

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

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

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

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

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

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

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

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

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

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

Moreover, in the police and military response to the social mobilizations of the Mapuche people, there have been repeated charges brought before a variety of international bodies that the right of indigenous children and teenagers to life and physical and psychological integrity has been infringed. Several human rights protection organizations, as well as international bodies, have denounced that judicial and police authorities are violating the rights of the Mapuche youth, who have been victims of arbitrary detentions and, in many instances, have been subjected to interrogations on the location of other members of the Mapuche people; these interrogations are often violent and take place during the school day or when the children or teenagers are on their way to school from home. The alleged crimes include cases of infringement of the children's and teenagers' right to life or personal integrity, in that they were wounded by bullets or harmed by tear gas fired or thrown, respectively, by the public security forces; or were forced to endure the fear or trauma of police search operations in the home, school or community. In 2007, the UN Committee on the Rights of the Child expressed its concern over reports of indigenous children and teenagers being subjected to acts of police brutality and, consequently, recommended that the Chilean State make sure that such acts do not occur and adopt preventive and corrective measures when it is suspected that such acts have taken place.<sup>1</sup>

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<sup>1</sup> UN Committee on the Rights of the Child – 44th Period of Sessions – Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Chile. UN Document CRC/C/CHL/CO/3, April 23, 2007, par. 30.

## **B. Binding International Legal Standards**

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

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

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

Any child or adolescent who comes into conflict with the law enjoys several internationally recognized minimum rights; children and teenagers who break criminal law must be dealt with under special systems of criminal responsibility. International rules and standards applicable to juvenile justice are enshrined in the Convention on the Rights of the Child, as well as in other international instruments, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, and the United Nations Guidelines for the Prevention of Juvenile Delinquency.<sup>2</sup>

In order for a special system of criminal responsibility to be implemented, special rules of procedure and sentencing, as well as limitations on the deprivation of liberty, must apply to children and adolescents. According to the UN Committee on the Rights of the Child, the guarantees established in the Convention on the Rights of the Child pertaining to juveniles who allegedly have violated criminal laws, or who are accused of or plead guilty to violating criminal laws, fully respect their procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort. The Committee notes that the administration of juvenile justice must promote, inter alia, the use of alternative measures such as diversion and restorative justice, consistently taking into account the best interests of the child.<sup>3</sup> A special law establishing the limits

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<sup>2</sup> United Nations Committee on the Rights of the Child: General Comment No. 10 (2007) – Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 4.

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

and characteristics of criminal responsibility of juveniles, Law 20.084 of 2007, has already been enacted by the Chilean State. Under this law, the Chilean State can criminally prosecute and punish children 14 to 18 years of age, in a manner that is consistent with international standards: avoiding deprivation of liberty, ensuring due process, and making sure that punishments are aimed at social reintegration of juveniles. Instituting criminal proceedings against indigenous children and adolescents under the procedure set forth in Law 18.314, which significantly restricts the scope of the minimum guarantees which constitute due process, is difficult to reconcile with these internationally recognized principles, as explained in the merits report of the instant case.

The principle of the best interests of the child must be the guiding light for acts of Chilean public officials, including officers of the police, judges, prosecutors and public defenders. In fact, one of the pillars of any juvenile criminal justice system is to protect the best interests of the child. This principle, in the opinion of the Inter-American Court of Human Rights, “is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.”<sup>4</sup> The scope of this international principle has been defined by the Committee on the Rights of the Child as follows: “In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children.”<sup>5</sup> The principle of protection of the best interests of the child permeates the criminal justice system; thus, the Committee on the Rights of the Child has explained that “the protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.”<sup>6</sup> As for indigenous children and adolescents, the principle of protection of the best interests of the child has an even more specific nature. In fact, the Committee on the Rights of the Child has noted “the application of the principle of the best interests of the child to indigenous children requires particular attention. The Committee notes that the best interests of the child is conceived as both a collective and an individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights. (...) When State authorities, including legislative bodies, seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group.”<sup>7</sup> Application of Chile’s anti-terrorist law to an indigenous child or adolescent is incompatible with the principle of protection of the best interests of the child.

Another key principle established by the Convention on the Rights of the Child is the promotion by states of non-judicial intervention as the first response to juveniles in conflict with the law. The general policy of juvenile justice is that States are bound under the Convention on the Rights of the Child to provide special attention to the prevention of juvenile delinquency, the introduction of alternative measures allowing for responses to juvenile delinquency without resorting to judicial procedures.<sup>8</sup> The Committee on the Rights of the Child has noted that “according to article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as,

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<sup>4</sup> Inter-American Court of Human Rights. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/2002, August 28, 2002, par. 56.

<sup>5</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007) Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par 10.

<sup>6</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007) – The Rights of the child in juvenile justice. UN Document CRC/C/GC/10, April 25, 2007, par. 10.

<sup>7</sup> UN Committee on the Rights of the Child: General Comment No. 11 (2009) – Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, pars 30-31.

<sup>8</sup> UN Committee on the Rights of the child: General Comment No. 10 (2007) – The Rights of the child in juvenile justice. UN Document CRC/C/GC/10, April 25, 2007, par. 4.

accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable,” and therefore, they are to take “measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services.”<sup>9</sup> Among other things, it prevents the stigmatization of such children and adolescents. Submitting the Mapuche children and adolescents to judicial criminal procedures, as the first resort of authorities, amounts to disregard for this international obligation by the Chilean State.

The Convention on the Rights of the Child, as interpreted by the Committee on the Rights of the Child, provides for several fundamental principles regarding the dignified treatment that must be accorded to children and adolescents in conflict with the law: these principles include: (i) treatment that is consistent with the child’s sense of dignity and worth – “this inherent right to dignity and worth [which] has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child;”<sup>10</sup> (ii) treatment that reinforces the child’s respect for the human rights and freedoms of others—a principle that “requires a full respect for and implementation of the guarantees for a fair trial (...). If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?;”<sup>11</sup> (iii) treatment that takes into account the child’s age and promotes the child’s reintegration and the child’s assuming a constructive role in society – a principle which “must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child,”<sup>12</sup> and which means that “all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children;”<sup>13</sup> and (iv) prohibit and prevent all forms of violence in the treatment of children in conflict with the law.<sup>14</sup> When interventions are carried out in the context of a judicial procedure, the Committee on the Rights of the Child has demanded that “pursuant to article 40 (1) of CRC, reintegration requires that no action may be taken that can hamper the child’s full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.”<sup>15</sup>

So, when the competent authority institutes judicial proceedings, the principles of a fair and just trial must be fully applied. The Committee on the Rights of the Child has further noted that “the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in

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<sup>9</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007) – Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 24.

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

<sup>11</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 13.

<sup>12</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 13.

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

<sup>14</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 13.

<sup>15</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 29.

particular pretrial detention, as a measure of last resort.”<sup>16</sup> Every child or adolescent who is criminally prosecuted must be treated justly and have an impartial trial, which fully adheres to the due process guarantees set forth in Article 40.2 of the Convention on the Rights of the Child, Article 14 of the International Covenant on Civil and Political Rights, Article 8 and Article 25 of the American Convention on Human Rights. These guarantees include the prohibition of ex post facto application of criminal laws, the presumption of innocence, the right to be heard, the right to effective participation in the proceedings, the right to receive direct and speedy information on the charges, the right to legal or any other appropriate assistance, the right to speedy decision with the participation of the parents, the right to the presence and examination of witnesses, the right to appeal, the right to the free assistance of an interpreter and full respect for his or her private life.<sup>17</sup> In this regard, the Committee on the Rights of the Child has emphasized that “a key condition for a proper and effective implementation of these rights or guarantees is the quality of the persons involved in the administration of juvenile justice. The training of professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers and others is crucial and should take place in a systematic and ongoing manner. These professionals should be well informed about the child’s, and particularly about the adolescent’s physical, psychological, mental and social development, as well as about the special needs of the most vulnerable children, such as, (...) children belonging to racial, ethnic, religious, linguistic or other minorities (...).”<sup>18</sup>

Respect for the right of indigenous children to be heard and for their opinions to be taken into account, in accordance with Article 12 of the Convention on the Rights of the Child, is equally as important. The Committee on the Rights of the Child has explicitly stated on this topic that “with regards to the individual indigenous child, the State party has the obligation to respect the child’s right to express his or her view in all matters affecting him or her, directly or through a representative, and give due weight to this opinion in accordance with the age and maturity of the child. The obligation is to be respected in any judicial or administrative proceeding. Taking into account the obstacles, which prevent indigenous children from exercising this right, the State party should provide an environment that encourages the free opinion of the child. The right to be heard includes the right to representation, culturally appropriate interpretation and also the right not to express one’s opinion.”<sup>19</sup> The Committee has also reminded States parties that pursuant to Article 12 of the Convention on the Rights of the Child, “all children should have an opportunity to be heard in any judicial or criminal proceedings affecting them, either directly or through a representative. In the case of indigenous children, States parties should adopt measures to ensure that an interpreter is provided free of charge, if required, and that the child is guaranteed legal assistance, in a culturally sensitive manner.”<sup>20</sup>

It is noted that some of the Mapuche juveniles being prosecuted under the anti-terrorist law are currently being held in preventive detention, which goes against the grain of the international standards that are binding on the Chilean State. The rule of deprivation of liberty as a last resort stems from the need to protect the right to development of children and adolescents in conflict with the law. In the view of the Committee on the Rights of the Child, “the use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37 (b) explicitly provides that deprivation of

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<sup>16</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 28.

<sup>17</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, pars. 40-67.

<sup>18</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 40.

<sup>19</sup> UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 38.

<sup>20</sup> UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 76.

liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child's right to development is fully respected and ensured."<sup>21</sup> The Committee has further emphasized that "the leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily;"<sup>22</sup> that "the States parties should take adequate legislative and other measures to reduce the use of pretrial detention;"<sup>23</sup> that "the duration of pretrial detention should be limited by law and be subject to regular review;"<sup>24</sup> that "decisions regarding pretrial detention, including its duration, should be made by a competent, independent and impartial authority or a judicial body, and the child should be provided with legal or other appropriate assistance;"<sup>25</sup> and that "every child deprived of his/her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."<sup>26</sup>

### **C. Criminal Prosecution of Indigenous Children and Teenagers**

The Committee on the Rights of the Child has explained that indigenous children, as provided in the Convention on the Rights of the Child, require special measures of protection in order to fully enjoy their rights;<sup>27</sup> it has noted that "indigenous children face significant challenges in exercising their rights,"<sup>28</sup> and has held that "contrary to article 2 of the Convention, indigenous children continue to experience serious discrimination in a range of areas."<sup>29</sup> Hence, it has asserted that indigenous children have the inalienable right to be free from discrimination,<sup>30</sup> and has noted that "indigenous children are among those children who require positive measures in order to eliminate conditions that cause discrimination and to ensure their enjoyment of the rights of the Convention on equal level with other children,"<sup>31</sup> and these measures must include whatever is necessary to ensure their access to culturally appropriate services in the area of juvenile justice. In every act, Chilean authorities must be respectful of the specific cultural characteristics of indigenous children and adolescents, by making sure that they have full access and enjoyment of their traditions, language and culture.

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<sup>21</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 11.

<sup>22</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 79.

<sup>23</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 80.

<sup>24</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 80.

<sup>25</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 81.

<sup>26</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children's Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 82.

<sup>27</sup> UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 5.

<sup>28</sup> UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 5.

<sup>29</sup> UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 5.

<sup>30</sup> UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 23.

<sup>31</sup> UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 25.

Specifically with regard to indigenous children and youth who come in contact with the juvenile justice system, the Committee on the Rights of the Child has expressed its concern over the fact that “incarceration of indigenous children is often disproportionately high and in some instances may be attributed to systemic discrimination from within the justice system and/or society;” therefore, “to address these high rates of incarceration, the Committee draws the attention of States parties to article 40(3) of the Convention requiring States to undertake measures to deal with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate. The Committee, in its general comment No. 10 on children’s rights in juvenile justice (2007) and in its concluding observations, has consistently affirmed that the arrest, detention or imprisonment of a child may be used only as a measure of last resort.”<sup>32</sup>

Based on Article 2 of the Convention on the Rights of the Child, non-discrimination is one of the core principles that States must adhere to in developing and implementing juvenile justice policy. As the Committee on the Rights of the Child has asserted, the States Parties to said Convention “have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as (...) indigenous children (...). In this regard, training of all professionals involved in the administration of juvenile justice is important (...), as well as the establishment of rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation.”<sup>33</sup>

In its concluding remarks on Chile in 2007, the Committee on the Rights of the Child expressed its concern for the discrimination of which Chilean indigenous children are victims. Consequently, it recommended “that the State party increase its efforts to review, monitor and ensure implementation of legislation guaranteeing the principle of non-discrimination and full compliance with article 2 of the Convention, and adopt a proactive and comprehensive strategy to eliminate discrimination on gender, ethnic, religious or any other grounds and against all vulnerable groups throughout the country.”<sup>34</sup>

According to accounts provided by different international organizations,<sup>35</sup> children and teenagers of the Mapuche people say they are victims of social discrimination in general, because of their physical appearance and their first and last names, which would reveal the ethnic group they belong to. In non-indigenous social settings, many of them report feeling excluded, scorned or rebuffed; furthermore, they feel that others consider them to be in a lower social class because they are Mapuche. This situation of discrimination is further exacerbated by the conditions of extreme and widespread poverty of the Mapuche indigenous people.

In light of this backdrop of discrimination, there is no question that subjecting indigenous children and adolescents to a pattern of criminal prosecution, which infringes their rights, under circumstances that run counter to the principle of equality, will only contribute to further engrain this perception of systematic and structural discrimination and lead to the possible consequential individual and collective effects.

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<sup>32</sup> UN Committee on the Rights of the Child: General Comment No. 11 (2009)- Indigenous Children and their Rights under the Convention. UN Document CRC/C/GC/11, February 12, 2009, par. 74.

<sup>33</sup> UN Committee on the Rights of the Child: General Comment No. 10 (2007)- Children’s Rights in Juvenile Justice. UN Document CRC/C/GC/10, April 25, 2007, par. 6.

<sup>34</sup> UN Committee on the Rights of the Child, 44th Period of Sessions, Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Chile. UN Document CRC/C/CHL/CO/3, April 23, 2007, par. 30.

<sup>35</sup> [http://www.unicef.org/adolescence/chile\\_39013.html](http://www.unicef.org/adolescence/chile_39013.html)



It is imperative, therefore, for the Chilean State to strive to effectively fulfill the minimum international guarantees that it pledged to respect regarding all persons under the age of 18 years old in dealing with indigenous children and youth. As vulnerable individuals who receive special protection under international law, Mapuche children and adolescents enjoy a set of fundamental rights and to disregard such rights is a breach of the international responsibility of the Chilean State.