

**Alternative Report submitted to the United Nations Human Rights Committee
for the consideration of the Sixth Report of the Republic of Chile
during the 108th session (8-26 July 2013)**



Unrepresented Nations and Peoples Organization

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I. INTRODUCTION TO THE REPORT

This alternative report is to be submitted by the Unrepresented Nations and Peoples Organization (UNPO) on the occasion of the 108th Pre-Sessional Working Group of the Human Rights Committee (HRC; hereafter referred to as “the Committee”).

This report discusses the International Covenant on Civil and Political Rights (ICCPR; hereafter referred to as “the Covenant”) and the application of its articles with respect to the Republic of Chile. The articles considered to have been violated shall be discussed sequentially, with recommendations on how to rectify and/or prevent further breaches suggested in turn. The final section of the report summarises these recommendations in order to inform the discussions between the Committee and the delegation of the Republic of Chile at the 108th session.

This alternative report will focus on the situation of the Mapuche people in Chile and the Chilean government’s compliance with and implementation of the provisions in the Covenant as it affects the Mapuche.

The major issues discussed in this report are the lack of self-determination and the portrayal of the Mapuche as terrorists, accompanied by the application of draconian anti-terrorism laws. The Mapuche are the largest indigenous group in Chile, and comprise a significant part of the entire population of Chile, yet they remain constitutionally unrecognised. Furthermore, decisions affecting their ancestral land are often made without consultation, with deleterious consequences for the culture of the Mapuche. In addition to the lack of consultation, when Mapuche protest their discrimination, they are branded as “terrorists”. The selective use of anti-terrorism laws is a blatant exercise of racial and ethnic discrimination, and violates many of the rights enshrined in the Covenant. Many human rights groups and other non-governmental organisations have condemned and questioned the use of these, and other, anachronistic laws and practices, which indicate the scope of the human rights abuses being committed.

The Hague, April 2013

II. INTRODUCTION TO THE MAPUCHE

The Mapuche are the largest indigenous group in Chile, with over 1.4 million people and making up approximately 8.7 per cent of the population of Chile.¹ The Mapuche are among the poorest and most marginalised groups in Chilean society. Around one-third of all Mapuche live below the poverty line (43,712 CLP per capita in urban areas; 29,473 CLP in rural areas). Approximately 80 per cent of heads of rural Mapuche households have less than four years of schooling. Less than three per cent of the entire Mapuche population receive any further educational training beyond high school.² Due to their current abysmal situation, and the systematic expropriation of Mapuche land, many Mapuche feel as though they are owed a “historical debt” by the Chilean government.³

Historically, the Mapuche resisted colonisation for centuries, defeating Incan, Spanish and Chilean forces. However, between 1861 and 1883, the Chilean waged a war against the Mapuche known as the *Pacificación de la Araucanía*, which ended the Mapuche rebellion and with it their independence. The Chilean government created slightly fewer than 3000 *reducciones*—pockets of land onto which the Mapuche could live their lives, distanced from national politics—which were later sub-divided and sold to wealthy elites and corporations, leaving the Mapuche with just over five per cent of their original territory.⁴

Throughout the 1960s and 1970s, successive governments instituted policies of land reform, which restored some ancestral land to the Mapuche. However, the coup in 1973 essentially reversed the land reform policies by offering Mapuche lands to international investors so as to bolster Chile’s economy.⁵ The Mapuche themselves were vilified under the Pinochet regime, often classified as “communists”, and assimilation programmes were pursued with renewed fervour.

The *Concertación* government, elected in 1989, campaigned on a platform of indigenous rights.⁶ The Mapuche petitioned the new government about their land rights and their previous vilification. The new government however, focused more on remedying the damage directly caused by the Pinochet regime, rather than addressing historical indigenous grievances. Mapuche expectations such as land reform, constitutional recognition, and an element of control over natural resources were not met. Organised Mapuche political and social protests began in the early 1990s, and have been escalating ever since.⁷

Presently, many Mapuche live in abject poverty, and those who continue to campaign for land rights are designated as terrorists by the media, and prosecuted as such under unjust anti-terrorism laws. This violation of the Mapuche’s human rights, and other infringements, are outlined in this alternative report.

¹ "Resultados Censo 2012," Instituto Nacional de Estadísticas, <http://www.censo.cl/>.

² Claudio A. Agostini, Philip H. Brown, and Andrei C. Roman, "Poverty and Inequality among Ethnic Groups in Chile," *World Development* 38, no. 7 (2010). 1028.

³ Gilda M. Waldman, "Historical Memory and Present-Day Oblivion: The Mapuche Conflict in Post-Dictatorial Chile," *Time & Society* 21, no. 1 (2012). p64.

⁴ David Carruthers and Patricia Rodriguez, "Mapuche Protest, Environmental Conflict and Social Movement Linkage in Chile," *Third World Quarterly* 30, no. 4 (2009). 744.

⁵ Waldman, "Historical Memory and Present-Day Oblivion: The Mapuche Conflict in Post-Dictatorial Chile." 58–59.

⁶ Carruthers and Rodriguez, "Mapuche Protest, Environmental Conflict and Social Movement Linkage in Chile." 745.

⁷ Waldman, "Historical Memory and Present-Day Oblivion: The Mapuche Conflict in Post-Dictatorial Chile." p61.

III. COMPLIANCE WITH ICCPR

ARTICLE 1: THE RIGHT TO SELF-DETERMINATION

Article 1.1: *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

Article 1.2: *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*

As the situation stands currently, there is no constitutional recognition of the indigenous people of Chile.⁸ Despite a statement made by President Piñera earlier this year suggesting the imminent creation of a bill to grant such recognition, so far the indigenous people of Chile remain unrecognised.⁹ As the Mapuche and other indigenous peoples have not been afforded constitutional recognition, their right to self-determination—as provided by international law—has been violated.¹⁰ As long as recognition is withheld, the economic, social and cultural development of the Mapuche, and other indigenous people of Chile, shall be encumbered by the State.

Historically, Chile has afforded varying degrees of recognition to the Mapuche people. While under colonial rule, the rights of the Mapuche to independence and independent sovereignty were officially recognised by the Spanish government.¹¹ Furthermore, until 1962 the Chilean State maintained “border relations” with the Mapuche, in effect bestowing upon them a form of recognition.¹²

The Republic of Chile’s report submitted to the Committee makes no mention of indigenous recognition, let alone the status of the Mapuche.¹³ The right to self-determination, as interpreted by the Republic of Chile and explained by their report, refers only to the institutional elements present in legal framework of a republic (specifically periodic elections and universal suffrage). While commendable, the absence of indigenous recognition is a grievous shortcoming, especially for a modern and ostensibly democratic country such as Chile.

While the creation of the 1993 Indigenous Law and the creation of the *Corporacion Nacional de Desarrollo Indigena* (CONADI)¹⁴ are to be commended as tentative steps in the right direction regarding indigenous self-

⁸ "Decreto 100 - Fija El Texto Refundido, Coordinado y Sistemático De La Constitución Política De La República De Chile," ed. Congreso Nacional de Chile (2005).

⁹ "Piñera Prepared to Grant Constitutional Recognition to Chile’s Indigenous Groups," MercoPress, <http://en.mercopress.com/2013/01/23/pinera-prepared-to-grant-constitutional-recognition-to-chile-s-indigenous-groups>.

¹⁰ Instituto Nacional de Derechos Humanos INDH, "Human Rights Situation in Chile: Executive Summary," in *Annual Report* (Instituto Nacional de Derechos Humanos (INDH), 2012). p4

¹¹ Patricia Richards, "Of Indians and Terrorists: How the State and Local Elites Construct the Mapuche in Neoliberal Multicultural Chile," *Journal of Latin American Studies* 42, no. 01 (2010). p61.

¹² *Ibid.* p62.

¹³ "Examen De Los Informes Presentados Por Los Estados Partes En Virtud Del Artículo 40 Del Pacto: Chile," (Comité de Derechos Humanos, 2012). [13]

¹⁴ National Corporation for Indigenous Development.

determination, further steps are needed. The lands deemed “indigenous lands” (and thus the lands which are available to be purchased by indigenous people) under this law are only those which were granted to the Mapuche after the *Pacificación*, which is approximately only 6.4 per cent of their original territory.¹⁵ This amounts to a deprivation of over 93 per cent of the ancestral land of the Mapuche, which in effect is a deprivation of the Mapuche’s means of subsistence, a violation of Article 1.2.

Furthermore, these steps, and other policies such as housing grants and training programmes, are based upon the notion that Mapuche demands are due to underlying socio-economic problems, rather than an absence of control over their national destiny. It is illustrative that previous governments have enacted policies of the types mentioned above, rather than considering notions such as autonomous territories, self-government or even some form of collective political representation.¹⁶ Constitutional recognition of the Mapuche and other indigenous people is arguably the first step to satisfactorily address the issues of the Mapuche and remedy the violation of the right of self-determination.

What little influence the Mapuche can exercise on their self-determination is limited by the Ministry of Planning’s Decree 124 which governs any negotiations with indigenous peoples. Amnesty International has said that Decree 124 does not live up to the standards as set by the International Labour Organization’s (ILO) Convention No. 169.¹⁷ Convention 169 states that indigenous peoples have a right to participate in the decision-making process of policies which affect them. In August 2012 it was announced that new regulations would be enacted to replace Decree 124, however Chile’s *Instituto Nacional de Derechos Humanos* (INDH)¹⁸ has criticised the proposal on the basis that it ‘fails to meet international standards in various important aspects, and [requires] substantial improvement’.¹⁹

Recommendations:

- Grant constitutional recognition of the Mapuche and other indigenous people.
- Establish a mechanism by which to enable the restitution of ancestral land to the Mapuche and other indigenous peoples, with appropriate compensation for affected third parties.
- Create legislation to safeguard the Mapuche’s and other indigenous people’s right to use ancestral land, even if not exclusively occupied.

ARTICLE 2: THE RIGHT TO NON-DISCRIMINATION

Article 2.1: *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

¹⁵ Richards, "Of Indians and Terrorists: How the State and Local Elites Construct the Mapuche in Neoliberal Multicultural Chile." pp62, 68.

¹⁶ Ibid. P69.

¹⁷ AI, "Amnesty International Report 2012: The State of the World's Human Rights," (Amnesty International, 2012). p106.

¹⁸ National Institute of Human Rights.

¹⁹ INDH, "Human Rights Situation in Chile: Executive Summary," in *Annual Report* (Instituto Nacional de Derechos Humanos, 2012). p4.

Article 2.2: *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

While officially prohibited by the government, instances of discrimination have been reported. These reports indicate discrimination based on, inter alia, race, ethnicity, gender and social status.²⁰ The passing of *Ley 20.609* is laudable, in that it provides a complaint mechanism for victims of discrimination. However, this is a remedial strategy, aimed at the providing redress for instances of discrimination, rather than preventing discrimination in the first place. The national narrative perpetuating the basis of discriminatory stereotypes and prejudices must be adapted and modernised in order to prevent future discrimination.²¹ The public must be informed, through public awareness and educational campaigns, in order to transform the derogatory myths and perceptions associated with indigenous peoples.

The employment situation of the average Mapuche is emblematic of the myriad forms of discrimination which they face. Typically employed in low-skilled labour (domestic help is the most frequent occupation), Mapuche are often required to work for longer hours and for less pay than would otherwise be the case.²² Many urban Mapuche are also forced to live in shanty towns ravaged by poverty. Indigenous women face yet another hurdle, for they are often discriminated against on the basis of their gender, the indigeneity, and their lower socio-economic status.²³

In addition to these daily challenge many Mapuche face, there is the constant and continuous demonization of the Mapuche by the press and by the State. Since the time of former-President Lagos, the Republic of Chile has painted two pictures of the Mapuche: one as a quaint yet willing assimilationist, happy to settle for State gifts; the other as “insurrectionists” and “terrorists”.²⁴ When Mapuche do not fall within the first category, they are relegated to the latter—regardless of intent. The use of the term terrorist in this instance builds upon the US-led War on Terror and allows for a diversion of attention from the underlying issues.²⁵ Other negative connotations follow the Mapuche as well, including stereotypes such as ‘lazy, violent, drunk, uncivilised and primitive’.²⁶ Construing the Mapuche as terrorists adds undue stress to tensions between the Mapuche and elites at local and national levels, and allows landowners to disregard any legitimate claims regarding repossession of ancestral Mapuche lands.²⁷

In order to give voice to these mechanisms of discrimination, the predominantly conservative mass media promotes the discrimination of the Mapuche as terrorists. Indeed, the media ‘has in fact made possible the state’s punitive measures by stigmatizing the Mapuche movement as ‘violent’, ‘terrorist’ and ‘illegal’.’²⁸

²⁰ DoS, “Chile,” in *Country Reports on Human Rights Practices* (United States of America Department of State, 2011). p11

²¹ INDH, “Human Rights Situation in Chile: Executive Summary.” p7.

²² Waldman, “Historical Memory and Present-Day Oblivion: The Mapuche Conflict in Post-Dictatorial Chile.” 66.

²³ DoS, “Chile.” p16

²⁴ Richards, “Of Indians and Terrorists: How the State and Local Elites Construct the Mapuche in Neoliberal Multicultural Chile.” p72.

²⁵ Ibid. p77.

²⁶ Ibid. pp 77–78.

²⁷ Ibid. pp80, 88–89.

²⁸ Waldman, “Historical Memory and Present-Day Oblivion: The Mapuche Conflict in Post-Dictatorial Chile.” p65.

These terms of association, when coupled with headlines such as ‘Alert in Arauco, Fearing Wave of Mapuche Violence’, ‘The Mapuche Intifada: The Indigenous Uprising Worsens’, ‘Mapuches Threaten’ and ‘Indigenous Communities on the War Path’²⁹ reinforce the one-sided depiction of the Mapuche.

In addition to their depiction as terrorists, press coverage on the issues the Mapuche face—and any associated human rights violations—is scant. For example, on at least two occasions Mapuche detained by the anti-terrorism laws have participated in hunger strikes; in 2010 from June 26 until October 13 (109 days), and in 2011 from March 15 until June 7 (84 days). The purpose of these hunger strikes was to draw attention to the discriminatory application of the anti-terrorism laws, and to protest the lack of due-process afforded to the indicted. An analysis of various nationwide newspapers published during these two periods mentioned above has shown that when the hunger strikes were mentioned in the press, there is rarely a corresponding mention of human rights violations. Furthermore, where human rights violations are discussed, the majority of articles espouse the viewpoint that no violation exists. Consider that of 639 news pieces concerning the first strike, only 45 focus on human rights violations (about 7%), and of those 45, 36 deny the violations.³⁰ Furthermore, of 177 notices published in relation to the second strike, only 12 mention human rights (also about 7%), 10 of which deny their violation.³¹ These statistics reinforce the biased portrayal of the Mapuche, and underscore the need for an active indigenous media.

Furthermore, national and foreign journalists and filmmakers covering Mapuche issues continue to face harassment by the police and the State. Several journalists have been detained on dubious charges since 2007, including Christopher Harrison, Paul Joffrey, Marcelo Garay and Elena Varela (though the latter was eventually acquitted). News agencies are regularly denied interviews with Mapuche political prisoners.

Finally, Chile has not yet ratified the Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women.³² This protocol should be ratified at the earliest possible moment.

Recommendations:

- Ratify the Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women.
- Establish approaches designed to portray indigenous people in a positive light, such as a Museum of Mapuche History.
- Implement educational programmes at primary and secondary school levels to teach students about Mapuche history, culture and tradition.
- Ensure fair and unbiased media representation of the Mapuche and their land claims.
- Promote the development of indigenous media, including by increasing opportunities for indigenous journalists.

²⁹ Richards, "Of Indians and Terrorists: How the State and Local Elites Construct the Mapuche in Neoliberal Multicultural Chile." p75.

³⁰ ICEI and Prof. José Miguel Labrín, "Informe Final: Análisis De La Cobertura Y Tratamiento De Conflictos Indígenas 2010-2011 " (Santiago, Chile: Instituto de la Comunicación e Imagen (ICEI) 2011). pp48, 57.

³¹ Ibid. pp59, 66.

³² Observatorio Ciudadano, "Human Rights Situation in Chile 2011," (Observatorio Ciudadano, December 2011).

ARTICLE 6: THE RIGHT TO LIFE

Article 6: *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

More detail on instances of police brutality used against the Mapuche can be found in the discussion of Article 7.

The right to life is perhaps the most fundamental of all human rights however instances of its violation have been reported. Between 2002 and 2010, at least three Mapuche protestors, all youths, were shot dead by police.³³ Police practices of this nature should be condemned, and mechanisms to safeguard against its recurrence should be implemented and/or strengthened. Human Rights Watch has linked the loss of Mapuche lives with police brutality and 'excessive and unjustified force'.³⁴ Examples of police brutality against Mapuche citizens are all too common, and are a cause of great concern.

Chile's report to the HRC does not mention the deaths of Mapuche at the hands of police, instead focusing on programmes relating to human rights abuses during the period of military government.³⁵

Recommendations:

- Investigate thoroughly, and take punitive action where appropriate, all reported instances of police brutality, especially where loss of life, or women and children are present.
- Encourage fair police practices, especially with regards to justified and proportionate uses of force.
- Where police brutality leads to loss of life, provide compensation to the families of the deceased.

ARTICLE 7: CRUEL, INHUMAN OR DEGRADING TREATMENT

Article 7: *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

Chile's report to the Committee outlines several praiseworthy initiatives which the government has taken in order to better uphold human rights, however further measures can be taken. While the inclusion of a human rights component in the *Gendamería de Chile* training programme,³⁶ the creation of a human rights department within the *Carabineros de Chile*,³⁷ the adoption of a Memorandum of Understanding with the International Committee of the Red Cross,³⁸ and an enhanced communication mechanism with the INDH³⁹ are all to be applauded, the fact that at least 212 complaints were recorded against the *Gendarmería* for 2010 and 2011 alone highlights the problem that much work remains to be done.⁴⁰

³³ Richards, "Of Indians and Terrorists: How the State and Local Elites Construct the Mapuche in Neoliberal Multicultural Chile." p74

³⁴ DoS, "Chile." p17.

³⁵ "Examen De Los Informes Presentados Por Los Estados Partes En Virtud Del Artículo 40 Del Pacto: Chile." [31]–[51].

³⁶ Ibid. [63].

³⁷ Ibid. [65].

³⁸ Ibid. [66].

³⁹ Ibid. [67].

⁴⁰ Ibid. [62].

With regards to the indigenous peoples, various sources have reported raids on Mapuche communities with accompanying police brutality and human rights abuses.⁴¹ The incident of 23 July 2012 is indicative of the situation. At a forced eviction of a group of Mapuche occupying a plot of agricultural land, *carabineros* fired buckshot rounds and tear gas, injuring protestors which included women and children.⁴² When a group of demonstrators gathered outside the hospital to which the injured had been taken, police again fired buckshot rounds and rubber bullets, without provocation or warning, at close range, into youths.⁴³

In addition to the misuse of less-than-lethal riot-suppression equipment, other sources report further instances of cruel, inhuman degrading treatment. For example, Amnesty International reports beatings and threats of sexual violence,⁴⁴ and *El Observatorio Ciudadano* (OC) has received reports of ‘firing rubber bullets, tear gas, beatings, [and an] abduction by a helicopter’⁴⁵ being attributed to the state police and directed against Mapuche civilians in Araucanía. Indeed, so serious were these incidents that UNICEF sought an injunction from the Inter-American Commission on Human Rights.⁴⁶

The report produced by Chile mentions *Ley 20.477* and the reform of military tribunals.⁴⁷ For more information on this topic please see the discussion of Article 14.

Recommendations:

- Investigate thoroughly, and take punitive action where appropriate, all reported instances of police brutality, especially where loss of life, or women and children, are present.
- Encourage fair police practices, especially with regards to justified and proportionate uses of force.
- Where police brutality leads to loss of life, provide compensation to the families of the deceased.

ARTICLE 9: THE RIGHT TO LIBERTY AND SECURITY

Article 9.1: *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived on his liberty except of such grounds and in accordance with such procedures as are established by law.*

Article 9.2: *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

Article 9.3: *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but*

⁴¹ Richards, "Of Indians and Terrorists: How the State and Local Elites Construct the Mapuche in Neoliberal Multicultural Chile." p74.

⁴² AI, "Amnesty International Report 2012: The State of the World's Human Rights."

⁴³ HRW, "Chile," in *Country Summary* (New York: Human Rights Watch, 2013). p2.

⁴⁴ AI, "Amnesty International Report 2012: The State of the World's Human Rights." p107.

⁴⁵ CONAPACH, "Informe Alternativo 2010 Respecto Del Cumplimiento Del Convenio 169 Sobre Pueblos Indígenas Y Tribales De La Oit, Al Cumplirse Un Año De Su Entrada En Vigencia En Chile " (Confederación Nacional de Pescadores Artesanales de Chile, 2010). p36 '*el disparo de balines, gases lacrimógenos, golpizas, secuestro en un helicóptero, imputables a efectivos policiales del Estado*'.

⁴⁶ Ibid.

⁴⁷ "Examen De Los Informes Presentados Por Los Estados Partes En Virtud Del Artículo 40 Del Pacto: Chile." [72].

release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

For more information on the anti-terrorism laws, see the discussions of Articles 14 and 26.

El Observatorio Ciudadano has reported several instances of warrantless police searches of Mapuche homes and the 'arrest and release of Mapuche individuals without a detention control hearing'.⁴⁸ This behaviour is a clear contradiction to the rights enshrined in Article 9.1 of the covenant. Furthermore, when compiling information for a 2009 report on the situation of human rights in Chile, warrantless raids and associated house destruction and animal and property confiscation were reported as common practices.⁴⁹

In addition to these practices, the selective application of *Ley 18.314* (also referred to as "the anti-terrorism law")⁵⁰ on Mapuche citizens has repercussions with regards to Article 9 of the Covenant. This law allows the State to keep the investigation a secret for up to six months, denying the defendant knowledge of the allegations against which he must defend.⁵¹ Moreover, the anti-terrorism law authorises detention for up to 10 days, circumventing Article 9.3 and proper judicial oversight.⁵²

The report that the Republic of Chile submitted to the Committee makes almost no mention of any of these issues.⁵³

Recommendations:

- Abandon the practice of warrantless raids.
- Condemn and punish the practice of house destruction and property confiscation during raids.
- Abolish the practice of Mapuche arrest and release without a detention control hearing.
- Stop the discriminatory prosecution of the Mapuche people under *Ley 18.314*.

ARTICLE 14: EQUALITY BEFORE THE COURTS

Article 14.1: *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

⁴⁸ DoS, "Chile." p17.

⁴⁹ CONAPACH, "Informe Alternativo 2010 Respecto Del Cumplimiento Del Convenio 169 Sobre Pueblos Indígenas Y Tribales De La Oit, Al Cumplirse Un Año De Su Entrada En Vigencia En Chile ". p46.

⁵⁰ "Ley 18.314 - Determina Conductas Terroristas Y Fija Su Penalidad," ed. Congreso Nacional de Chile (1984).

⁵¹ Gonzalo Berríos Díaz, "Los Adolescentes Mapuche Y Las Reformas a La Ley No. 18.314 Sobre Conductas Terroristas," in *Anuario De Derechos Humanos* (Santiago: Universidad de Chile, 2012). p148.

⁵² Ibid. p148.

⁵³ "Examen De Los Informes Presentados Por Los Estados Partes En Virtud Del Artículo 40 Del Pacto: Chile." [76].

Article 14.2: *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

Article 14.3: *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
- (c) To be tried without undue delay;*
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
- (e) To 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;*
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
- (g) Not to be compelled to testify against himself or to confess guilt.*

For more information on the anti-terrorism laws, see the discussions of Articles 9 and 26.

As mentioned elsewhere in this report, the selective application of *Ley 18.314* against the Mapuche people is a major source of the human rights breaches present in Chile. With reference to Article 14, prosecution under the anti-terrorism laws violates several of the human rights guaranteed therein.

Firstly, the anti-terrorism laws permit the use and testimony of so-called “faceless witnesses”.⁵⁴ Established under the Pinochet regime, these laws were intended to enable the swift processing of dissidents. The withholding (under threat of punishment) of the name, address, profession, workplace and any other information which would enable the identification of the witness, violates the defendant’s right to examine witnesses on the same conditions as which he is examined.

Secondly, prosecution under the anti-terrorism laws operates from a presumption of guilt, rather than a presumption of innocence. This enhances the onus of the defendant, by altering the burden of proof in relation to criminal intent (*mens rea*), and violates Article 14.2 of the Covenant.⁵⁵

Furthermore, the practice of trying civilians in front of military tribunals is another violation, due to their lack of independence and absence of due process guarantees.⁵⁶ In military tribunals there may be secret inquisitorial aspects, the criminal proceedings are largely conducted in writing rather than in person, the use of wire-tapping is permitted, and due to the testimony of faceless witnesses opportunities for cross-

⁵⁴ "Ley 18.314 - Determina Conductas Terroristas Y Fija Su Penalidad." Artículo 15 (*'testigo sin rostro'*).

⁵⁵ CONAPACH, "Informe Alternativo 2010 Respecto Del Cumplimiento Del Convenio 169 Sobre Pueblos Indígenas Y Tribales De La Oit, Al Cumplirse Un Año De Su Entrada En Vigencia En Chile ". 37–38.

⁵⁶ HRW, "Chile." 2.

examination are scarce.⁵⁷ While the passing of *Ley 20.477* prevents some cases involving civilians,⁵⁸ and *Ley 20.519* prevents children under the age of 18 years,⁵⁹ from being tried in military tribunals, such tribunals retain jurisdiction when State police officers are involved in crimes against civilians (such as police brutality cases).⁶⁰ As mentioned by the Republic of Chile in its report,⁶¹ these reforms are commendable, yet more are needed. Indeed, Amnesty International reports that at the end of 2012—one year after the adoption of *Ley 20.519*—five Mapuche minors were still being prosecuted under the anti-terrorism laws.⁶²

Finally, the anti-terrorism laws mandate the handing down of aggravated sentences to the convicted. The punishment handed down under the anti-terrorism act may be up to three grades higher than under the standard criminal code.⁶³ Moreover, a threat to commit a crime governed by the anti-terrorism act can be prosecuted as an attempt to commit the crime (which often carries the same sentence as a completed crime)—an erroneous and farcical stretch of criminal law.

Recommendations:

- Stop the discriminatory prosecution of the Mapuche people under *Ley 18.314*.
- Prosecute all cases involving civilians in the civilian justice system.
- Drop the charges being prosecuted under the anti-terrorism law that are levied against minors.

ARTICLE 21: THE RIGHT OF PEACEFUL ASSEMBLY

Article 21: *The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

Several human rights agencies have published reports of large demonstrations ending in confrontations with police.⁶⁴ The OC summarises the situation succinctly:

The authorities have limited this right [of peaceful assembly] pursuant to the Executive Decree 1086 of 1983, an infra-legal standard that infringes the right to assemble without permission and without bearing arms recognized in article 19 Nº 13 of the Political Constitution of 1980 (CP 1980). In addition there has been a heavy police crackdown against demonstrations which has been denounced not only by civil society organizations but also by the Human Rights National Institute [sic] itself [INDH], which concludes, in a report on police action during demonstrations between March and August 2011, that: *the police do not distinguish between people who peacefully exercise their right to assemble and express their opinion, from those who use violent acts in the same demonstrations; that in police procedures in manifestations, the police do not apply*

⁵⁷ Ibid. 3.

⁵⁸ "Ley 20.477 - Modifica Competencia De Tribunales Militares," ed. Congreso Nacional de Chile (2010). Artículo 1.

⁵⁹ "Ley 20.519 - Modifica Disposiciones De La Ley No 18.314 Y Otro Cuerpo Legal, Excluyendo De Su Aplicación a Conductas Ejecutadas Por Menores De Edad," ed. Congreso Nacional de Chile (2011). Artículo 1.

⁶⁰ Observatorio Ciudadano, "Human Rights Situation in Chile 2011," (Observatorio Ciudadano, 2011).

⁶¹ "Examen De Los Informes Presentados Por Los Estados Partes En Virtud Del Artículo 40 Del Pacto: Chile." [86]–[88].

⁶² AI, "Amnesty International Report 2012: The State of the World's Human Rights." 106.

⁶³ CONAPACH, "Informe Alternativo 2010 Respecto Del Cumplimiento Del Convenio 169 Sobre Pueblos Indígenas Y Tribales De La Oit, Al Cumplirse Un Año De Su Entrada En Vigencia En Chile ". 38.

⁶⁴ AI, "Amnesty International Report 2012: The State of the World's Human Rights." 106.

*criteria of proportionality in the use of deterrent methods; that, in the police buses and vehicles, the detained were subjected to abuse and aggression which are not subject to control or supervision; that in police stations the procedures are slow, ineffective, and contrary to the current regulations; and that the treatment given to minors under 18 and over 14 years of age are contrary to current regulations.*⁶⁵

The aforementioned use of buck shot, rubber bullets and tear gas against demonstrations further illustrates the situation. Moreover, reports of water cannon use against students and forcible detention provide further evidence for human rights violations.⁶⁶ As a result of the jurisdiction of military tribunals where cases of police brutality are involved, disciplinary procedures are often less severe than if the proceedings would be undertaken by an independent body.⁶⁷

UNPO supports the further monitoring of *Carabinero* practices and, where applicable, denouncement of poor behaviours, as mentioned in the report submitted by the Republic of Chile.⁶⁸

Recommendations:

- Investigate thoroughly, and take punitive action where appropriate, all reported instances of police brutality, especially where loss of life, or women and children, are present.
- Encourage fair police practices, especially with regards to justified and proportionate uses of force.
- Prosecute all cases involving civilians in the civilian justice system.

ARTICLE 25: THE RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS

Article 25: *Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

- (a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) *To have access, on general terms of equality, to public service in his country.*

Notwithstanding the wide representation mentioned in the report submitted by the Republic of Chile,⁶⁹ there is a noticeable and significant absence of Mapuche at all levels of political representation. While indigenous people have the legal right to participate in the political process, the systemic and institutional framework inhibits their active participation at any level other than the municipal level.⁷⁰ For example, in the region of la Araucanía—the region in Chile with the greatest percentage population of Mapuche—there is a telling underrepresentation in parliament. In 2005, out of a total of 35 candidates for parliament, only two were Mapuche. In 2009, the number of Mapuche candidates increased to seven (with the total number of candidates remaining at 35).⁷¹ Nevertheless, 31.3% of the population in la Araucanía is Mapuche,⁷² and the

⁶⁵ Ciudadano, "Human Rights Situation in Chile 2011." (emphasis added). [10]

⁶⁶ DoS, "Chile." pp7–8

⁶⁷ Ciudadano, "Human Rights Situation in Chile 2011." pp5–6 (emphasis added).

⁶⁸ "Examen De Los Informes Presentados Por Los Estados Partes En Virtud Del Artículo 40 Del Pacto: Chile." [112].

⁶⁹ Ibid. [126].

⁷⁰ DoS, "Chile." p9

⁷¹ Andrés Jouannet Valderrama, "Participación Política Indígena En Chile: El Caso Mapuche," (Bolivia: Fundación Konrad Adenauer, 2011). p126.

proportion of Mapuche candidates were 6% and 20% respectively—far short of equal representation. Furthermore, the numbers above only refer to the candidates, not the actual parliamentarians. The Mapuche are represented by one regional councillor, two mayors (out of 32 municipalities), and one tenth of the municipal councillors, all of whom are in the region of la Araucanía.⁷³ The Mapuche are not represented in either of the two houses of Congress. These statistics clearly show the absence of equal representation, and the need for redress. Finally, even though the ILO Convention No. 169 was adopted, few reforms were effected, thus prolonging the difficulties indigenous communities faced when attempting to participate in the political arena.⁷⁴

Recommendations:

- Implement all reforms necessary in order to give effect to the ILO Convention No 169.
- Reform the system of political representation so as to give a voice to indigenous communities.

ARTICLE 26: EQUALITY BEFORE THE LAW

Article 26: *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effect protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other statuses.*

For more information on the anti-terrorism laws, see the discussions of Articles 9 and 14.

As mentioned elsewhere in this alternative report, a cause of great concern is the selective prosecution of Mapuche citizens under the anti-terrorism laws. These legal relics of Chile's military government enable the handing down of more severe sentences than the standard criminal code by the mere imputation of a terrorist intent.⁷⁵ Several hundred Mapuche have been arrested under the pretence of these laws.⁷⁶

Moreover, the anti-terrorism legislation has been used in cases to prosecute minors. UNPO applauds the passing of *Ley 20.519* which amends the anti-terrorism legislation so as to make it inapplicable to minors,⁷⁷ however reports of adolescents awaiting trial under this legislation as of the end of 2012 are a cause for concern.⁷⁸ The Inter-American Commission on Human Rights has petitioned the Inter-American Court of Human Rights to condemn the unjustified and discriminatory application of the anti-terrorism laws against the Mapuche.⁷⁹ Exacerbating the injustice with which these laws are applied is the nature of the crimes for

⁷² "Resultados Censo 2012." p192.

⁷³ Peter Marimán, "La Exclusión Política De Los Mapuche," [elciudadano.cl](http://www.elciudadano.cl), <http://www.elciudadano.cl/2011/12/11/45310/la-exclusion-politica-de-los-mapuche/>.

⁷⁴ CONAPACH, "Informe Alternativo 2010 Respecto Del Cumplimiento Del Convenio 169 Sobre Pueblos Indígenas Y Tribales De La Oit, Al Cumplirse Un Año De Su Entrada En Vigencia En Chile ". 47.

⁷⁵ Berríos Díaz, "Los Adolescentes Mapuche Y Las Reformas a La Ley No. 18.314 Sobre Conductas Terroristas." p148.

⁷⁶ Richards, "Of Indians and Terrorists: How the State and Local Elites Construct the Mapuche in Neoliberal Multicultural Chile." P73

⁷⁷ "Ley 20.519 - Modifica Disposiciones De La Ley No 18.314 Y Otro Cuerpo Legal, Excluyendo De Su Aplicación a Conductas Ejecutadas Por Menores De Edad." Artículo 1.

⁷⁸ AI, "Amnesty International Report 2012: The State of the World's Human Rights." 106.

⁷⁹ Ibid. 106.

which they are invoked. The severity of crimes range from land trespass through to arson—neither of these nor anything in-between qualifies as terrorism by any international standard.⁸⁰

Further causes for concern are the sentences handed down on police convicted for committing crimes against Mapuche. This issue is linked with the jurisdiction of military tribunals in situations where crimes are committed by members of State police. In April 2011 a report was undertaken by the Equitas Foundation's Barometer of Politics and Equality which determined that the sentences handed down on police who had committed crimes against Mapuche were much more lenient than those handed down on Mapuche.⁸¹ This is a grievous injustice which flies in the face of the right of equality before the law.

Recommendations:

- Stop the discriminatory prosecution of the Mapuche people under *Ley 18.314*.
- Prosecute all cases involving civilians in the civilian justice system.
- Drop the charges being prosecuted under the anti-terrorism law that are levied against minors.

ARTICLE 27: MINORITY RIGHTS

Article 27: *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

While the mechanisms mentioned in Chile's report to the Committee are to be commended, there are issues of contention concerning the protection of indigenous culture.⁸² Firstly, as mentioned elsewhere in this alternative report, there is no constitutional recognition of the Mapuche or other indigenous peoples of Chile. Constitutional recognition and Aboriginal title land rights are two steps which would help ensure the right of minorities to enjoy their own culture. Furthermore, the prioritisation of neoliberal development above indigenous rights must be examined. The fact that the construction of hydroelectric dams, airports, highways, agricultural and aquacultural industries, and refuse facilities are given priority over Aboriginal title, and that logging companies own more than three times as much land as the Mapuche, exemplify the issue.⁸³ The introduction of foreign flora (specifically pine and eucalyptus plantations) causes severe environmental damage which hinders the ability of the Mapuche to enjoy their culture.

In addition to this, there are various State initiatives (operated through municipalities and CONADI) which seek to commercialise Mapuche culture.⁸⁴ The concept of "ethno-tourism" and the marketing of indigenous textiles are nothing more than the exploitation of indigenous culture. These practices act as a disincentive and possess the potential for ridicule, thereby infringing the right for minorities to enjoy their own culture. Moreover, this feeds into conceptions held by local elites that Mapuche are "inventing" culture—such as

⁸⁰ HRW, "Chile." 3.

⁸¹ Domingo Namuncura, "Condensas a Mapuche. El Inicio De Una Nueva Etapa De Resquemores," in *El Primer Año. Modelo Para Armar, Barómetro De Política Y Equidad* (Santiago, Chile: Fundación Equitas, 2011). 160.

⁸² "Examen De Los Informes Presentados Por Los Estados Partes En Virtud Del Artículo 40 Del Pacto: Chile." [140]

⁸³ Richards, "Of Indians and Terrorists: How the State and Local Elites Construct the Mapuche in Neoliberal Multicultural Chile." p68.

⁸⁴ *Ibid.* p69.

inventing words and creating new ceremonies—in order to claim land.⁸⁵ This causes a further basis for discrimination and inflames tensions between the Mapuche and the *latifundistas*.

The disappearance of the Mapuche's language (*Mapudungun*) and indigenous knowledge is also of great concern. A study completed by UNICEF and the *Ministerio de Desarrollo Social* revealed that approximately 89% of the indigenous children in Chile cannot speak or understand their native tongue.⁸⁶ Several factors act as force multipliers, accelerating the loss of Mapudungun: there are a very limited number of scholars working on its preservation; there is controversy as to the alphabet used for its romanisation; and there are at least seven different dialects.⁸⁷ The disappearance of Mapudungun is in itself a tragic loss of culture, let alone a failure to ensure the Mapuche's ability to practise their right to language.

In April 2013 CONADI announced that it would provide funds for a number of communities in la Araucanía for the purposes of teaching indigenous language and knowledge.⁸⁸ This is a commendable action, however, the fact that only communities in la Araucanía benefit means that the Mapuche in other regions of the country miss out on these opportunities. Due to urban migration, almost 80% of the total Mapuche population now lives in proximity to five urban centres,⁸⁹ with over 37% of all Mapuche live in the Santiago metropolis alone.⁹⁰ In addition to forgoing the benefit of the CONADI funds, this urban migration has a further impact on the loss of Mapudungun. As of 2013, schools where at least 20% of the enrolment is indigenous are required to teach indigenous languages.⁹¹ While this is an improvement on the previous threshold of 50%, 20% is not representative of the indigenous population.⁹² As the Mapuche comprise approximately 8.7% of the Chilean population, a threshold of 20% effectively limits the teaching of indigenous languages to areas that are already disproportionately-highly inhabited by Mapuche. For the 80% of the Mapuche population living in urban centres, it is unlikely that the indigenous enrolment at the local schools would be greater than 20% of the total. These demographics, combined with the pressures of assimilation that urban Mapuche youth face, combine to severely impede upon the freedom of the Mapuche to learn, use and enjoy their own language.⁹³

Recommendations:

- Grant constitutional recognition of the Mapuche and other indigenous people.

⁸⁵ Ibid. p84.

⁸⁶ EFE, "El 89 % De Los Menores Indígenas De Chile No Habla Ni Entiende Su Lengua Originaria," <http://www.elmostrador.cl/noticias/pais/2012/01/23/el-89-de-los-menores-indigenas-de-chile-no-habla-ni-entiende-su-lengua-originaria/>.

⁸⁷ Patricio R. Ortiz, "Indigenous Knowledge and Language: Decolonizing Culturally Relevant Pedagogy in a Mapuche Intercultural Bilingual Education Program in Chile " *Canadian Journal of Native Education* 32, no. 1 (2009). pp 94, 97.

⁸⁸ CONADI, "Conadi Lanzó Programa Para Que 120 Comunidades Mapuches De La Araucanía Aprendan Su Lengua Originaria," CONADI, <http://www.conadi.gob.cl/index.php/2-noticias/972-conadi-lanzo-programa-para-que-120-comunidades-mapuches-de-la-araucania-aprendan-su-lengua-originaria/>.

⁸⁹ Ortiz, "Indigenous Knowledge and Language: Decolonizing Culturally Relevant Pedagogy in a Mapuche Intercultural Bilingual Education Program in Chile ". p97.

⁹⁰ "Resultados Censo 2012." p185.

⁹¹ "Educación Para Preservar Nuestra Diversidad Cultural: Desafíos De Implementación Del Sector De Lengua Indígena En Chile ", (Santiago: Ministerio de Educación, 2012).

⁹² EFE, "El 89 % De Los Menores Indígenas De Chile No Habla Ni Entiende Su Lengua Originaria."

⁹³ Ortiz, "Indigenous Knowledge and Language: Decolonizing Culturally Relevant Pedagogy in a Mapuche Intercultural Bilingual Education Program in Chile ". p101.

- Establish a mechanism by which to enable the restitution of ancestral land to the Mapuche and other indigenous peoples, with appropriate compensation for affected third parties.
- Create legislation to safeguard the Mapuche's and other indigenous people's right to use ancestral land, even if not exclusively occupied.
- Consult with Mapuche communities regarding the commercialisation of their culture, in order to come to a mutually satisfactory arrangement.
- Encourage the use, study and learning of indigenous languages, including Mapudungun.

IV. RECOMMENDATIONS

1. Abandon the practice of warrantless raids.
2. Abolish the practice of Mapuche arrest and release without a detention control hearing.
3. Condemn and punish the practice of house destruction and property confiscation during raids.
4. Consult with Mapuche communities regarding the commercialisation of their culture, in order to come to a mutually satisfactory arrangement.
5. Create legislation to safeguard the Mapuche's and other indigenous people's right to use ancestral land, even if not exclusively occupied.
6. Drop the charges being prosecuted under the anti-terrorism law that are levied against minors.
7. Encourage fair police practices, especially with regards to justified and proportionate uses of force.
8. Encourage the use, study and learning of indigenous languages, including Mapudungun.
9. Ensure fair and unbiased media representation of the Mapuche and their land claims.
10. Establish a mechanism by which to enable the restitution of ancestral land to the Mapuche and other indigenous peoples, with appropriate compensation for affected third parties.
11. Establish approaches designed to portray indigenous people in a positive light, such as a Museum of Mapuche History.
12. Grant constitutional recognition of the Mapuche and other indigenous people.
13. Implement all reforms necessary in order to give effect to the ILO Convention No 169.
14. Implement educational programmes at primary and secondary school levels to teach students about Mapuche history, culture and tradition.
15. Investigate thoroughly, and take punitive action where appropriate, all reported instances of police brutality, especially where loss of life, or the presence of women and children, is present.
16. Promote the development of indigenous media, including by increasing opportunities for indigenous journalists.
17. Prosecute all cases involving civilians in the civilian justice system.
18. Ratify the Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women.
19. Reform the system of political representation so as to give a voice to indigenous communities.
20. Stop the discriminatory prosecution of the Mapuche people under *Ley 18.314*.
21. Where police brutality leads to loss of life, provide compensation to the families of the deceased.