dictatorship. Used to tackle audacious armed actions by leftist urban guerrilla groups in the mid-1980s—there was a failed attempt on Pinochet's life in 1986 in which four of his bodyguards were killed—the law was also an instrument for intimidating non-violent dissidents. The law's use to quell non-violent dissent ended with the return of democracy in March 1990, but Law No.18,314 continued to be used until the mid-1990s against remnants of leftist urban guerrilla groups.

In January 1991, the Aylwin government introduced major amendments to the law as part of a wider effort to bring the public security legislation inherited from the military government into line with human rights standards. In May 2002, the law was again modified to harmonize its provisions with the new code of criminal procedure.

### ***Terrorist Crimes***

While the law began life under Pinochet, it was paradoxically the Aylwin government's reforms that turned it into what prosecutors came to view as a suitable instrument for dealing with the kind of offenses that have characterized land conflicts in the South. Faced by a situation in which the military government had treated terrorism essentially as a political or ideological offense, the Aylwin reforms removed its political connotations and conceived of it simply as an egregious type of violent crime against the person. The preamble to the 1991 Aylwin bill defined terrorism as an "attack against life, physical integrity or liberty by means which produce or may produce indiscriminate harm, with the purpose of causing fear in a part of or all of the population."<sup>25</sup> According to the law, terrorist crimes are committed:

[w]ith the intention of producing in the population, or in part of it, a well-founded fear of falling victim to the same type of crime, either because of the nature and effects of the method used, or by evidence that the act was part of a premeditated plan to attack a specific group or category of persons.<sup>26</sup>

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<sup>25</sup> "Historia de la Ley 19,027, Biblioteca del Congreso Nacional [1997]," cited in Antonio Bascuñán Rodríguez, "El delito de incendio terrorista," *Informe en Derecho*, Universidad de Chile, Facultad de Derecho, Departamento de Ciencias Penales, October 15, 2003, pp. 5, 9.

<sup>26</sup> Art. 1 of Law No.18,314.

The law states that in certain cases a terrorist intention can be inferred from the use of weapons of indiscriminate or mass destruction, such as explosives, incendiary devices, and chemical or biological weapons. Otherwise, the burden is on the prosecutor to establish evidence of a terrorist intention.<sup>27</sup>

The law lists the following crimes as potential crimes of terrorism: murder; mutilation; infliction of wounds; kidnapping; hostage-taking; sending explosive substances; arson; derauling of trains; attacks on ships, planes, trains, and buses (including hijacking); assassination of the head of state and/or leading political, judicial, and religious figures, or of internationally protected persons; the detonation of explosive or incendiary substances that endanger life; and illegal association to commit any of these crimes.<sup>28</sup>

The most questionable crime included in this list is precisely the one most frequently applied to the Mapuche—that is, arson, including its less serious forms. Offenses under the anti-terrorism law include setting fire to uninhabited buildings and “woods, cornfields, pasture, scrub, fences, or fields.”<sup>29</sup> The anti-terrorism law in force during the Pinochet era made no reference to arson. The original bill presented by the Aylwin government did not contemplate it either, but it was introduced during the bill’s discussion in committee in the lower house of the Chilean Congress.<sup>30</sup>

Arson is included in the ordinary criminal code in a chapter that refers to crimes against property, rather than in one referring to crimes against the person. It is the only crime of violence in the anti-terrorism law that does not involve a direct or deliberate threat to life, liberty, or physical integrity. Inclusion of arson of this less serious sort among a list of terrorist offenses is highly questionable given the much more serious crimes contemplated by international conventions dealing with terrorism.

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<sup>27</sup> Government officials, who may open an investigation under the anti-terrorism law, are sometimes insufficiently rigorous in what they label as terrorism. For example, in August 2003 the Ministry of the Interior filed a complaint under the anti-terrorism law against those responsible for burning a bus during a general strike organized by the Chile’s main trade union federation, the Central Unitaria de Trabajadores (CUT). In this case the crime involved a serious act of violence, but it could scarcely be presumed to be a premeditated act intended to terrify others. Otherwise, all violent public order offenses accompanying street protests could lead to convictions for terrorism, a drastic and inappropriate escalation in the state response. “Paro: Gobierno recurre a ley antiterrorista por incidentes,” *La Nación*, August 14, 2003; Juan Manuel Ugalde, “Gobierno desata ofensiva judicial post paro,” *La Nación*, August 15, 2003.

<sup>28</sup> Art. 2 of Law No.18,314.

<sup>29</sup> Art. 476 (3) of the Criminal Code.

<sup>30</sup> Antonio Bascuñán Rodríguez, “El delito de incendio terrorista,” p. 9.

International law considers terrorist crimes to be of extraordinary gravity: the “peacetime equivalent of a war crime,” as terrorism expert A.P. Schmid told the United Nations Crime Branch in 1992. Its core elements include deliberate attacks on civilians, hostage taking, and the killing of prisoners. In the words of United Nations Secretary-General Kofi Annan: “By its very nature, terrorism is an assault on the fundamental principles of law, order, human rights, and the peaceful settlement of disputes upon which the United Nations is established.”<sup>31</sup>

Most of the twelve United Nations conventions and protocols on terrorism deal individually with its specific forms (hostage-taking, bombings, seizure of aircraft, attacks on maritime navigation, and so on), each of which involves violence and potential harm to persons. The only convention that includes a definition of terrorism is the International Convention for the Suppression of Financing of Terrorism. In this treaty terrorism is defined as:

Intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>32</sup>

The Inter-American Convention against Terrorism, adopted in June 2002 and signed by thirty-three countries including Chile, refers only to the offenses defined under the United Nations conventions and protocols already mentioned. As noted already, all involve grave violence against persons.<sup>33</sup>

Crimes considered extraditable offenses in the European Convention on the Suppression of Terrorism also involve attacks on life, liberty, and physical integrity. They include the hijacking of aircraft; unlawful acts against the safety of civil aviation; attacks against the life, physical integrity, and liberty of internationally protected persons; kidnapping and hostage-taking; and any offense involving the use of a bomb, grenade, rocket, automatic firearm, or letter or parcel bomb if this use endangers persons.<sup>34</sup>

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<sup>31</sup> Cited in United Nations Office on Drugs and Crime, “Global Program against Terrorism,” webpage article at <http://www.unodc.org/unodc/terrorism.html> [online], (retrieved June 24, 2004).

<sup>32</sup> International Convention for the Suppression of the Financing of Terrorism, art. 2 (1) (a) (b).

<sup>33</sup> Inter-American Convention against Terrorism, 2003, art. 2.

<sup>34</sup> European Convention on the Suppression of Terrorism, concluded in Strasbourg on January 27, 1977, art. 1.

Chile's Constitution expressly considers that "[t]errorism in any of its forms is by its essence contrary to human rights."<sup>35</sup> The use of antiterrorism legislation to deal with crimes of lesser gravity is inconsistent with that forthright constitutional principle. The consequences for those convicted are serious. The Constitution reserves special punishment for convicted terrorists that far exceeds what applies to ordinary criminals. In addition to the stiffer prison sentences, those convicted may not hold public office, teach in schools or universities, practice journalism, or lead political parties, trade unions, student or professional associations for fifteen years. Moreover, they are excluded from any government pardon except to commute a death sentence to life imprisonment.<sup>36</sup> Those charged with terrorist offenses lose the right to vote for the duration of the trial until they are acquitted. They may only be released on bail with the express consent of a higher court composed of all its members in a unanimous vote.<sup>37</sup> If they are convicted, they lose their citizenship. After they complete their sentences, their citizenship can be restored, but only by a special law requiring an absolute majority of all members of Congress.

Under current Chilean laws anyone can bring a criminal complaint alleging that a crime of terrorism has been committed against them. Private individuals, companies, the regional government, the Ministry of the Interior, and even the mayor of Temuco, have all initiated terrorism proceedings against Mapuche through such allegations in recent years. Although a judge must first issue a reasoned ruling that the crime be investigated as an act of terrorism (a decision that gives extra powers to the prosecution, as we note below), the fact that any party can lodge a criminal complaint alleging terrorism increases the risk of arbitrary accusations.<sup>38</sup>

The government's position on the use of the law is ambiguous. Government officials continue to insist that, while there are prosecutions for terrorism, there is no terrorism in Chile. This is the opinion of Jorge Vives, a senior interior ministry official. When questioned on the issue by a judge in the Poluco Pidenco case, Vives replied:

Your Honor, it's very simple. In Chile there's no terrorism, but in Chile terrorist crimes have been committed. Those are two totally different questions.... There are two people who were convicted of terrorist

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<sup>35</sup> Art. 9 of the Chilean Constitution.

<sup>36</sup> Ibid.

<sup>37</sup> Articles 16 (2) and 19 (7) (e) of the Constitution.

<sup>38</sup> Art. 14 of Law No.18,314.

crimes, but to say that there are people who have committed terrorist crimes doesn't mean that there is terrorism in Chile.<sup>39</sup>

The United States State Department also considers that there is no terrorism in Chile. In a world-wide review of terrorist activity in 2003, the U.S. State Department stated that “[n]o incidents of explicit terrorism occurred in Chile in 2003.”<sup>40</sup> The report does not mention the application of anti-terrorism legislation in land conflicts in southern Chile. It is difficult to understand, if there is no terrorism in Chile, how eight people in Chile have been convicted on terrorism charges in 2003 and 2004, and how, at this writing, eleven others still face terrorism charges. The most obvious conclusion is that those convicted and facing charges are not really terrorists and are being pursued according to a law that is inappropriate given the nature of the crimes.

Yet Chilean courts have rarely questioned use of the anti-terrorism law in dealing with the typical crimes that have characterized the land conflicts. In some cases, even courts that have acquitted defendants accused of terrorism have not questioned its applicability. A case in point is the already described “trial of the loncos” in which three individuals were accused of setting fire to two manor houses and pine plantations on the Nanchahue estate, near Traiguén, in December 2001. In the first trial, in April 2003, the Oral Criminal Court of Angol ruled that the prosecution had established “beyond reasonable doubt” that terrorist crimes were committed even though it found the evidence insufficient to convict the accused as perpetrators of those crimes. The court held that the methods and strategy used in the attacks “[h]ad a malicious intent of causing general fear in the zone, a situation that is public and well-known and which these judges cannot ignore.” The recovery of Mapuche lands was by “[d]irect action, without respect for the legal and institutional order,” using acts of force that had been “[p]reviously planned, agreed and prepared by radicalized groups that seek to create a climate of insecurity, instability and fear in the Eight and Ninth Regions.”<sup>41</sup> In another case, the Poluco Pidenco case discussed below, the Supreme Court disqualified and removed the only judge who had rejected the terrorism charges. The trial court eventually reinstated the charges and five defendants were convicted.

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<sup>39</sup> Court transcript, dated August 10, 2004, copy on file at Human Rights Watch.

<sup>40</sup> U.S. Department of State, *Patterns of Global Terrorism 2003*, released by the Office of the Coordinator for Counterterrorism, April 29, 2004.

<sup>41</sup> Oral Criminal Court of Angol, C/ Pascual Huentequero Pichún Paillalao y otros, April 14, 2003.



March of the community of Traiguén in front of the Oral Criminal Court of Angol during the first "trial of the loncos." On the right are lonco Aniceto Norin and machi Maria Anacamilla. March 31, 2003.

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Terrorism charges were also invoked to convict Mapuche leader Víctor Ancalaf Llaupé for setting fire to four trucks and a mechanical digger belonging to the electrical company Endesa in three separate incidents in September 2001 and March 2002, during protests against the Ralco dam. The case against Ancalaf was brought under the anti-terrorism law by the governor of Bío Bío province, Enrique Krausse Salazar. Unlike the other cases discussed in this report, this terrorism trial was conducted under the largely written procedures of the old code of criminal procedure, which was still in force at the time in the Bío Bío region, where the incidents occurred. In December 2003, Judge Diego Simpértegui, of the Concepción Appeals Court, sentenced Ancalaf to ten years and one day of imprisonment after finding him responsible in each of the three incidents. In June 2004, the sentence was reduced on appeal to five years and a day after the Appeals Court acquitted him of the first two incidents, finding the evidence weak. Nevertheless, the court upheld the terrorist charge for the third offense. Among the considerations cited by the court was the use of an incendiary device, as well as the



supposed intention to cause fear and to wrest a decision (against Ralco) from the government.<sup>42</sup>

Although the Office of the Attorney General is autonomous, its officials seem to share the viewpoint of government officials on the use of the law. As we note below, the law gives the prosecution advantages over the defense in the treatment of evidence, particularly through the longer period in which it may be kept secret and the admission of testimony from anonymous witnesses. Also, use of the anti-terrorism law may, under certain circumstances, undermine the presumption of innocence. In several cases involving Mapuche defendants accused of terrorism, judges cite the terrorist charges as grounds for rejecting defense requests for the accused to be released on bail. The nature of the terrorist accusation, in itself, makes it probable that the accused will be held in preventive detention for months, longer than if the defendant were accused of similar crimes under the ordinary criminal code.

### ***Due Process Restrictions***

Law No.18,314 provides law enforcement officers with special tools to deal with terrorist offenses. Detainees may be held for up to ten days before being presented to a judge and formally charged. This is a week longer than the time permitted in the case of ordinary criminal defendants, although during this extra period the detainee is allowed to receive visits from a lawyer. Once formally charged with a terrorist offense, the detainee's right to receive visits from family members may be restricted; prosecutors may apply to the judge for powers to tap telephones, intercept correspondence, emails, and other communications with any person, except for the lawyer, for an indefinite period; and, if the prosecutor considers that the physical security of witnesses is at risk, evidence may be kept secret for up to six months.<sup>43</sup> All of these powers have been used in cases involving Mapuche.

In the following sections three due process restrictions that typically arise in anti-terrorism trials are discussed: extended pretrial detention, the use of anonymous or "faceless" prosecution witnesses, and the hazard of double jeopardy.

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<sup>42</sup> Concepción Appeals Court, Sentence, June 4, 2004. An appeal presented by Ancalaf's defense to the Supreme Court alleged that the appeals court committed an abuse, among other reasons, by interpreting and applying the anti-terrorism law incorrectly. At this writing, the appeal has still to heard.

<sup>43</sup> In normal criminal investigations judges may authorize such powers for only two months, and only order the interception of the telephone calls of the defendant and criminal suspects.

## **Pretrial Detention**

A detainee held on terrorist charges, even if eventually acquitted, is likely to face long periods in pretrial detention due to the seriousness of the terrorist tag: the formal charges have a decisive bearing on such crucial matters as the liberty of the defendant and the access of his or her counsel to prosecution evidence. In deciding to investigate a crime as a terrorist act a prosecutor increases the likelihood that the suspect will remain in prison for the entire period until the trial, or a significant part of it.

The new criminal procedure code allows for periodic reviews of orders for pretrial detention at which the accused may eventually obtain pretrial release.<sup>44</sup> Under the new code, pretrial detention is permitted only when the judge considers it necessary to ensure the success of the investigation or when the accused is considered dangerous.<sup>45</sup> Among the facts the court considers are the number of crimes involved and the severity of the penalty attached to them. The court may not order preventive custody when it is out of proportion to the seriousness of the crime or the penalty.<sup>46</sup> But clearly, if the charges are serious—terrorist arson, for example—judges are likely to approve an order for the defendant’s imprisonment without further question. Most, in fact, have done so in cases of Mapuche accused of terrorist acts.

Indeed, even in ordinary criminal trials, defense lawyers have criticized prosecutors for exaggerating charges to prolong unfairly the period of pretrial detention.

As the Indigenous Rights Program at the University of the Frontier has pointed out:

In this sense, even though the first statement of the charges (*formalización*) is a unilateral faculty of the prosecutor that may not be challenged, it does not seem logical to allow the prosecutor to exercise it arbitrarily and artificially in order to obtain and maintain the preventive detention of a person, as has occurred in the case of the Mapuche accused in the context of the conflicts.<sup>47</sup>

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<sup>44</sup> Indeed, if a hearing is requested after more than two months have passed since the last such hearing, the court must agree to it (art. 144). After six months have passed since the last hearing the court itself must order a hearing to decide whether imprisonment should continue (art. 145).

<sup>45</sup> Art. 139 of the Code of Criminal Procedure: “[p]reventive detention shall only be valid when the other personal measures of protection are insufficient to ensure the objectives of the proceedings.”

<sup>46</sup> Art. 140, 141 of the Code of Criminal Procedure.

<sup>47</sup> *Los Derechos de los Pueblos Indígenas*, p. 235. Under Chile’s new criminal procedure, criminal investigations begin with a court hearing known as a “formalization hearing” (*audiencia de formalización*), in which the prosecutor explains to the defendant in the presence of the juez de garantía the accusations and charges on

The cases of Jorge Huaiquín Antinao and Juan Luis Llanca illustrate the abuses inherent in the anti-terrorism statute's pretrial detention provisions. Twenty-nine-year-old Jorge Huaiquín Antinao from the community of Agustín Chiguaicura, commune of Nueva Imperial, was detained on April 15, 2002, on five serious charges: "violent usurpation," robbery with force, damage to property, illegal felling of trees, and arson, allegedly committed during the occupation of a disputed neighboring estate. After four months in preventive detention, he was released conditionally on August 21, 2002, but was re-arrested on December 4, 2002, to face a new charge of terrorist conspiracy. After another eight months in detention, he was released conditionally from custody in September 2003. At that time, the Oral Criminal Court of Temuco dropped the criminal charges against Huaiquín for lack of evidence and replaced them with the charge of "public disorder." The prosecutor asked for three hundred days of imprisonment, but the court found the evidence shaky, and in January 2004, it acquitted Huaiquín and his co-defendant, Juan de Dios Puel Tralma.<sup>48</sup>

Juan Luis Llanca, from the Mapuche community of Domingo Trángol, was arrested on January 11, 2002, for his alleged role in setting crops on fire at the private El Ulmo estate.<sup>49</sup> The prosecutor filed charges against Llanca under the anti-terrorism law. The seriousness of the charges prevented Llanca's release until July 2003—he lost three hearings in which his preventive detention was reviewed. The prosecutor finally dropped the terrorist charge after Llanca, who until then had stuck to his right to remain silent, confessed that he had participated in the burning of the crops. "The burning happened on the spur of the moment as a response to the action of the carabineros, because they invaded our land," Llanca testified. He received a five-year suspended sentence for this crime, but by then had already spent eighteen months in pretrial detention on the terrorism charges.

Under the International Covenant on Civil and Political Rights, people are:

[e]ntitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, or at any other

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which the investigation is based. They conclude with a formal indictment (*acusación*) which forms the basis of the trial.

<sup>48</sup> Oral Criminal Court of Temuco. "Public Disorders" [online], <http://www.defensoriapenal.cl/archivos/1087499109.pdf> (retrieved June 22, 2004). "Temuco: Tribunal Oral absuelve a dirigentes mapuches," *El Mostrador*, January 23, 2004.

<sup>49</sup> Since 1932 Domingo Trángol, located about twelve kilometers from the town of Victoria, has been seeking the recovery of 428 hectares of land now occupied by private owners and the Mininco forestry company. The community began mobilizing to reclaim the land in early 2001.

stage of the judicial proceedings, and should occasion arise, for execution of the judgment.<sup>50</sup>

The United Nations Human Rights Committee interprets this requirement to mean that “[p]re-trial detention should be an exception and as short as possible.”<sup>51</sup> Under the anti-terrorism legislation now being applied in Chile, it has become the rule rather than the exception and has often lasted for longer than a year.

Unless used as an exceptional measure, moreover, lengthy pretrial detention can affect the presumption of innocence, a cornerstone of the new Chilean criminal justice system. In the Giménez case, the Inter-American Commission on Human Rights argued that:

[t]he risk of inverting the presumption of innocence increases with an unreasonably prolonged pre-trial incarceration. The guarantee of presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial imprisonment is prolonged unreasonably, since presumption notwithstanding, the severe penalty of deprivation of liberty which is legally reserved for those who have been convicted, is being visited upon someone who is, until and if convicted by the courts, innocent.<sup>52</sup>

### **“Faceless” Witnesses**

Under the anti-terrorism law, the prosecution’s use of witnesses whose identity is withheld from the accused and his or her defense lawyers seriously limits the scope of the defense, and increases the risk of unsound convictions. These witnesses are presented in court behind screens that prevent them being seen by the defendants, their lawyers, or the public. During the trial of Pascual Pichún, Aniceto Norín, and Patricia Troncoso, the hidden witnesses spoke through voice-distorting microphones. Both procedures are being used in the trial currently underway in Temuco for “illicit terrorist

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<sup>50</sup> International Covenant on Civil and Political Rights, art. 9 (3).

<sup>51</sup> United Nations Human Rights Committee, *General Comment No. 8: Right to liberty and security of persons* (Art. 9), HRI/GEN/1/Rev.6, chap. II, para. 3, June 30, 1982. See also, *Protection of human rights and fundamental freedoms while countering terrorism*, report of the Secretary General, fifty-eighth session, Item 119 (b) of the provisional agenda. United Nations General Assembly, A/58/266, August 8, 2003, para. 41 [online], <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/464/15/PDF/N0346415.pdf?OpenElement> (retrieved on September 10, 2004).

<sup>52</sup> Case No. 11.245, March 1, 1996. Annual Report of the Inter-American Commission on Human Rights, 1995. OEA/Ser.L.V/II.91, Doc. 7 rev. February 28, 1996 [online], <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/humanrights.htm> (retrieved September 10, 2004).

association.” In principle, as explained below, the use of unidentifiable witnesses is an unacceptable limitation of the right to defense. It is particularly serious if the evidence submitted by them is crucial to the prosecution case and a conviction could hinge on it.

The modifications of the anti-terrorism law introduced in 2002 envisage measures to protect key prosecution witnesses and their relatives or loved ones if the Public Ministry considers them to be in physical danger.<sup>53</sup> The law allows for these witnesses to give evidence in court “[b]y any suitable means that prevents their normal physical identification.”<sup>54</sup> The problem is not that the defense is barred from cross-examining these protected witnesses. It is allowed to do so—indeed, the law explicitly prohibits the introduction of such testimony into judicial proceedings unless the defense has had an opportunity to examine the witness.

When the defense is refused information about the witnesses’ names or personal details, however, it is unable to investigate their credibility or identify potential conflicts of interest. Relevant factors might include possible kin or other relationships to the defendants, the victims, or other prosecution witnesses; employment history; criminal records; or medical details such as whether the witness is shortsighted or suffers from impaired memory. One of the most important guarantees against perjury is the ability of the defense to seek out such information to cast doubt on the veracity of testimony from prosecution witnesses.

International human rights bodies have expressed the view that the use of anonymous witnesses violates international standards of fair trial. In its Concluding Observations on Colombia, the United Nations Human Rights Committee found that Colombia’s regional judicial system, “[w]hich provides for faceless judges and anonymous witnesses, does not comply with art. 14 of the Covenant, particularly paragraph 3 (b) and (e), and the Committee’s General Comment 13 (21).”<sup>55</sup>

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<sup>53</sup> The identity of these witnesses may be withheld from all records in the case, substituting instead a codename; the address of the courthouse may be substituted for their personal address, and they may be questioned at a secret location. The press is not allowed, under penalty, to release their names or details that could lead to them being identified or to photograph or film them. “Protected witnesses,” as they are referred to in the law, may be assigned police guards if needed. Also, if necessary, they may be given money to help them move to a new residence or for other purposes, and in cases of extreme urgency they may be provided with a new identity.

<sup>54</sup> Art. 16 of Law No. 18, 314.

<sup>55</sup> United Nations Human Rights Committee, *Concluding Observations on the Report Submitted by Colombia under art. 40 of the International Covenant on Civil and Political Rights*, CCPR/C/79/Add.76, May 5, 1997, para. 21.

Art. 14(3) (e) of the ICCPR states that the accused shall be entitled “[t]o examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” According to General Comment 13 (21), the purpose of this provision is to “[g]uarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”<sup>56</sup>

In its recent report on terrorism and human rights, the Inter-American Commission on Human Rights considers that the right to examine witnesses could, in principle, be restricted “in some limited instances.” However, it points out that the vulnerability of witnesses “[c]an never serve to compromise a defendant’s non-derogable due process protections and each situation must be carefully evaluated on its own merits within the context of a particular justice system.” Among the considerations that must be weighed, in the commission’s view, is the sufficiency of the grounds given for withholding information about the identity of witnesses. Other relevant considerations are whether defense counsel is able to question the anonymous witnesses, and whether the court itself knows their identity.<sup>57</sup>

In the new Chilean criminal system, the juez de garantía (the judge who safeguards defendants’ rights during the pretrial investigation) may reject the grounds given by the prosecution for withholding the identity of witnesses. In some cases, judges have actually ordered prosecutors to make this information available to the defense. It is also true that the prosecution must provide judges with the names and addresses of protected witnesses—they are handed over in a sealed envelope. However, defense lawyers consulted by Human Rights Watch did not consider this an effective safeguard. Judges in the new accusatorial system do not investigate; that function is left exclusively to prosecution and defense. It is up to the defense alone to do any investigation that might impugn the credibility of prosecution witnesses. As noted, their anonymity shields them from such scrutiny.<sup>58</sup>

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<sup>56</sup> United Nations Human Rights Committee, *General Comment 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law* (Art. 14). A/39/40, April 13, 1984. Annex VI (pp. 143-147), CCPR/C/21/Rev.1, (pp. 12-16) [online], [http://sim.law.uu.nl/SIM/CaseLaw/Gen\\_Com.nsf/a1053168b922584cc12568870055fbbc7ed542c53f198d83c125688700532c31?OpenDocument](http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/a1053168b922584cc12568870055fbbc7ed542c53f198d83c125688700532c31?OpenDocument) (retrieved June 22, 2004).

<sup>57</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., October 22, 2002, D[1:g].

<sup>58</sup> Human Rights Watch telephone interview with Sandra Jelves, Public Defender’s Office, Temuco, June 24, 2004.

The United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, noted in his report on his visit to Chile in 2003 that the system of protected witnesses cancels out some of the advantages of the oral proceedings and “[i]ntroduces a serious imbalance in the weight given to oral testimony as opposed to documentary and material evidence.”<sup>59</sup>

The use of faceless witnesses is becoming more common as trials of Mapuches under the anti-terrorism law multiply. Two faceless witnesses featured in the April 2003 “trial of the loncos,” mentioned above. About thirty-eight are to be presented in the trial of sixteen alleged members of the CAM for “illicit terrorist association,” which began on October 8, 2004. Of the sixteen defendants, eight are on trial at the time of writing; the trial of the other eight is pending.<sup>60</sup>

The appearance of two faceless witnesses in the “trial of the loncos” provoked a debate in the press about due process standards in antiterrorism trials.<sup>61</sup> When the loncos’ defense attorneys complained to the judges that they could not defend their clients effectively if the names of key witnesses were withheld, the court accepted that due process was a constitutionally protected right and ordered that the names be disclosed to the lawyers. However, the lawyers were not allowed to reveal the names to their clients. This is a potentially serious limitation, since the defendants are likely to know much more about these witnesses, most of whom live in or close to their communities, than their defense counsel.

In another case, a judge ruled that the prosecutor should provide the defense with the names of protected witnesses as well as the amount of money spent on them. Ten Mapuches and a sympathizer had been accused of “terrorist arson” in connection with a December 2001 fire at the Poluco Pidenco property of the forestry company Mininco. Apart from police and forestry workers, the prosecution witnesses included ten Mapuches from the communities in question who were under the protection of the Unit for the Care of Victims and Witnesses.<sup>62</sup>

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<sup>59</sup> *Report of the Special Rapporteur. Rodolfo Stavenhagen*, para. 35.

<sup>60</sup> Human Rights Watch interview with prosecutor Francisco Rojas, Temuco, August 13, 2004.

<sup>61</sup> “Tribunal oral absolvió a Mapuches: debate genera declaración de los denominados ‘testigos sin rostro,’” *La Semana Jurídica*, Year 3, No. 127, April 14-20, 2003. See also Felipe Marín Verdugo, “Testigos sin rostro y violación al derecho a la defensa,” *El Mercurio*, April 6, 2003.

<sup>62</sup> The Unit for Care of Victims and Witnesses (Unidad de Atención a Víctimas y Testigos) is a unit of the prosecutor’s office that guards witnesses considered to be at risk of attack or intimidation.

In practice, protected witnesses are usually members of the same Mapuche communities as the accused. Prosecutors offer them protection in exchange for inside information, considering anonymity essential to give them confidence to defy possible threats and intimidation by Mapuche activists or their sympathizers.<sup>63</sup> The police provide these witnesses with guards or erect fences outside their homes; reinforce the doors and windows of their homes; install emergency alarms; supply them with cell-phones; and if necessary move them out of the communities to rented housing. After the verdict in the Poluco Pidenco case was announced on August 17, 2004, a Temuco electronic newspaper published a confidential report from the office of the regional prosecutor to the juez de garantía, Nancy Germany, detailing expenses totaling more than twenty million pesos (more than \$30,000) used to protect the ten key witnesses in the case.<sup>64</sup>

Inside the communities the identity of these witnesses is often obvious to the *comuneros*.<sup>65</sup> Those who approach or are approached by the police often belong to families who have held long grudges against the accused. The protection of the authorities as well as the resources they receive gives them power inside the communities. These circumstances, allege defense lawyers, provide a fertile ground for malicious accusations based on resentment, revenge, or greed.

In the Poluco Pidenco case, for example, once the defense had the names of protected witnesses it determined that several had criminal records for gun possession and threats and was able to challenge their credibility.<sup>66</sup> Although the challenge ultimately failed in the court, this is the kind of issue which defense teams should be able to raise if there are to be fair trials in such cases.<sup>67</sup>

### **Supreme Court Interventions**

On two occasions when judges have issued decisions favoring Mapuche defendants in terrorism cases, the Supreme Court has issued highly controversial decisions reversing them.

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<sup>63</sup> Human Rights Watch interview with Esmirna Vidal, Regional Prosecutor for the Ninth Region, May 27, 2004.

<sup>64</sup> "Más de 20 millones se gastó en testigos sin rostros," *El Gong*, August 18, 2004.

<sup>65</sup> *Comuneros* are members of a *comunidad*, or indigenous community.

<sup>66</sup> Official court transcript, dated August 11, 2004 (copy on file at Human Rights Watch). A Human Rights Watch representative was present at the trial on August 9 and 11, 2004.

<sup>67</sup> Oral Criminal Court of Angol, C/ José Benicio Huenchunao Mariñan and others. Delito: Incendio. Código: 00837 R.U.C.: 0100086594-2. R.I.T.: 21-2004, August 22, 2004, para. 18.



In April 2002, in the “trial of the loncos,” the trial court acquitted Pascual Pichún, Aniceto Norín, and Patricia Troncoso on charges of terrorist arson and threats. The trial court concluded unanimously that the evidence presented by prosecutors was unreliable. In July 2003, the Supreme Court ordered a retrial, upholding the view of the prosecutor and the victims that the verdict was null because the court had not stated clearly its grounds for rejecting prosecution evidence. The justices argued that the trial court had failed to give proper weight to all the evidence supplied by the prosecution.

One of the five judges, Milton Juica, dissented from this judgment. In his opinion, the law did not require the court to specify in the judgment the reasons for rejecting prosecution evidence, while the court was obliged to explain exactly its grounds for accepting evidence for a conviction. The point highlighted by Juica follows from the presumption of innocence, the fundamental principle on which Chile’s new criminal procedure code is based. No one has to prove their innocence; the burden is on the court to prove guilt and for this it must specify its grounds in detail.

After hearings that took a few hours, the Supreme Court overruled the findings of a trial court that had ruled unanimously after meticulously sifting evidence for twelve days in open court. A subsequent Supreme Court judgment in a different annulment appeal applied the reasoning used by Juica in dissent in the case of the loncos rather than that of the majority decision.<sup>68</sup> Moreover, in a discussion at a book launch at Temuco’s Catholic University on August 25, 2003, Enrique Cury, the justice who had read out the verdict annulling the acquittal of the loncos, stated that he had altered his opinion and believed that the position adopted by Judge Juica had been correct.<sup>69</sup>

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<sup>68</sup> In a ruling against an appeal requesting annulment of a conviction in a rape case, the same Supreme Court bench ruled in August 2003 that, in passing judgment, courts are not required to substantiate the grounds for rejecting prosecution evidence in such detail as is required when specifying the evidence on which a conviction is based. (Oral Criminal Court of Calama, Rol Único 0200011127-1, August 11, 2003).

<sup>69</sup> Human Rights Watch interview with Jose Martínez Ríos, Attorney, Araucanía Public Defender’s office, Temuco, October 5, 2004. Martínez was present at the discussion.



Second "trial of the loncos" in the Angol Oral Criminal Court. In the photograph are loncos Pascual Pichun and Aniceto Norin, wearing their traditional makun (poncho) and trarilonko (head piece). August 9, 2003.  
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Commenting on the retrial that followed the annulment verdict, the United Nations special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, stated that he could not:

...[h]elp but express concern at such an extraordinary situation, which has arisen in the context of a social conflict and in which the right to due process could be violated and the impartiality of a respected body such as the Supreme Court of Justice could be called into question.<sup>70</sup>

Another questionable intervention by the Supreme Court occurred in the middle of the Poluco Pidenco investigation. Juez de garantía Nancy Germany had rejected the prosecution's treatment of the arson attack as a terrorist crime and denied prosecution requests for witness protection and anonymity.<sup>71</sup> The Temuco Appeals Court upheld her

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<sup>70</sup> *Report of the Special Rapporteur, Rodolfo Stavenhagen*, para. 40.

<sup>71</sup> A few days later, a witness, Luis Licán Montoya, was beaten, shot, and seriously wounded by unknown assailants as he left his home in the community of San Ramón. Two comuneros associated with the defendants in the case were arrested for attempted murder, but Judge Germany ordered their release in September after they tested negative on nitrate tests. Representatives of the Mapuche community of Chekenko issued a

decision. Acting at the petition of the defense, Judge Germany refused to incorporate into the indictment four pages containing arguments and evidence backing the terrorist accusation, arguing that they contained elements not presented at the formalization hearing.<sup>72</sup> The prosecution lodged a disciplinary complaint (*recurso de queja*) against the judge, which the Temuco Appeals Court declared inadmissible. The prosecutor then sent the complaint to the Supreme Court.

In a decision reached in January 2004, the Supreme Court also ruled the disciplinary complaint inadmissible. Yet, in a controversial ruling, in March 2004 the Supreme Court's criminal bench stated that Judge Germany had nevertheless overstepped her powers by rejecting the prosecutor's case for the terrorism prosecution. In one fell swoop it ordered the terrorist charges reinstated and removed Judge Germany from the case.<sup>73</sup> The court invoked a statute governing the functions of the courts to the effect that "if it considers it convenient for the good administration of justice, the Supreme Court may correct on its own account the faults and abuses that any judges or judicial officials commit in the course of their duties."<sup>74</sup> The decision appalled those engaged in the Mapuche defense. "It sent a very stern message to the judges," a senior official of the Public Defenders' office commented to Human Rights Watch.<sup>75</sup>

In ordering that the terrorism charge be reinstated the Supreme Court argued that a juez de garantía has no powers to rule on the validity of charges brought by the prosecutor, which must be a matter for the trial court to decide.<sup>76</sup> The court's reasoning raises concern that prosecutors who abuse their discretion and file unwarranted charges of terrorism will not be subject to any judicial control until the start of the trial. As already

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statement two days after the attack in which they accused Licán of threatening members of the community with a gun. "Many comuneros don't want to cooperate with the prosecutors," the statement said, "but they summon them to testify and then ask them to collaborate and give them money and a cell-phone and tell them they will always have protection of every kind against the rest of the comuneros." The crime against Licán has still not been clarified. "Declaración de Chekenko y San Ramón," Mapuexpress, published in the electronic newspaper El Gong on July 7, 2004 [online], <http://www.mapuexpress.net/publicaciones/comunicados/denuncia-fiscales.htm> (retrieved June 22, 2004).

<sup>72</sup> The law stipulates that the indictment can only refer to facts and individuals referred to in the formalization hearing, although the nature of the charges in the indictment may be different (art. 259 (3) of the Code of Criminal Procedure). In the Poluco Pidenco case, the defense argued that the prosecutor had violated this norm by including in the indictment references to incidents that were not referred to in the formalization hearing. Judge Germany ordered the prosecutor to remove these sections of the indictment, which actually formed the basis for the terrorism charge.

<sup>73</sup> Supreme Court ruling dated March 18, 2004, copy on file at Human Rights Watch.

<sup>74</sup> Art. 541 of the Organic Code of Courts.

<sup>75</sup> Human Rights Watch interview with José Martínez, lawyer, Public Defender's Office, Temuco, August 10, 2004.

<sup>76</sup> Second Chamber of the Supreme Court, ruling dated March 18, 2004, para 6 (copy on file at Human Rights Watch).

noted above, the upshot of the Supreme Court's intervention was that the terrorist charges were reinstated, and on August 17, 2004, the five defendants in the Poluco Pidenco case were found guilty as charged. The court sentenced them to ten years and a day in prison and ordered them to pay compensation to the victims of 425 million pesos (approximately U.S \$679,000).

There seems little doubt that the Supreme Court came under political pressure to intervene in favor of the prosecution in the Poluco Pidenco case. In the months leading up to the Supreme Court ruling on the prosecution complaint against Germany influential voices were heard complaining about her conduct. In April 2003, Alberto Espina, senator for the Araucanía and an outspoken advocate of the anti-terrorism prosecutions, lambasted Germany's decision to deny the witnesses protection and anonymity. Senator Espina complained that the trials would be fruitless as the witnesses would "not dare to give testimony without protection."<sup>77</sup> On October 21, 2003, Attorney General Guillermo Piedrabuena reportedly met the then-president of the Supreme Court, Mario Garrido Montt, to protest about Judge Germany.<sup>78</sup> It is commented in judicial circles in Temuco that a month earlier, during a routine administrative visit to Temuco, a member of the Supreme Court's criminal bench, Nivaldo Segura, made a special trip to the small town of Collipulli, where he met with Germany and reportedly berated her for her handling of the case.<sup>79</sup>

### ***Illicit Terrorist Association: Double Jeopardy?***

At this writing, sixteen prominent leaders and sympathizers of the CAM are on trial in Temuco on a charge of "illicit terrorist association." Among the sixteen are at least five who have already been convicted on a different charge for the same underlying acts. Another defendant has already been acquitted for a crime that was not judged to be a terrorist offense and which now forms part of the accusation against him. As such, the case raises another issue of due process: the right not to be tried more than once for a single crime, also known as *non bis en idem*, or double jeopardy.

The sixteen were arrested in a coordinated police sweep in December 2002 following an eight month investigation by the regional prosecutor's office of Temuco that included

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<sup>77</sup> Espina's reported comment was that "the interpretation of the jueces de garantía violates the letter and spirit of the anti-terrorist law that we approved in Parliament." "Jueces negaron petición de presentar nuevos 'testigos ocultos' en juicios terroristas," *El Gong*, April 16, 2003 [online], [http://www.diarioelgong.cl/news/one\\_news.asp?IDNews=10921](http://www.diarioelgong.cl/news/one_news.asp?IDNews=10921) (retrieved June 24, 2004).

<sup>78</sup> "Califican de 'mano blanda' a cuestionada jueza de Collipulli," *La Segunda*, October 22, 2003.

<sup>79</sup> Several sources who requested anonymity informed Human Rights Watch of this incident. Judge Germany declined our requests for an interview.

undercover surveillance, phone tapping, searches, and inspection of computer hard drives. They are accused of “illicit terrorist association”—that is, of participating in a criminal association devoted to planning and carrying out acts of terrorism in different parts of the Araucanía over a period of several years.

In a formal indictment on December 6, 2002, the prosecutor alleged that the group met regularly in the Temuco home of two of the accused, José Llanquileo and Angélica Ñancupil, whom he described as “[l]eaders, advocates, and instigators of all the illegal activities the association carried out.” He then listed a series of incidents for which the group was responsible in the districts of Temuco, Ercilla, Collipulli, Traiguén, and Nueva Imperial. The prosecutor summarized these criminal actions as follows:

In the urban environment—public disorders, including attacks on uniformed personnel; damage to public and private property, even affecting the physical and mental integrity of private persons. In the rural environment—damage, theft, and robbery; starting forest fires on properties belonging to companies and private persons which have meant losses of more than 600 hectares of pine and eucalyptus just in the last year; the burning of plantations and fields of wheat and other cereals; of manor houses on private properties; of trucks for the transportation of lumber; of heavy machinery; of bridges and others; using firearms and other offensive weapons; attacks even on the life and physical integrity of the owners, their workers, their families, and also of those community members who do not agree with their ideas.<sup>80</sup>

The trial, which began on October 8, 2004 in the Temuco Oral Criminal Court, raises another due process issue. The admission into the illicit association proceedings of evidence involving incidents on which other courts have previously passed judgment, including the case of the loncos and Poluco Pidenco, might violate the principle of double jeopardy if used to convict those already tried for these crimes, in the absence of other evidence linking them to the alleged illicit association.

Moreover, the crimes listed in the indictment other than the two already mentioned have been previously tried under the criminal code as ordinary crimes, not acts of terrorism. The trial of crimes for which other courts have previously passed judgment could be prejudicial to those already tried for them, again violating the double jeopardy rule.

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<sup>80</sup> Formalization Hearing, Rit N° 5694-2002; Ruc N° 0200142499-0. December 6, 2002.

A case in point is that of Jorge Huaiquín, from the community of Agustín Chiguaicura, commune of Nueva Imperial, who was acquitted in January 2004 on charges of “public disorders” allegedly committed during the occupation of a neighboring private estate (see above, section on pretrial detention). Despite the fact that the court considered this an ordinary crime and found Huaiquín not guilty, the incident and also the crimes of which he was accused (usurpation with violence; robbery with force; damage; illegal felling of trees, and arson) form part of the current accusation against him for illicit terrorist association for which the prosecutor has asked that Huaiquín be given a fifteen-year prison sentence.

“The principle of *non bis en idem*—the right of a person once tried or punished not to be subject to successive prosecutions for the same offense—is one of the basic due process guarantees protected in art.14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>81</sup> Art. 14(7) states:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Art. 8 (4) of the American Convention on Human Rights states: “[a]n accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.” Chile ratified the ICCPR in 1976 and the American Convention in 1990. Courts must observe this fundamental principle of due process, or else the Chilean State is in violation of its international human rights obligations.

### ***Pursuit of Crime or Political Persecution?***

The public prosecutors responsible for the illicit terrorist association case insist that their intent is to find and prosecute those responsible for crimes of violence committed in the context of land protests, not to persecute political organizations pursuing legitimate objectives within the law. “We are not persecuting the CAM per se,” a representative of the Temuco Regional Prosecutor’s Office assured Human Rights Watch. “We are prosecuting individuals within the organization who plotted to commit crimes attributing to themselves the name of the CAM.”<sup>82</sup>

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<sup>81</sup> “Limitations on the principle of non bis en idem from an international legal perspective,” Center for Justice and International Law and Allard K. Lowenstein International Human Rights Law Clinic of Yale Law School, paper delivered at the Javierana University Law School, Santafé de Bogotá, Colombia, September 27, 2002.

<sup>82</sup> Human Rights Watch interview with Francisco Rojas, Regional Prosecutor’s Office, Temuco, August 13, 2004.

According to the indictment:

[t]he investigation carried out so far by the Public Ministry has been able to establish that the group has operated in the region under the umbrella of the Arauco Malleco Coordinating Group, an organization that has a functioning hierarchical structure....

As this suggests, much of the investigation sets out to prove that the CAM is an organization purposefully set up to commit crimes. Government statements also clearly suggest that the CAM as such is the organization in its sights. In a conversation with the newspaper *El Mercurio* following the convictions in the Poluco Pidenco case, Jorge Correa Sutil, the undersecretary of the interior, affirmed that the dismantling of the CAM was the result of a successful and systematic police intelligence operation called “Operation Patience.”<sup>83</sup>

The terms in which the CAM is referred to in the indictment also lead to the conclusion that the target is not merely some of the individuals who comprise the CAM’s leadership, but the group per se. Apart from a diagram of the organization that was obtained by police from the computer of one of the accused, the evidence against the CAM includes statements like this:

The high profile of this association has been possible as a result of the commission of the illegal acts described and the use of modern and expensive media of communication. Among them are the official website of the CAM and a print edition of the same. In the first there are explanations about each of the communities intervened by [sic] the association, the estate affected by the illegal acts, its owner and size, and, most important, (the association’s) demands, with details of the profile of the victims and the state of the judicial proceedings the crimes have given rise to.<sup>84</sup>

The language used in this extract from the indictment is loaded. Many Mapuche organizations have websites that report on land conflicts in detail, almost invariably in support of Mapuche territorial demands. The communities “intervened” by the association are simply the communities from which CAM members come. The use of the word “intervened” implies, wrongly, that the accused are outsiders to the

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<sup>83</sup> “Gobierno avala condena a mapuches,” *El Mercurio*, August 22, 2004.

<sup>84</sup> Formalization Hearing, Rit n° 5694-2002, Ruc n° 0200142499-0, December 6, 2002.

communities, whereas many are traditional community leaders or spokespeople. It also implies criminal intent, which the prosecutor also appears to detect in other CAM activities, like the debate promoted on its website. Such a debate is clearly legal and should be protected in a democratic society.

The prosecutor and the government have asked for a fifteen-year sentence for those accused of being leaders of the group, and five years for lower-ranking members. Again, the seriousness of the sentence sought is related not to the gravity of the individual acts they are accused of, but to their position within the organization.

On March 30, 2004, the juez de garantía of Temuco, Isabel Uribe, declared herself incompetent to continue hearing the case, accepting an appeal lodged by the defense, which argued that the case be transferred to a court in Cañete in the Bío Bío Region. This court had begun investigating the CAM under the same charge of illicit association in 1999, before the new criminal procedures code came into force. The defense argued that the crime of illicit association must date from the year the CAM was formed (1998), and the trial must be heard by the local court in Cañete that started the investigation. The prosecutors claimed, on the other hand, that the current trial did not involve the CAM as such, but a conspiracy by a group of individuals within it, and was therefore completely distinct from the earlier investigation. In April, the Temuco Appeals Court accepted this position unanimously and ordered Judge Uribe to resume hearing the case. Nevertheless, as noted, despite the argument of the prosecution, much of the evidence in the trial relates directly to the CAM as an organization, and this is how government officials have presented it to the public.<sup>85</sup>

The government's belief that the combination of vigorous prosecution of CAM leaders and legal reforms has lowered tensions in the south may be premature.<sup>86</sup> Despite the introduction of the new criminal justice system and its unquestionable gains for the rights of defendants, the terrorist charges make many Mapuche distrust and fear the justice system now more than ever.<sup>87</sup> At least eight Mapuche are currently fugitives

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<sup>85</sup> Human Rights Program of the Institute of Indigenous Studies at the University of the Frontier, *Las Nuevas Contradicciones de la Justicia* [online], <http://www.derechosindigenas.cl/modules.php?name=News&file=article&sid=81> (retrieved August 24, 2004).

<sup>86</sup> "La Coordinadora está casi desarticulada," *El Mercurio*, August 24, 2004.

<sup>87</sup> Forty-two-year-old Mireya Figueroa spent more than a year in detention on terrorist charges in the Poluco Pidenco and illicit association cases, during which she suffered episodes of clinical depression. She was eventually released, but broke the terms of her release and now faces a national and international arrest warrant on charges of terrorism. She told a reporter from *El Mercurio*: "I'll present myself in court. I am not trying to escape justice. But I'll do it when the State gives me guarantees of a fair trial. When there are no faceless or paid witnesses." Ivan Fredes, "Huyo por dignidad, no por cobardía," *El Mercurio*, August 23, 2004. In the



because they are certain that they will not receive a fair trial. Mapuche communities are still raided by police who insult and mistreat the inhabitants (see the cases described in the next chapter). Furthermore, the systematic use of protected witnesses has further polarized the communities rather than healed divisions within them. By effectively outlawing political groups, the government has encouraged rather than dissuaded clandestine political activity.



Mapuche leader, Mireya Figueroa, is led under police custody to the Temuco Appeals Court. She is wearing on her head a trapelacucha, a traditional silver adornment worn by Mapuche women. March 8, 2003.  
© 2003 Archivo Periódico Azkintuwe

If this suspicion of the justice system is to be overcome, the application of the law must be both impartial and *seen* to be so. Individuals responsible for physical attacks on Mapuche should be as zealously prosecuted as Mapuche accused of crimes of violence. Unfortunately, courts have been lenient toward perpetrators of attacks on Mapuche. A case in point was the acquittal of Alejandro Herdener, who was accused of shooting a Mapuche, Luis Cheuquelén, in September 2000. Cheuquelén was hit by three bullets and seriously wounded but survived the attack. Herdener argued that he fired in self-defense after a group of Mapuche who were trying to attack him ignored a warning shot fired into the air. Forensic tests, however, revealed that Herdener's gun had only been fired

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interview, Figueroa denied any connection with the CAM. She is currently standing for election in Ercilla as a local councilor for the Communist Party.

three times, indicating that he had not fired a warning shot at all. In a hearing before the Temuco Appeals Court, Herdener's lawyer spoke of the Mapuche's known dangerousness as evidence to support his client's claim that he acted in self-defense. The court cleared Herdener of all the charges.<sup>88</sup>

## V. ILL TREATMENT AND POLICE BRUTALITY

At all times in dealing with Mapuche protests law enforcement forces must ensure that force is used only when justified by the exigencies of the situation and in strict proportion to the physical risk faced. Police officers who treat Mapuche with lack of respect or use racist taunts and insults not only commit an offense punishable under law, they also exacerbate existing tensions, reinforce bitter feelings, and encourage violent reactions from those affected.

Since the government began its campaign against radical Mapuche groups in late 2001, the number of allegations involving the use of excessive force by carabineros in response to land occupations and other forms of Mapuche protest has declined. However the decline appears to be due to a change in the intensity of the land conflict, rather than a clear reform of the operational procedures and conduct of the police. Recent eyewitness testimonies suggest that when they enter Mapuche communities in large numbers to make arrests, carabineros continue to physically mistreat or insult residents, including women, children, and old people.

Cases of torture of Mapuche while in police custody after their arrest have declined significantly since the introduction of the new code of criminal procedure in the Araucanía. Nevertheless, the Indigenous Rights Program at the Institute of Indigenous Studies of the University of the Frontier continues to receive occasional reports of the beating of detainees at the moment of arrest or shortly after arrest, even though the mistreatment usually falls short of torture.

Under existing Chilean legislation, all complaints of the use of excessive force or physical abuse by carabineros are investigated by military prosecutors and heard in largely secret written procedures by military courts. These courts do not provide victims of police abuses with guarantees of a fair and impartial investigation. In fact, most complaints are rejected or left unresolved, and those responsible for the abuses are ultimately not held accountable. The gross imbalance that exists between the vigorous prosecution of

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<sup>88</sup> *Los Derechos de los Pueblos Indígenas*, p. 229.

Mapuche who break the law and the *de facto* impunity enjoyed by law enforcement officers who abuse them is a telling indicator of the unequal treatment that the Mapuche receive from the justice system.

### ***Ill-treatment during Police Raids***

Adriana Loncomilla's wooden hut in the community of José Guiñón is at the foot of the vast Poluco Pidenco tree farm. From her door, pines cover the hills to the horizon. Adriana's husband, José Osvaldo Cariqueo Saravia, a lonco, is wanted on charges of terrorist association and terrorist arson on the Poluco Pidenco estate. His two brothers, Juan and Patricio Marileo Saravia, recently began a ten-year prison term after being sentenced on August 21, 2004, for the incendiary attack. José Osvaldo Cariqueo did not appear at the trial, and a national and international warrant was issued for his arrest.<sup>89</sup>

Eighty-six-year-old Lorenza Saravia, mother of the three brothers, told the Indigenous Rights Program in 2003 that the police had raided the community five times looking for her sons. "There were about two hundred carabineros," she recalled. "They arrested me, and dragged me over the stones like an animal and threw me into their van like a sack of potatoes. They slapped me twice in the face. Who gives them the right to hit an old woman?"<sup>90</sup>

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<sup>89</sup> "Juicio por Incendio Terrorista: Caza de Mapuches rebeldes," *El Mercurio*, July 30, 2004.

<sup>90</sup> Indigenous Rights Program, University of the Frontier, *Allanamientos policiales en la comunidad José Guiñón, sector San Ramón, Comuna de Ercilla*, August 2003, (unpublished; copy on file at Human Rights Watch).



A woman is dragged away by carabineros (uniformed police) during a police intervention in the community of Juan Currin, Temuco. January 2000.  
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Women, children, and old people often bear the brunt of the distress caused by the incursions of the police. After the flight of her husband and the imprisonment of her brothers-in-law, Adriana, who is a *machi* (spiritual healer) in her community, is left with her fifteen-year-old son Jorge and three younger children. Jorge is being treated by a psychologist. She told Human Rights Watch: “He has bad memories. Last time the carabineros came, on July 28, 2004, Jorge tried to defend me when they started insulting me. They pushed him outside, pinned him to the ground and twisted his arm. We are usually fast asleep when they come. Would a terrorist be asleep in his home?”

“Here we don’t have a problem with [the forestry company] Mininco,” continued Adriana, a soft-spoken woman in a flowery apron. “This land was bought for us by CONADI from the forestry company Cautín. We have support from Orígenes (a government program that gives credit to Mapuche communities) and the International Development Bank. We even helped (Senator) Espina in his election campaign.”<sup>91</sup>

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<sup>91</sup> Human Rights Watch interview with Adriana Loncomilla, Comunidad José Guifón, Ercilla, August 11, 2004.

Less than one hundred meters away lives Juan Ignacio Queipul, one of the witnesses against her husband and brothers-in-law who is receiving police protection. Relations with Adriana's family are not good. As she explained, "When we started to talk to CONADI and Cautín, he got envious and wanted to be in on the deal, but we said no. Once he shot at my home. I heard the shots and thought at first it was hunters. We denounced it to the police and they found the shells, but they did nothing." Queipul's home, protected by a metal fence, is just visible from the road leading to Adriana's house.

According to an affidavit signed by Adriana, on July 7, 2004, the police arrived in José Guiñón at about 5:00 p.m. to investigate a complaint made by Queipul that Adriana and her family had destroyed a fence on his property. According to Adriana's statement, unable to find her two brothers-in-law Juan and Patricio Marileo Saravia, and fearing they had been arrested (indeed they had been), she walked over to where the public prosecutor was standing to ask him what was happening. In response, the prosecutor abruptly got into his car and drove away, accidentally striking Jorge, who was accompanying his mother. Apparently thinking that Jorge had tried to attack the prosecutor's vehicle, three or four officers pounced on him and pinned him to the ground, pointing their weapons at him. The police also attacked José Necul Cariqueo, Adriana's nephew, when he shouted at the police that the Jorge meant no harm and to leave him alone.<sup>92</sup>

Witnessing this unprovoked violence, the affidavit continued, Adriana began to scream in desperation, leading two policemen to punch and kick her. One of the officers lost his balance, dragging her to the ground. He drew his revolver and fired two shots close to Adriana's head. Adriana was taken to hospital where her injuries were treated. Jorge and José Necúl were taken into police custody in Angol. José was held for a week and a military prosecutor charged him with resisting arrest and assault (*maltrato de obra*).<sup>93</sup> Meanwhile, a Collipulli court ordered the immediate release of Adriana's brothers-in-law Juan and Patricio Marileo Saravia, declaring their arrest to have been illegal.

According to Adriana Loncomilla, her experience is not unique. Luis Licán, an elderly member of the same community of José Guiñón, was hit by birdshot fired by a carabinero during an earlier police raid, on August 15, 2003. Startled by the presence of a

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<sup>92</sup> *En lo principal interpone denuncia por violencia innecesaria*, Military Prosecutor (Letrado del Ejército y Carabineros), July 27, 2004; copy on file at Human Rights Watch.

<sup>93</sup> Indigenous Rights Program, University of the Frontier, *Allanamientos policiales en la comunidad José Guiñón, sector San Ramón, Comuna de Ercilla, August 2003* (unpublished; copy on file at Human Rights Watch).

large contingent of police in the community, Licán was hit by gunshot while running away. As Adriana, who witnessed the attack, described the events:

When they came to search, he was returning to his house, and when he saw lots of carabineros, he got scared and started to run. And the carabineros shot him down and left him there full of pellets. After they shot him, they kicked him, stepped on him, and kept hitting him. The carabineros were saying: "Go on run away now, asshole," (*buevón*) and laughing. Afterwards, he was like a wounded chicken with blood pouring out when they took him to Collipulli.<sup>94</sup>

Luis Licán died months after the raid. There is no clear evidence linking his death to this mistreatment during the raid, although the community is convinced that there is a link.

Police raids have been common in other communities affected by land conflicts. Flora Collonao has experienced at least seven such raids. She is married to Pascual Pichún, lonco of the community of Temulemu, near Traiguén, now serving a five-year sentence for "terrorist threats" against landowner Juan Agustín Figueroa. Her two sons, Rafael and Pascual, sentenced in January 2003 to five years in prison for burning a truck from the Figueroa estate, were released on parole, but the court in Traiguén ordered their parole terminated and their return to prison because the brothers were unable to pay Figueroa compensation of six million pesos (almost \$10,000). Since then, carabineros have been trying to detain them.<sup>95</sup> During the first three months of 2004, the Pichún-Collonao family home was visited seven times by the police operating in large groups with air support from helicopters; other officers kept watch for months on roads adjoining their community. As Flora Collonao described one such raid:

They raided us again on Thursday, March 11. I wasn't in time to open the door, and they kicked it open instead. They broke the door and a window. I got up and asked them, "What's happening?" "We're looking for your sons," they said. The police don't treat us like people but as if we were animals. The police come in saying, "[g]et out of bed, you shit." And how could they do it? They are supposed to be educated people. The way they treat us, it seems that they are not.... When *investigaciones*

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<sup>94</sup> Reported in *Los Derechos de los Pueblos Indígenas en Chile*, p. 256.

<sup>95</sup> Centro de Documentación Mapuche, "Gobierno chileno ordena encarcelar a personas por deudas," [online], <http://mapuche.info.scorpionshops.com/mapu/afppm040429.html> (retrieved August 29, 2004); Ivan Fredes, "Loncos eluden cerco de la policía," *El Mercurio*, January 14, 2004.

[plainclothes criminal investigation police] arrived, they handcuffed me and threw me like an animal onto their truck.<sup>96</sup>

Other incidents since 2002 involving mistreatment and verbal abuse by carabineros during efforts to detain Mapuches have been reported in the communities of José Millacheo Levio, near Chekenko, Ercilla, and Aylla Varela, near Caillín. There have also been reports throughout the land conflict of police using excessive force during operations to evict Mapuches occupying disputed land, in particular using shotguns when lethal force was not warranted. One such incident resulted in the only death so far resulting from police action during the conflicts in the Araucanía (the case of Alex Lemún, discussed below).

Carabineros have been aware of these problems for several years, although little has been said publicly of any measures that might have been taken to prevent them. A revealing article published in the newspaper *La Tercera* quotes from a letter sent on June 12, 1999, by the head of the Ninth Zone of carabineros, Gen. Mauricio Catalán, to the Cautin prefectorate. The letter, basing its observations partly on police as well as press video footage, complains of:

bad mannered, offensive, insulting and high-handed treatment, both by chiefs, officers and personnel toward those who subvert order, especially members of the Mapuche ethnic group. It can be appreciated with absolute clarity that carabineros' personnel arrive at the site of an incident with a predisposed confrontational attitude and indeed in more than one incident the reaction of the Mapuches has been provoked by the excessive and aggressive behavior of the police, a situation that is unacceptable in our institution.

Together with criticisms of the poor control exercised by senior officers over their men in these operations, the letter notes that use of anti-riot shotguns is often indiscriminate and that officers are ignorant of the concept of legitimate defense, “[a]s they continue to fire even after the subversives are running away.”<sup>97</sup>

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<sup>96</sup> *Los allanamientos del domicilio de la familia Pichun de Temulemu y el ‘encauzamiento’ del denominado conflicto mapuche*, Indigenous Rights Program, Institute of Indigenous Studies, University of the Frontier, Temuco, March 17, 2004.

<sup>97</sup> Fredy Palomera / Temuco y Pedro Lezaeta, “Documento revela mea culpa de carabineros en maltrato a mapuches,” *La Tercera*, November 24, 2000.

Recent incidents suggest that carabineros continue to behave in the manner criticized by General Catalán. In July 2004, officers investigating complaints that Mapuche were responsible for a fire at the home of the brother of a prominent landowner, Jorge Luchsinger, raided the homes in Truf Truf, near Temuco, of two Mapuche families. Only women, children, and old people were present at the time of the raids. On July 25, 2004, a contingent of some fifty police traveling in a bus and armed personnel carriers arrived at the home of Irma Lleuvul Cherquián, in Itineto, district of Padre de las Casas, when she was alone with her four children. Armed with submachine guns and accompanied by a prosecutor—apparently in search of a suspect—the police turned the house upside down, breaking furniture and the children’s school supplies. They gave no explanation for their action, nor did they exhibit a search warrant. Two gold rings left to Irma Lleuvul by her grandparents and 40,000 pesos (approximately U.S.\$60) in an envelope disappeared during the raid. On the same day, about thirty police raided the home of seventy-year-old Rosa Quidel Chicahual and sixty-five-year-old Alberto Catrilaf Parra, who were with three young children. The police threatened the couple with their guns, and pushed and fenced them in with their shields while the house was searched. Again, they failed to show any arrest or search warrant.<sup>98</sup>

### ***Ill-treatment after Detention***

As noted above, allegations of torture in police custody have declined significantly since the introduction of the new criminal procedure code, but reports of mistreatment of Mapuche during or soon after their arrest continue to surface.<sup>99</sup>

Several provisions of the new code protect the rights of detainees and defendants. In the first place, a judge must review all detentions within twenty-four hours in a public hearing at which the defendant, his or her defense lawyer, and the prosecutor are present. The code also prohibits the use of any method of interrogation that “impinges on or inhibits the freedom of the accused to declare.” It explicitly prohibits “[a]ny methods that affect the memory, the capacity of comprehension, and direction of the acts of the accused, especially any form of ill-treatment, threats, physical or psychological violence, torture, deceit, or the administration of drugs or hypnosis.”<sup>100</sup>

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<sup>98</sup> “La represión continúa en Xuf Xuf,” *El Gong*, August 9, 2004. [online], [http://www.diarioelgong.cl/news/one\\_news.asp?IDNews=24232](http://www.diarioelgong.cl/news/one_news.asp?IDNews=24232) (retrieved September 22, 2004); Declaración Pública Ayjarrewe de Xuf Xuf, julio de 2004 [online], [www.derechosindigenas.cl](http://www.derechosindigenas.cl) (retrieved September 22, 2004).

<sup>99</sup> *Informe Anual sobre Derechos Humanos en Chile*, 2004 (Santiago: Law Faculty, Diego Portales University, May 2004), pp.159-160; *Los Derechos de los Pueblos Indígenas en Chile*, pp. 251-252.

<sup>100</sup> Art. 195 of the Code of Criminal Procedure.



The juez de garantía can take measures to remedy ill-treatment of the defendant at any stage of the proceedings, and if these measures are insufficient to correct the problem, may order suspension of the proceedings. Confessions extracted by the police outside the courtroom do not help the prosecution or the police since the new code of criminal procedures discounts them if they are not ratified by the defendant during the trial. Defendants' right to remain silent is now respected, as evidenced by the fact that many Mapuche defendants have chosen not to testify. As a final protection, in the last resort, the Supreme Court may annul trials that have failed significantly to comply with the rights of the defendant guaranteed in the Constitution, laws, and international treaties to which Chile is a party.

However, these controls appear to be less effective in preventing ill-treatment at the moment of arrest or shortly afterwards, particularly if the detainee is released during the twenty-four hours that follow. According to one study, most complaints of police ill-treatment in 2002 related to incidents that took place during this limited period, such as while detainees were being transported in police vehicles to a police station.<sup>101</sup>

## VI. MILITARY JUSTICE

Mapuche accused of violence against the police as well as those who have themselves been victims of police violence or abuse, appear, whether as defendants or victims, before military courts. Both prosecutors and judges are members of the armed forces on active service. Judges do not have to have formal legal training, do not enjoy tenure, and are subject to the military chain-of-command. As such, these courts do not provide the guarantees of independence and impartiality required to ensure that Mapuche defendants receive a fair trial or that Mapuche victims have a fair opportunity for redress.

### ***Obstacles Posed by Military Tribunals for Mapuche Seeking Redress for Police Abuse***

The contrast between the procedures now being applied in the ordinary criminal courts and the anachronistic system of military justice is apparent in the Araucanía, where the two systems coexist side by side. Drawing on the experience of lawyers who have specialized in litigating Mapuche cases in military courts, the Indigenous Rights Program at the University of the Frontier's Institute of Indigenous Studies has described the obstacles presented by the military justice system as follows:

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<sup>101</sup> *Informe Anual sobre Derechos Humanos en Chile, 2003* (Santiago: Law Faculty, Diego Portales University, January 2003), pp. 116-119.

They are very lengthy, bureaucratic trials in which there is practically no right to a defense. That's because the investigation stage is secret and there are no hearings at which arguments and evidence can be produced, except when the judge has already made up his mind about the case... In most cases involving Mapuche, carabineros carry out an internal inquiry, which is considered part of the investigation (*sumario*) and constitutes a fundamental resource for the prosecutor and the judge. This inquiry is carried out by the commanding officers of the officials involved, which again affects the possibility of clarifying the events under investigation since the conviction of one or several carabineros on accusations of torture can damage the image of the institution.<sup>102</sup>

Fifteen years have passed since, in a speech inaugurating the judicial year at the end of the military government, Chief Justice Luis Maldonado criticized the lack of independence of military judges. Yet, despite a number of academic studies, there is still no comprehensive bill in Congress limiting the scope of military courts. Until very recently, not even partial reforms had been proposed, such as amendments to remove from military jurisdiction the crime of "ill-treatment by deed" or physical violence (*maltrato de obra*) against carabineros.<sup>103</sup> When in 1998 Congress approved legislation to introduce torture as a specific offense in the criminal code, it missed the opportunity to transfer police torture and excessive use of force cases to the jurisdiction of ordinary criminal courts. These continue to be classified as military offenses if they are committed by members of the armed forces on active service, or on military or police premises. During the period from 1990 to 1996, almost 70 percent of the cases heard by military courts involved civilians, either as defendants or victims.<sup>104</sup>

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<sup>102</sup> *Los Derechos de los Pueblos Indígenas en Chile*, p. 244-245.

<sup>103</sup> In December 2003, the Chamber of Deputies approved a bill to remove the crime of "*desacato*" (insult to authorities of state) from Chilean laws. The bill includes a proposal to place under civilian jurisdiction the crime of sedition, when committed by a civilian. It also proposes to include under civilian jurisdiction the crime of "*maltrato de obra*" (art. 416 of the Code of Military Justice). In July the government gave the bill "extreme urgency," which means that it had to be debated in a week. However, at this writing the bill was still pending.

<sup>104</sup> Jaime Couso Salas, "Competencia de la Justicia Militar: una Perspectiva Política Criminal," in *Hacia una Reforma de la Justicia Militar: Delito Militar, Regimen Disciplinario, Competencia y Organización* (Santiago: Escuela de Derecho, Universidad Diego Portales, Cuadernos de Análisis Jurídico, October 2002), p. 73-78; Jorge Mera (ed), *Justicia Militar y Estado de Derecho*, (Santiago: Law Faculty, Diego Portales University, Cuadernos de Análisis Jurídico No. 40, 1998).

## **Alex Lemún Saavedra**

A clear example of the failings of the military justice system is its failure to prosecute the carabineros officer allegedly responsible for the shooting death of seventeen-year-old Alex Lemún Saavedra. On November 7, 2002, Maj. Marco Aurelio Treuer and two other carabineros entered the Santa Alicia estate, near Ercilla, a property owned by the forestry company Mininco that had been occupied by a group of Mapuche families. Treuer was sent to observe the situation on the estate, but his party was spotted by the Mapuche, who challenged and insulted him and his colleagues, some reportedly hurling stones from boleadoras.<sup>105</sup> Treuer and his squad used tear gas and fired numerous rubber bullets to fend off the attack. During the clash, Alex Lemún was hit in the head by a lead pellet from a twelve-gauge shotgun fired by Treuer, and he died in hospital in Temuco five days later.

Two weeks later, the regional prosecutor of Temuco announced that the case would be referred to a military prosecutor, since there was evidence that a member of carabineros might be responsible. After a detailed internal investigation by the carabineros and investigaciones, the plainclothes criminal investigation police, on August 29, 2003, the military prosecutor of Angol decided to prosecute Treuer for “unnecessary violence resulting in death.” The prosecutor concluded that:

[w]hen Major Treuer fired the shot there was no real and imminent danger to his physical integrity or that of his subordinates that would justify him firing with the shotgun, consequently the force used at the time of the events was completely unnecessary and had no rational motive that could justify it.”

Treuer appealed to the Military Appeals Court (*Corte Marcial*), which ruled that the prosecution be dropped. The court was apparently satisfied with the account given by Treuer in his defense that he had heard a gunshot and a bullet pass close to himself and his men and decided to use live ammunition to protect them. Other than the police, no other witnesses supported Treuer’s version of the events. No material evidence was found to prove that the Mapuche had, in fact, fired weapons: no shell casings other than those of the police were found, and Alex Lemún tested negative on a paraffin test. Attempts by lawyers acting for the Lemún family to reverse the Appeals Court decision and to persuade the military prosecutor to re-launch the prosecution have been unsuccessful. Human Rights Watch has learned that Treuer has been transferred out of the Mapuche region to the city of Rancagua, but is still on active service in the

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<sup>105</sup> Testimony of Major Marco Aurelio Treuer.

carabineros. The Lemún family has received no compensation for the loss of their son. Alex's father, Edmundo Lemún, told Human Rights Watch that he could not understand how his death could go unpunished.<sup>106</sup>

### ***Alberto Coliñir Painemil***

Another case that illustrates the failure of military courts to prosecute police officers responsible for grave abuses against Mapuche detainees is that of Alberto Coliñir Painemil. Carabineros arrested Coliñir, together with his father, his brother, and four other people, on December 16, 1999, while they were asleep at their homes in the communities of Quefquehueno and Ñinquileo, near the town of Padre Las Casas, in the Araucanía. The procedure was irregular in several ways: the police were traveling in an unmarked vehicle, were not in uniform, and used force to gain entry to the houses in the dead of night. They beat some of the detainees in the presence of their wives and children. Moreover, the arrest warrant in their possession, which they failed to exhibit to the detainees, contained orders for the arrest of only three of them.<sup>107</sup>

After arriving at the police station in Padre Las Casas, Ruperto Coliñir, Alberto's brother, was left handcuffed face down on the floor for at least four hours. Police then made him stand all morning handcuffed to a post in the yard. Alberto Coliñir was beaten, kicked, and hit with a rubber object. Later he was taken to an office in the building, where he was subjected to a torture known as the "dry submarine" (a plastic bag is held over the victim's head making him gasp for breath). After repeated applications of the bag, Coliñir passed out. After he regained consciousness, his interrogators persisted, shocking him with electricity while questioning him about the names of people involved in Mapuche protests and land occupations.<sup>108</sup>

On December 23, 1999, Mapuche leaders from the communities affected presented a formal complaint to the Temuco military prosecutor. Coliñir's lawyer produced medical evidence including an x-ray that showed a fractured rib and a doctor's report describing extensive bruising. Yet, in 2001 the military court of Valdivia closed the case for lack of evidence that a crime had been committed. In August 2003, Julio Pino Urbina, a carabinero official who allegedly had received death threats from his superiors after protesting police abuses, was granted political asylum in the United Kingdom.<sup>109</sup> Pino

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<sup>106</sup> Human Rights Watch interview with Edmundo Lemún Necul, Angol, August 9, 2004.

<sup>107</sup> *Los Derechos de los Pueblos Indígenas en Chile*, p.253.

<sup>108</sup> "Texto de la denuncia de siete mapuches que sufrieron torturas," Equipo Nizkor [online], [<http://www.derechos.org/nizkor/espana/doc/endesa/denuncia.html>] (retrieved August 31, 2004).

<sup>109</sup> Pedro Cayuqueo, "Ex policía denuncia tortura a mapuches, Kolectivo Lientur, September 12, 2003 [online], [http://www.nodo50.org/kolectivolientur/justicia\\_inglesa.htm](http://www.nodo50.org/kolectivolientur/justicia_inglesa.htm) (retrieved August 31, 2004).

informed the British immigration judge that his fellow police officers had told him about Coliñir's torture.

In part based on Urbina's claims lawyers acting for the victims asked the Appeals Court to reopen the investigation and the case against four policemen allegedly responsible for the abuses. However, in August 2004, the Appeals Court upheld the trial court's decision to close the inquiry.<sup>110</sup>

### ***Daniela Ñancupil***

In January 2001, carabineros returning from a land eviction in the district of Galvarino shot and wounded a thirteen-year old Mapuche girl, Daniela Ñancupil, under circumstances that remain murky but that cry out for investigation. Passing by Daniela's house, which is about eight kilometers from the site where Mapuche had occupied an estate, the police stopped their bus. One of them got out and subsequently shot Daniela with a shotgun in the back; the details of the events that preceded the shooting remain unclear. Although the occupants of the bus and those authorized to carry the weapon involved were identified, no one has been charged with the attack, and the officers in the bus have been transferred to other parts of the country, hindering the investigation. A year and a half later, in July 2002, unidentified individuals in civilian clothes abducted Daniela for several hours shortly after her defense lawyer, Jaime Madariaga, had presented a request for the police responsible for the January 2001 attack to be charged. Her captors blindfolded Daniela and questioned her about the participation of members of her family in the CAM. They also threatened to kill Madariaga if he did not drop the action against the police. A few days later, unidentified individuals set fire to Madariaga's car, destroying it completely. To this day, no one has been charged for Daniela's abduction, or the destruction of Madariaga's car.<sup>111</sup>

### ***Use of Military Tribunals against Mapuche Defendants Accused of Attacks on Police***

Bureaucratic delays and lack of transparency are equally evident in proceedings by military courts investigating assaults by Mapuche on members of the carabineros. Military prosecutors are currently investigating at least fifteen complaints of violence by Mapuche against carabineros (seven in Temuco, six in Angol, and at least three in Valdivia). One of the cases still under investigation involves José Llanca Ailla, who is one of six mapuches accused of attacking two carabineros in a confusing incident that

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<sup>110</sup> "Corte Marcial sobresee causa por torturas contra carabineros de Padre Las Casas," *El Gong*, August 13, 2004 [online], [http://www.diarioelgong.cl/news/one\\_news.asp?IDNews=22690](http://www.diarioelgong.cl/news/one_news.asp?IDNews=22690) (retrieved August 31, 2004).

<sup>111</sup> *Los Derechos de los Pueblos Indígenas*, p. 248.

took place on April 24, 2003. The two officers, who were not in uniform at the time, arrived at the Fundo Ginebra, near Ercilla, to arrest Llanca, who was wanted for arson. They testified later that members of the community, including Llanca, attacked them after forcing open the door of the caretaker's house, where the officers had taken refuge. Llanca reportedly stabbed and beat them and Llanca himself was hit in the face with a spade. One year and five months later, the military prosecutor's investigation has still not been concluded.

Llanca, now in prison in Temuco awaiting trial for illicit terrorist association, told the Indigenous Peoples' Rights Watch a very different version of the story. While he was sowing in a field near the manor house of the Ginebra estate, he said, several carabineros jumped on him to arrest him. Llanca tried to fight them off with a stick but they overpowered him and continued to beat and kick him for about fifteen minutes until he was unconscious and covered in blood. After more Mapuche came to fight the police, Llanca was put on a horse and managed to escape. On May 6, 2003 a large squad of police including carabineros and investigaciones surrounded the home of Llanca's sister, where he had taken refuge, beat down the door, broke the windows, and threatened to kill everyone there including the children. Still weak from his injuries, Llanca gave himself up.<sup>112</sup>

Military prosecutors are investigating several other incidents involving alleged aggression by Mapuche against the police and police aggression against Mapuche. The need for such cases to be dealt with by an independent court that can assess evidence from both sides impartially is obvious. As in the example of Llanca, the police and the Mapuche accounts of what occurred in these incidents differ radically. An example was the violent eviction on June 10, 2003, of Mapuche students from a CONADI office that they were occupying in Temuco. Twenty-nine students were arrested and five students and several police officers were injured during the operation to clear the building. The Indigenous Rights Program at the University of La Frontera, which interviewed many of the students and inspected the building afterwards, concluded that the police had acted with excessive force. At least ten carabineros allegedly beat student leader Julio Marileo on the face and body after the police had taken him out of one of the offices. Police also reportedly beat several of the injured students in buses taking them to hospital. The military prosecutor of Temuco, meanwhile, continues to investigate charges that protesters attacked the police and used molotov cocktails.<sup>113</sup>

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<sup>112</sup> Indigenous Peoples' Rights Watch (Observatorio de Derechos de los Pueblos Indígenas), "El caso de José Llanca Ailla," unpublished document. Copy on file at Human Rights Watch, October, 2004.

<sup>113</sup> *Los Derechos de los Pueblos Indígenas*, p. 252; "Todo fue como en una guerra," *El Gong*, June 11, 2003 [online], [http://www.diarioelgong.cl/news/one\\_news.asp?IDNews=12110](http://www.diarioelgong.cl/news/one_news.asp?IDNews=12110) (retrieved September 22, 2004).

A clear doctrine has evolved in the jurisprudence of international human rights bodies over the last fifteen years that the jurisdiction of military tribunals over civilians violates the due process guarantees protected in art. 14 of the International Covenant on Civil and Political Rights (ICCPR). In its General Comment No. 13, issued in 1984, the Human Rights Committee (a U.N. expert committee charged with interpreting the ICCPR) held that while the Covenant did not prohibit military tribunals, their use to try civilians must be “very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in art. 14.”<sup>114</sup>

During the 1990s, the position of the Human Rights Committee on military tribunals became more robust still. It rejected their use to try civilians under any circumstances, or to try military personnel for infractions other than those committed in exercise of military functions. This jurisprudence includes the Committee’s “concluding observations” on the reports submitted by States Party to the Covenant, such as Algeria (1992), Colombia (1993), Russia (1994), Peru (1996), Poland (1999), and Cameroon (1999), as well as decisions on individual cases. In the case of Chile, the Committee noted in its 1999 concluding observations:

The wide jurisdiction of the military courts to deal with all the cases involving prosecution of military personnel and their power to conclude cases that began in the civilian courts contribute to the impunity which such personnel enjoy from punishment for serious human rights violations. Furthermore, that Chilean military courts continue to have the power to try civilians violates art. 14 of the Covenant. Therefore, the Committee recommends that the law be amended so as to restrict the jurisdiction of the military courts to trials only of military personnel charged with offences of an exclusively military nature.<sup>115</sup>

Other U.N. human rights monitoring bodies such as the Committee against Torture, the Committee on the Rights of the Child, and the Working Group on Arbitrary Detentions, have adopted a similar approach.

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<sup>114</sup> United Nations Human Rights Committee, *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law* (art. 14), April 13, 1984 [online], [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bb722416a295f264c12563ed0049dfbd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument) (retrieved September 22, 2004).

<sup>115</sup> *Concluding Observations on the fourth periodic report of Chile*, March 30, 1999. CCPR/C/SR.1740, para. 205. The comment about the power of military tribunals to conclude cases begun in the civilian courts is probably a reference to the fact that civilian judges initially investigate such crimes until they have established that a member of carabineros on active duty as involved or that the crime was committed on military premises. As soon as judges have established this, they usually declare themselves incompetent and transfer the case to a military court.

The inter-American system of human rights protection specifically restricts military jurisdiction over human rights violations. The Inter-American Convention on Forced Disappearance of Persons expressly states that members of the military or other state actors involved in forced disappearances shall not enjoy military jurisdiction.<sup>116</sup> The Inter-American Court of Human Rights has opposed the use of military tribunals to try military personnel in cases of human rights violations. Commenting on the investigation by a military court into the prison massacre of El Frontón in Peru, the court noted:

In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crimes or offences that by its own nature attempt against legally protected interests of military order.<sup>117</sup>

Under no circumstances may human rights violations be considered crimes related to the functions assigned by law to military forces.

The Inter-American Court of Human Rights has also taken a position against the trial of civilians by military courts. In a case involving the trial by a Peruvian military court of a Chilean national on charges of treason, the court argued:

Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process is violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.<sup>118</sup>

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<sup>116</sup> International Commission of Jurists, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations* (Geneva: International Commission of Jurists, 2004), p. 113.

<sup>117</sup> Inter-American Court of Human Rights, *Durand and Ugarte v. Peru*, judgment of 16 August 2000, Series C No. 68, paras.117 and 118.

<sup>118</sup> Inter-American Court of Human Rights, *Castrillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, Series C No. 52, para. 127.



The Inter-American Commission on Human Rights has repeatedly taken the view that military courts do not satisfy the requirements of independence and impartiality of courts of law. In its recommendations to member states included in its 1998 Annual Report, the Commission noted:

With regard to jurisdictional matters, the Commission reminds the member States that their citizens must be judged pursuant to ordinary law and justice and by their natural judges. Thus, civilians should not be subject to military tribunals. Military justice has merely a disciplinary nature and can only be used to try armed forces personnel in active service for misdemeanors or offenses pertaining to their function. In any case, this special jurisdiction must exclude crimes against humanity and human rights violations.<sup>119</sup>

The opinion of the international community on the issue of military tribunals is consistent. It is time for the Chilean government to introduce the reforms necessary to limit the jurisdiction of military courts to infractions of military regulations, to transfer investigations into crimes committed by civilians to ordinary courts, and to provide civilians who have been convicted by military courts with an opportunity to have their case reviewed by a competent court.

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<sup>119</sup> *Annual Report of the Inter-American Commission on Human Rights (1998)* OEA/Ser.L/V/II.102, April 16, 1999, ch. VII, para. 1 [online], <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/humanrights.htm> (retrieved September 3, 2004).

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