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December 6, 2019

**IN THE MAIN FILE: AMICUS CURIAE ON CRIMINALIZATION OF ENVIRONMENTAL
HUMAN RIGHTS DEFENDERS**

ORAL CRIMINAL COURT OF TEMUCO

The Center for Justice and International Law (CEJIL) represented by Maria Leoni, the Center for Human Rights and Environment (CEDHA) represented by Romina Picolotti, Earth Rights International (ERI) represented by Juliana Bravo Valencia, Goldman Environmental Foundation, represented by Michael Sutton, Dinah Shelton, Professor Emeritus, the George Washington University Law School, John Knox, Former United Nations Special Rapporteur on Human Rights and Environment, present ourselves before the Hon. Temuco Oral Criminal Court as amicus curiae in the criminal case Internal Role No. 539-2018, RUC: 1800401372-3, against Mr. Alberto Pascual Curamil Millanao¹, lonko Mapuche of lof Radalko de Curacautín and human rights defender, with the objective of bringing some international considerations and standards of human rights applicable to the case that we estimate must be taken into account for the decision that this Honorable Court needs to adopt regarding the criminal responsibility of Mr. Curamil Millanao.

I. SUBJECT MATTER

Respectfully, the *amicus curiae* or friends of the court, by means of the present, approach this Hon. Court with analysis of the international standards that determine the scope and content of Chile's international obligations with respect to the protection of human rights defenders and the guarantees for the effective exercise of the right to defend rights, which have a reinforced character under international law.

In particular, we will present an analysis of the phenomenon of the criminalization of human rights defenders as one of the ways in which their work is frequently hindered in the continent and in Chile, especially affecting indigenous leaders and those dedicated to the defense of the environment and the land. Likewise, we will address the important role of judges in preventing criminal proceedings from becoming tools of persecution and punishment against human rights defenders, and we will highlight some of the guidelines that international law has identified to characterize criminalization.

¹ Judiciary Republic of Chile. Court of Guarantee of Lautaro. Ordinary Cause Internal Role No. 539-2018. RUC: 1800401372-3. Entry Date 04/25/2018. File available: <https://reformaprosesal.pjud.cl/ConsultaCausasJsFWeb/page/panelConsultaCausas.jsf>



Being Alberto Curamil Millanao a human rights defender and defender of the environment, who is currently prosecuted in a case that presents many common characteristics with the criminalization cases that have been verified by international instances, we consider that all these elements should be taken into account by this Hon. Court in order to adopt a decision adjusted to international standards and to the obligations of the State when deciding on the criminal situation of Mr. Alberto Curamil Millanao.

To that end, we respectfully approach this Hon. Court as *amicus curiae* in the certainty that the honorable judges will appreciate and integrate these elements into its decision. We divide our presentation into the following sections: We first and briefly address the situation of risk faced by environmental defenders (Section II). Secondly, we describe the phenomenon of criminalization of which human rights defenders are often victims, including an analysis of certain common aspects that these processes present and that can help identify them more easily (Section III). Third, we analyze some important criteria that this Honorable Court must consider when analyzing the present case, as they constitute fundamental aspects of State's international obligations - in this case through the Judiciary -. Moreover, we refer to the importance of the context in which the cases occur, the reinforced nature of the obligations of the State with respect to human rights defenders, and the control of conventionality (Sections III.i, III.ii). Finally, we refer to some aspects of this specific case that raise concerns and make it necessary for this Honorable Court to analyze the facts and evidence according to the criteria developed in this amicus (Section IV).

II. THE FUNDAMENTAL ROLE OF HUMAN RIGHTS DEFENDERS AND THE SITUATION OF ENVIRONMENTAL DEFENDERS

International law especially protects human rights defenders. The United Nations Organization (UN), the Inter-American Commission on Human Rights (hereinafter, "IACHR") and the Inter-American Court of Human Rights (hereinafter, "IA Court") have broadly defined human rights defenders. Thus, according to the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter, the "Declaration"), human rights defenders are "...individuals, groups and associations [that contribute to], the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals,..."².

Similarly, the IACHR has consistently adopted a broad definition for the scope of this special protection, stating that human rights defenders are "those who in any way promote or seek the realization of nationally or internationally recognized human rights and fundamental freedoms."³

Accordingly, what defines a human rights defender is the activity that he or she engages in and no other factors, such as profession, belonging to an organization or receiving remuneration.⁴ Nor does this

² UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms Adopted by General Assembly resolution 53/144 of 9 December 1998, Preamble <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>

³ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 19 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>. See also IACHR SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II. Doc. 66, 31st December 2011 Original: Spanish, Para. 12 <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>

⁴ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 19 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>



recognition is affected by the type of right the person defends. International human rights law recognizes as human rights defenders those who are dedicated to the defense of civil and political rights, as well as those who defend economic, social, cultural rights, including the right to a healthy environment.⁵

The State's obligation to provide a special protection to human rights defenders responds mainly to the fact that through their work these people play a fundamental role for the functioning and the strengthening of democracy and the rule of law. In this way, their denunciation and defense of the rights of all persons helps States fulfill their duties to respect and guarantee all fundamental human rights and avoid impunity.

The IACHR has recognized that the work of human rights defender “contribute to the improvement of social, political and economic conditions, the reduction of social and political tensions, the building of peace, domestically and internationally, and the nurturing of national and international awareness of human rights.”⁶ Hence, for the IACHR, defenders constitute pillars for the strengthening and consolidation of democracies, “since the purpose that motivates their work involves society in general, and seeks to benefit society. Accordingly, when a person is kept from defending human rights, the rest of society is directly affected.”⁷

Being able to conduct activities that involve the defense of human rights, without discrimination, persecution, or violence of any kind, is in itself a right. This has been recognized by the Declaration, which states that “[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”⁸

Likewise, this rights is recognized within the Inter-American Human Rights System (hereinafter “IAHRS”) by clearly stating that States have an obligation to guarantee all the necessary conditions for human rights defenders to carry out their work (“the right to defend rights”). The IA Court has recognized for example that:

“[T]he inter-American norms existing so far do not establish a single right that guarantees the work of promotion and protection of human rights. On the contrary, they establish multiple rights components whose guarantee allows the work of defenders to materialize. Thus, the right to defend human rights and the correlative duty of the States to protect it, are related to the enjoyment of various rights contained in the American Declaration of the Rights and Duties of Man and in the American Convention, such as life, personal integrity, freedom of expression, association, judicial guarantees and judicial protection. These guarantees, as a whole, constitute the vehicle for the realization of this right, and allow a

⁵ Human Rights Council, Thirty-first session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. A/HRC/31/L.28, Pag. 1 Distr.: Limited 21 March 2016 Original: English <https://documentsddsny.un.org/doc/UNDOC/LTD/G16/055/98/PDF/G1605598.pdf?OpenElement>

⁶ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 20 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

⁷ IACHR SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II. Doc. 66, 31st December, 2011 Original: Spanish, Para. 13 <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>

⁸ UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms Adopted by General Assembly resolution 53/144 of 9 December 1998, Art. 1 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>



free exercise of the activities of defense and promotion of human rights, since only when the defenders have an appropriate protection of their rights can they seek freely protecting the rights of other people.”⁹

The IACHR similarly stated that the society as a whole “has the right and the duty to seek, by different means, to promote and realize their rights both domestically and internationally [and that] [a]ny person, individually or collectively, has the right to pursue peaceful activities that make it possible to attain those objectives, whether directly geared to the public authorities, or to society in general or in groups.”¹⁰

However, despite the clear recognition of the right to defend rights, and the importance of protecting those who exercise it for the benefit of all people, our region and the world are witnessing the risk that the defense of rights represents, both to the life and integrity of human rights defenders, as well as for their families and communities. The Americas is unfortunately the most dangerous region in the world for the defense of rights.¹¹ For many years now, there is significant evidence in the region to the various ways in which human rights defenders are constantly subjected to threats, harassment, stigmatization, criminalization and violence, which in a large number of cases include the participation of State agents and are affected by impunity.¹²

Among human rights defenders, the group that mostly faces violence, criminalization and impunity are those human rights defenders dedicated to the defense of the environment and the land, whose rights over their lands and natural resources are generally not recognized¹³. That is why generally private companies, often with participation or acquiescence of the State, have taken advantage of this situation of criminal persecution of environmental defenders and impunity against the violation of environmental law to benefit economically, causing serious damage to the environment.¹⁴ The struggle of human rights defenders of the environment tends to decay in long conflicts with damages that affect the entire community.¹⁵ According to the international organization Global Witness, “[This] pattern seems to be getting worse in a context of growing economic pressure on land and natural resources.”¹⁶

The United Nations Human Rights Council expressed deep concern about the risk faced by environmental human rights defenders in its resolution of March 2019, stating that: “...human rights defenders working in environmental matters, referred to as environmental human rights defenders, are among the human rights defenders most exposed and at risk...”¹⁷. This is consistent with the expression of alarm that the IACHR

⁹ I/A Court H.R., Case of Escaleras Mejía et al. v. Honduras. Judgment of September 26, 2018. Series C No. 361. Para. 60. Decision only in Spanish

http://www.corteidh.or.cr/docs/casos/articulos/seriec_361_esp.pdf

¹⁰ IAHR REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II.124, Doc. 5 rev., 17 March 2006, Para. 35 Original: Spanish <http://www.icnl.org/research/resources/assembly/oas-human-rights-report.pdf>

¹¹ Global Witness, *Enemies of the State?*, July 2019, pag. 9

¹² See for example IAHR REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II.124, Doc. 5 rev., 17 March 2006, Parra. 35 Original: Spanish <http://www.cidh.oas.org/countryrep/Defenders/defenderstoc.htm>

¹³ Global Witness, *Enemies of the State?*, July 2019, Pag. 38

¹⁴ *Ibíd.*

¹⁵ *Ibíd.*

¹⁶ *Ibíd.*

¹⁷ UN Human Rights Council, *Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development*, March 20th 2019, A/HRC/40/L.22/Rev.1. Pag. 2. <https://www.universal-rights.org/wp-content/uploads/2019/03/Recognizing-the-contribution-of-environmental-human-rights-defenders-to-the-enjoyment-of-human-rights-environmental-protection-and-sustainable-development.pdf>



has carried out by including environmental defenders as one of the seven groups of human rights defenders who are in a situation of greatest risk, together with trade unionists, leaders and peasant and community leaders, indigenous and afro-descendants.¹⁸ It is appropriate to emphasize that the lonko Alberto Curamil Millano integrates 2 of the 7 highest risk groups considered by the Commission, given that he is an indigenous leader as well as an environmental defender.

The statistics that support this concern are alarming. In 2017 and 2018, the United Nations Organization "...recorded and verified 431 killings across 41 countries. Every passing week saw at least eight people murdered at the front lines of efforts to build more inclusive and equal societies"¹⁹ establishing a worrying increase from previous years.²⁰ For its part, Global Witness, in its annual report on the impact of violence against defenders, determined that in 2018 alone, 164 defenders of the environment and land were killed worldwide, more than half in Latin America alone. Largely for the defense of "their homes, forests and rivers from destructive industries."²¹ In addition, these environmental defenders are silenced "through violent attacks, arrests, death threats or lawsuits."²²

The impact of threats, violence and criminalization suffered by human rights defenders transcends the person victim directly targeted by the aggressions, also affecting and violating the rights of their families and communities. This is particularly relevant in the case of environmental defenders, and especially those who are also leaders or members of indigenous communities.

The United Nations Human Rights Council has indicated that the security of this group of defenders is inherently linked to the security of their communities, and that it can only be effectively secured in a context that includes the strengthening of democratic institutions, the struggle against impunity, reduction of economic inequality and equal access to justice.²³ Similarly, the IACHR has highlighted that in a large majority of cases that come to its attention "the persons who stand up for the rights of their peoples and communities are those spiritual leaders considered a source of ancestral knowledge; they are fundamental figures for the political, spiritual, and cultural development of the communities."²⁴ The unexpected absence of these leaders seriously undercuts the identity, integrity, and culture of the peoples and communities to which they belong. Accordingly, these actions have a direct negative impact on the cultural integrity and survival of the indigenous peoples.²⁵ For this reason, the IACHR considers that reprisals against indigenous

¹⁸ IACHR SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II. Doc. 66, 31st December 2011 Original: Spanish <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>

¹⁹ United Nations Report of the Secretary-General on SDG Progress 2019 Special Edition, May 8th 2019, E/2019/68. Pag. 23 https://sustainabledevelopment.un.org/content/documents/24978Report_of_the_SG_on_SDG_Progress_2019.pdf

²⁰ *Ibid.*

²¹ Global Witness. Enemies of the State? How governments and business silence land and environmental defenders. ISBN: 978-1-911606-39-0. July 30th, 2019. Pag. 8

²² Global Witness. Enemies of the State? How governments and business silence land and environmental defenders. ISBN: 978-1-911606-39-0. July 30th, 2019. Pag. 8

²³ UN Human Rights Council, Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development, March 20th 2019, A/HRC/40/L.22/Rev.1. Pag. 3. <https://www.universal-rights.org/wp-content/uploads/2019/03/Recognizing-the-contribution-of-environmental-human-rights-defenders-to-the-enjoyment-of-human-rights-environmental-protection-and-sustainable-development.pdf>

²⁴ IAHR REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II.124, Doc. 5 rev.,17 March 2006, Para. 221 Original: Spanish <http://www.icnl.org/research/resources/assembly/oas-human-rights-report.pdf>

²⁵ IAHR REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II.124, Doc. 5 rev.,17 March 2006, Para. 221 Original: Spanish <http://www.icnl.org/research/resources/assembly/oas-human-rights-report.pdf>



human rights defenders affect the “survival of the indigenous peoples”²⁶ and their cultural integrity²⁷ and constitute violations of the American Convention on Human Rights.

In recent years, in addition to threats, harassment, and acts of violence, the region has seen a significant increase in cases of criminalization of human rights defenders, and in particular, of those who defend the right to a healthy environment and the land. This complex phenomenon involves subjecting people to criminal proceedings, often arbitrary and devoid of sufficient evidence and guarantees, in which they also face extensive times of preventive detention. The appearance of legitimacy that many of these processes may have, and the undeniable power and duty of the State to investigate possible crimes, makes the identification of criminalization situations complex. In this context, the judiciary has a fundamental role, and must take decisive measures to verify and ensure that criminal proceedings do not become tools of harassment, silencing and impeding the work of defenders. Failure to do so may configure the international responsibility of the State for violating the right to defend rights.

In the next section, we refer to this phenomenon and state some of the guidelines that can be used to guide the actions of the Judiciary in this and other cases.

III. THE PHENOMENON OF CRIMINALIZATION OF HUMAN RIGHTS DEFENDERS AS A VIOLATION OF THE RIGHT TO DEFEND RIGHTS.

Criminalization of human rights defenders through the misuse of criminal law is a recurring practice in some States of the region²⁸. This is a dangerous practice that seeks to hide human rights violations to this group behind an appearance of legality, with the impact that often defenders are imprisoned or prevented or inhibited from continuing their defense work. Criminalization has been defined by the IACHR as “...the misuse of criminal law involves the manipulation of the State’s punitive power by State and non-State actors in order to hinder their work in defense and thus prevent the legitimate exercise of their right to defend human rights.”²⁹ This phenomenon has been increasing globally and responds to a sophistication of the mechanisms designed to hinder, block and discourage the work of the defense and promotion of human rights.³⁰

Without prejudice to the duty of the State to investigate and punish crimes that occur in its territory, the phenomenon of the criminalization of defenders is a worrying reality that deserves to be addressed urgently, largely with decisive and conscious work of Judiciary. According to the IACHR, “The increasingly systematic and recurring way in which baseless criminal actions are brought against human rights defenders has caused this obstacle to gain visibility in the region and to become a problem that merits urgent attention

²⁶ *Ibíd.*

²⁷ *Ibíd.*

²⁸ IACHR, Towards effective integral protection policies for human rights defenders, December 30, 2017, Para. 1, OEA/Ser.L/V/II. Doc. 207/17 <http://www.oas.org/en/iachr/reports/pdfs/Defensores-eng-2017.pdf>

²⁹ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 43 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

³⁰ United Nations Report of the Secretary-General on SDG Progress 2019 Special Edition, May 8th 2019, E/2019/68, Pag. 23

https://sustainabledevelopment.un.org/content/documents/24978Report_of_the_SG_on_SDG_Progress_2019.pdf See also IACHR SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II. Doc. 66, 31st December 2011 Original: Spanish, Para. 172 <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>



on the part of the States, as it undermines the leading role defenders play in the process of pursuing the full attainment of the rule of law and the strengthening of democracy”³¹

Therefore, the IACHR has urged States to ensure that their authorities do not manipulate the punitive power or the judicial bodies to harass human rights defenders.³² This call was reiterated vehemently and recently in the framework of a thematic hearing convened by the IACHR in September 2019, where the Commission received complaints of criminalization of environmental defenders throughout the region, including the case of Alberto Curamil. On that occasion, the IACHR affirmed its concern about the use of criminal systems to retaliate against defenders of the environment and the importance of States taking special measures to respond and prevent these processes³³.

To fulfill this duty, the role of judicial authorities is essential, since it is they who have the power to provide justice, ensure judicial guarantees and the rights of the persons prosecuted, and prevent criminalizing processes from progressing.

One of the main challenges is to be able to identify in time the processes that pursue the purpose of criminalizing. Since it is a recurring practice in various international complaints, the IACHR, IA Court, and other mechanisms have advanced in the identification of certain common patterns that are repeated, which, added to the knowledge and consideration of the existence of criminalization contexts, serve as indicators and alarms that the judicial authorities can use to evaluate the processes with reinforced due diligence avoiding the criminalization. The IACHR has clarified regarding this:

“The Commission considers it necessary to clarify that patterns have been established based on disturbing incidents or incidents that constitute violations of rights. Nonetheless, there are common characteristics that make it possible to determine and classify the patterns through other forms, such as: who commits the violations, when they are committed, and the persons or groups of persons who are the victims of such conduct.”³⁴

Thus, many of the criminalization processes usually begin with unfounded complaints, or based on criminal categories that do not respect the principle of legality or that do not comply with the inter-American standards regarding the conduct they punish.³⁵ In this regard, the IACHR has indicated that this pattern is characterized in that “the authorities in charge of investigating the crime—perhaps due to a lack of precision in the criminal codes themselves, or due to a lack of diligence in the investigation—proceed with the

³¹ IACHR SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II. Doc. 66, 31st December 2011 Original: Spanish, Para. 78 <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf> See Also Human Rights Council Thirty-ninth session 10–28 September 2018 Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development A/HRC/39/17/Add.2* Distr.: General 28 June 2018, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico, Para. 67 <http://unsr.vtaulicorpuz.org/site/images/docs/country/2018-mexico-a-hrc-39-17-add2-en.pdf>

³² IAHR, “IAHRC Ends 149th Period of Sessions”, Annex to the Press Release, Washington D.C., november 8th 2013 <http://www.oas.org/es/cidh/prensa/comunicados/2013/083A.asp>

³³ IAHR, Thematic Regional Hearing. “Use of Criminal Justice gainst human Rights Defenders”, 173 Period of Sessions, Washington D.C., September 27 2019, available at <https://www.youtube.com/watch?v=EeF2EFwsnyE>

³⁴ IAHR REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II.124, Doc. 5 rev.,17 March 2006, Para. 139 Original: Spanish <http://www.icnl.org/research/resources/assembly/oas-human-rights-report.pdf>

³⁵ See IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 59 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>



criminal indictment before gathering the necessary evidence to verify that the unlawful conduct has occurred”³⁶.

Also, many times, complaints are often accompanied by smear campaigns against human rights defenders, which attempt to place them as members of criminal gangs, guerrillas, terrorist groups, or as a threat to national security³⁷. In fact, it is common that the person undergoing criminal proceedings has had a criminal record that resulted in acquittals or arbitrary detentions, and even previous reprisals by police officers.

On a large number of occasions, defenders are usually accused through the use of ambiguous crimes, such as public order disturbance, usurpation, invasion, conspiracy, coercion and instigation to commit crimes³⁸. In other cases, they are charged with “crimes like robbery, murder, and kidnapping based on false and fabricated evidence without the defenders having engaged in unlawful or guilty conduct.”³⁹ In many cases the arrest warrants are issued without the existence of the necessary evidence and with extraordinary speed *vis a vis* cases of other persons not necessarily involved with the defense of human rights.⁴⁰

The United Nations Special Rapporteur on human rights defenders has pointed out that frequently, due to security provisions, the evidence underlying the arrests of defenders is kept secret, totally or partially⁴¹. According to this Rapporteur, “[t]hese conditions make it extremely difficult for defenders to verify the legality of the arrest and respect for relevant human rights related to conditions of detention, or to ensure an adequate legal defence.”⁴²

Another patterns that is repeated in observed and verified cases of criminalization is that the judicial proceedings include long periods of preventive detention⁴³, even with unjustified exceptions of the deadlines established in local legislation and without respecting the established international standards.

On this point, and to limit the abusive use of pretrial detention, the IA Court has indicated that “the judicial decision that restricts the personal freedom of a person through pretrial detention must substantiate and prove, in the specific case, the existence of sufficient evidence to reasonably assume the criminal conduct of the person and that detention is strictly necessary, and therefore cannot be based on mere suspicion or personal perception of the defendant's membership of a particular illegal group.”⁴⁴

³⁶ *Id.* Para. 58

³⁷ Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico, June 28th, 2018. A/HRC/39/17/Add.2. Para. 40 & 67. See also, Global Witness. *Enemies of the State? How governments and business silence land and environmental defenders.* ISBN: 978-1-911606-39-0. July 30th, 2019. Pag. 29

³⁸ *Ibid.*

³⁹ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 180 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

⁴⁰ Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Mexico, August 10th, 2018. A/HRC/39/17. Para. 49. See also, Global Witness. *Enemies of the State? How governments and business silence land and environmental defenders.* ISBN: 978-1-911606-39-0. July 30th, 2019. Pag. 29

⁴¹ UN General Assembly, Human Rights Council, Report submitted by the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, A/58/380, September 18th, 2008. Para. 30. <https://undocs.org/pdf?symbol=en/A/58/380>

⁴² UN General Assembly, Human Rights Council, Report submitted by the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, A/58/380, September 18th, 2008. Para. 30. <https://undocs.org/pdf?symbol=en/A/58/380>

⁴³ UN General Assembly, Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz, August 10th 2018, A/HRC/39/17, para. 50.

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See Also, Global Witness. *Enemies of the State? How governments and business silence land and environmental defenders.* ISBN: 978-1-911606-39-0. July 30th, 2019. Pag. 29.

⁴⁴ I/A Court H.R., Case of Herrera Espinoza et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2016. Series C No. 316. Para. 143. (Only in Spanish)



The IACHR has also called attention to the abuse of the use of this procedural measure in cases of human rights defenders, stating that “in some cases members of the judiciary order precautionary measures without addressing the procedural purposes for which they are designed, to be implemented rather as a mechanism to prevent the work of defenders by their detention or creating other obstacles that interfere with the activities of defense they perform.”⁴⁵

For this reason, the IACHR often states that judges need always to consider alternative measures to preventive detention if the risk of the accused absconding or obstructing the investigation can be reasonably avoided by a less restrictive measure.⁴⁶

Failure to comply with these guidelines may lead to an arbitrary detention and illegitimate deprivation of liberty, since pretrial detention becomes an early penalty.⁴⁷ In the particular case of criminalization processes of human rights defenders, the impact and violation of rights is even greater, since the deprivation of liberty of the human rights defender fulfills the purpose of those who promote and allow arbitrary criminal proceedings, which is that of preventing the person from continuing with his defense work and thus sending a threatening and silencing message to other defenders.⁴⁸

Additionally, the criminalization of human rights defenders is characterized by the imputation of crimes and the imposition of sentences without sufficient evidence or with insufficient justifications. Many times, the imposition of pretrial detention or the sentences are justified in the personal characteristics of the accused, the danger of the person, the social impact of the sentence, or in the seriousness or type of crime that is charged. However, none of these considerations can constitute *per se* grounds for justification for convictions.⁴⁹

It is worth mentioning in this regard that the IA Court clearly emphasizes the need to explain and sustain every conviction and decision on deprivation of liberty. This is a fundamental guarantee for the persons prosecuted, which is particularly relevant in the framework of criminal proceedings against defenders of human rights:

⁴⁵ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 195 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

⁴⁶ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 198 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

⁴⁷ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 202 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

⁴⁸“Even if the charges are withdrawn, preventive detention can last for long periods, a year or more and, for the detained person means, stigmatization and loss of employment and family and community ties and can involve difficulties or situations impossible to solve ” UN General Assembly, Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz, August 10th 2018, A/HRC/39/17, para. 77

⁴⁹ IACHR Report on the Use of Pretrial Detention in the Americas. OEA/Ser.L/V/II. December 30th 2013. Para. 21. <https://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf> I/A Court HR. Case García Asto y Ramírez Rojas Vs. Perú. Sentence november 25th 2005. Serie C Number 137, Para 106. CIDH. Criminalización de la labor de las defensoras y los defensores de derechos humanos. OEA/Ser.L/V/II.Doc. 49/15. 31 de diciembre de 2015, párr. 204. ACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 204 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>



“[T]he relevance of the motivation, in order to guarantee the principle of presumption of innocence, mainly in a conviction, which must express the sufficiency of proof of charge to confirm the accusatory hypothesis; the observance of the rules of sound criticism in the assessment of the evidence, including those that could generate doubt of the criminal responsibility; and the final judgment that derives from this assessment. The judicial decisions, must reflect the reasons why it was possible to obtain conviction about the imputation and criminal responsibility, as well as the assessment of the evidence to distort any hypothesis of innocence, and only then be able to confirm or refute the accusatory hypothesis. The foregoing would allow the presumption of innocence to be distorted and criminal responsibility determined beyond any reasonable doubt. When in doubt, the presumption of innocence and the principle in *dubio pro reo*, operate as a decisive criterion at the time of issuing the judgment”.⁵⁰

Moreover, another pattern that is repeated in cases of criminalization is the existence of intelligence tasks carried out by state agents on the defenders that derive or frame criminal proceedings⁵¹. Since 2006, the IACHR has been calling attention to this issue, stating that:

“The Commission has received information that indicates that the security forces of some states of the region aim their intelligence activity at human rights organizations and their members. In addition, the Commission has received several complaints related to the manner in which intelligence information is collected on persons who defend human rights and their organizations. According to these complaints, one method used by the intelligence services is to obtain financial documents and other private documents without authorization. The complaints indicate that the state security forces are wiretapping and secretly taping phone conversations without judicial authorization. The Commission has been informed that the intelligence services in some countries have created files or records on human rights defenders.”⁵²

The serious impact of criminalization is also widely documented and goes beyond the human rights defender subject to criminal proceedings. The IACHR has established that “the processes of misuse of criminal law negatively impact the interpersonal relationships of human rights defenders, since in many cases the persons subjected to criminal proceedings are forced to separate from their families and change their place of residence and even to leave their community, city, or country, and therefore alter their life plans, abandoning their daily work.”⁵³

⁵⁰ I/A Court H.R., Case of Zegarra Marin v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 15, 2017. Series C No. 331. (Only in Spanish) http://www.corteidh.or.cr/docs/casos/articulos/seriec_331_esp.pdf

⁵¹ Inter-American Commission on Human Rights. Towards effective integral protection policies for human rights defenders : Approved by the Inter-American Commission on Human Rights on December 30, 2017.

v. ; cm. (OAS. Official records ; OEA/Ser.L/V/II) ISBN 978-0-8270-6723-3. See also, IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 59 “The IACHR has also learned that prosecutors and other authorities sometimes perform secret preliminary investigations, which may include intelligence activities or collecting intelligence reports by the army or police, prior to, as part of, or even in the absence of a criminal investigation against a human rights defender. “

<http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

⁵² IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 185

⁵³ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 217



Likewise, the negative effects of criminalization of human rights defenders directly affect the defense of the human rights of society in general, since criminalized defenders must "...invest his or her time and resources on his or her defense and loses the ability to attend his or her work or the organization's." ⁵⁴ In addition, criminalization has a threatening effect on the rest of society and other defenders, so that they do not carry out their tasks of protection and promotion of rights for fear of reprisals. On this, the Commission clearly stated that:

“Criminalization affects persons which play significant roles in a society, town or community, such as social and community leaders and indigenous authorities, it has a very negative impact on the collective because not only is the accused person affected, but also the society in which he or she plays a role, as that person is prevented from exercising his or her position of representation, leadership, or authority.”⁵⁵

Given the impact that this violation of rights can have, it is essential that the state authorities responsible for the investigation and prosecution of crimes ensure the correct application of the law, seeking the truth of what happened, and acting "with professionalism, good faith, procedural loyalty, considering both elements that allow to prove the crime and the responsibility of the accused in the act, as well as those that can exclude or mitigate the criminal responsibility of the accused."⁵⁶

Likewise, the IACHR has reflected on the responsibilities of judges who intervene in consummating criminalization when deciding to accept processes without evidence, with insufficient evidence or with allegations of false witnesses, or “when they incur on improper interpretation of the law and do not take into account international instruments that protect defenders, which results in the obstruction of [their work]”⁵⁷

Thus, in many of these processes, judicial authorities are in a position to avoid or contribute to consummate the criminalization of human rights defenders and its impacts on their communities. Avoiding the criminalization is an obligation of the State, whose breach generates international responsibility⁵⁸ and erodes the entire criminal justice system.

As Pope Francis expressed when addressing the participants in the XX Congress of the International Association of Criminal Law on November 20 of this year:

⁵⁴ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 178 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

⁵⁵ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 220 <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>

⁵⁶ IACHR. Basic Guidelines for the Investigation of Violations of Rights of Human Rights Defenders in the Americas, Para. 61, only available in Spanish <http://www.oas.org/es/cidh/informes/pdfs/DirectricesBasicas-PersonasDefensoras.pdf>.

⁵⁷ IACHR. Basic Guidelines for the Investigation of Violations of Rights of Human Rights Defenders in the Americas, Para. 62, only available in Spanish <http://www.oas.org/es/cidh/informes/pdfs/DirectricesBasicas-PersonasDefensoras.pdf>.

⁵⁸ The Commission explained that such "unfounded criminal actions" can hold a State responsible for the violation of fundamental human rights at the international level. IACHR SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS OEA/Ser.L/V/II. Doc. 66, 31st December 2011 Original: Spanish, Paras. 8, 77 & 81.



“The first thing that jurists should ask themselves today is what they can do with their own knowledge to counteract this phenomenon, which endangers democratic institutions and the very development of humanity. Specifically, the current challenge for every criminal jurist is to contain criminal punitive irrationality, which manifests itself, among other things, in mass seclusions, overcrowding and torture in prisons, arbitrariness and abuse of security forces, extension of the scope of the penalty, the criminalization of social protest, the abuse of pretrial detention and the repudiation of the most elementary criminal procedural guarantees of due process.”⁵⁹

In addition to searching for the presence of these patterns in the present case, this Honorable Court needs to take into account three fundamental considerations that should guide the action of the judiciary in criminal proceedings against human rights defenders and that we elaborate below: (i) the consideration of the existence of a context of criminalization and harassment cases in the country, (ii) the reinforced nature of the obligations of the State regarding human rights defenders, and the control of conventionality that the judicial powers must carry out to comply with the international obligations of the State.

i. The Criminalization of Human Rights Defenders in Chile

In addition to taking into account the general patterns identified above, international human rights organizations agree that judicial authorities must consider and take into account the situation of defenders in their country, and the possible existence of a criminalization environment. This is relevant in the particular case of Chile, where a context of aggression, harassment and criminalization regarding human rights defenders has been denounced on various occasions, especially against those who defend the environment and are Mapuche indigenous leaders. In fact, Alberto Curamil Millanao himself has been criminalized before, as well as other people from his community and organization, the Alianza Territorial Mapuche (ATM).

With respect to Chile, the United Nations Special Rapporteur on human rights defenders has drawn attention to cases of imprisonment, criminalization, and violence against human rights defenders in the country.⁶⁰ According to this Rapporteurship, this criminalization, which translates into “violations of a judicial nature,” usually includes arrests, imposition of fines, prison sentences, absence of procedural guarantees, in particular within the framework of anti-terrorism legislation and, making broad accusations, vague and / or allegedly false.⁶¹

Similarly, the UN Rapporteur on the Rights of Indigenous Peoples has recently made a pronouncement after visiting Chile. In her report she expressed concern about the high presence of criminalization processes against Mapuche indigenous people, indicating that in those cases “judges and prosecutors have contributed to the misuse of criminal law by accepting false testimony, issuing warrants without sufficient evidence, allowing unfounded prosecutions to advance and improperly interpreting the law to incriminate indigenous defenders.”⁶² As the Rapporteur concluded, in these cases the state authorities, through the acts of members

⁵⁹ Speech by Pope Francis XX Congress of the International Association of Criminal Law, Vatican, November 20, 2019. Bollettino Salla Stampa della Holy See N.0873

⁶⁰ UN. General Assembly, Human Rights Council, A/HRC/19/55, Report of the Special Rapporteur on the Situation of Human Rights Defenders, , Margaret Sekaggya, December 21st 2011, para. 77.

⁶¹ Ibidem para. 104.

⁶² UN General Assembly, Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz, August 10th 2018, A/HRC/39/17, para. 46.



of the judiciary”are clearly and actively responsible for acts which stigmatize indigenous individuals and communities and place them at risk.”⁶³

In fact, the tendency to criminalize the Mapuche authorities and to use criminal law and certain aggravated legal frameworks to punish and inhibit those who claim the territory or oppose the exploitation of natural resources has been widely documented by international monitoring bodies. Thus, in 2013, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism highlighted, stated after visiting Chile that, there “can be no doubt that the anti-terrorism law has been used disproportionately against persons accused of crimes in connection with the Mapuche land protests.”⁶⁴ Likewise, in 2017, the Special Rapporteur of the IACHR on freedom of expression expressed concern about the criminalization of defenders, stating that “the complaints received reveal that the State's reaction to the forms of protest has been characterized by the violent emergence of security forces in the communities and the criminalization of their leaders”⁶⁵

The criminalization of Mapuche leaders and authorities was even verified and condemned by the IA Court in the case of *Norin Catriman et al. v. Chile*. In this judgment, the IA Court established that “As of 2001, the number of leaders and members of Mapuche communities investigated and tried for committing ordinary offenses in relation to violent acts associated with the above- mentioned social protest increased significantly. In a few cases they have been investigated and/or convicted of offenses of a terrorist nature in application of Law 18,314 (Counter- terrorism Act)”⁶⁶. In this specific case, the Court determined that the Anti-Terrorist Law was used abusively and with discrimination to persecute Mapuche leaders⁶⁷. This conclusion has also been supported by other international bodies.⁶⁸

The criminalization and imprisonment of Mapuche leaders and authorities has a significant impact on their communities. In this regard, the IACHR has stated that “...for the indigenous Mapuche people, the criminal prosecution of their traditional authorities Lonkos and Werken was a violation with implications on the collective social fabric. Traditionally, the Lonkos Mapuche lead the decision-making processes in political, economic, military and administrative affairs of the community, and often lead religious and spiritual processes, being repositories of ancient wisdom, and preside ceremonies as important as the guillatun (prayers).”⁶⁹

⁶³ UN General Assembly, Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz, August 10th 2018, A/HRC/39/17, para. 72.

⁶⁴ UN General Assembly, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, on his mission to Chile, A/HRC/25/59/Add.2, April 14th 2014, Para. 54. <https://undocs.org/A/HRC/25/59/Add.2>

⁶⁵ IACHR, Special Rapporteur on Freedom of Expression, Special Report on Freedom of Expression in Chile 2016, OEA/Ser.L/V/II, CIDH/RELE/INF.16/17, March 15th 2017, para. 180, only available in Spanish at: http://www.oas.org/es/cidh/expresion/docs/publicaciones/INFORME_PAIS_Chile.pdf

⁶⁶ *Norin Catriman et al. (LEADERS, MEMBERS AND ACTIVIST OF THE MAPUCHE INDIGENOUS PEOPLE) v. CHILE v. Chile*, JUDGMENT OF MAY 29, 2014 (*MERITS, REPARATIONS AND COSTS*), Serie C No. 279. Para. 83 http://www.corteidh.or.cr/docs/casos/articulos/seriec_279_ing.pdf

⁶⁷ *Norin Catriman et al. (LEADERS, MEMBERS AND ACTIVIST OF THE MAPUCHE INDIGENOUS PEOPLE) v. CHILE v. Chile*, JUDGMENT OF MAY 29, 2014 (*MERITS, REPARATIONS AND COSTS*), Serie C No. 279. Para. 83 http://www.corteidh.or.cr/docs/casos/articulos/seriec_279_ing.pdf

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⁶⁹ IACHR Report on Criminalization of the Work of Human Rights Defenders, Doc. 49/15, 31 December 2015 Original: Spanish, Para. 221



Criminalization situations, and the way in which they disproportionately affect the defenders of the environment and indigenous leaders, have also been documented in Chile, both by the National Institute of Human Rights⁷⁰, and by civil society⁷¹. For example, the Observatory of Mining Conflicts has denounced that “express trials and faceless witnesses have been part of the State's attempts to silence and control the outbreak of protest and resistance of [the] ancestral [Mapuche] people”⁷².

In conclusion, the identification of criminalization case patterns, and in particular the consideration of the context in which criminalization processes may occur in Chile, cannot be alien to the role of the judiciary, since its performance becomes the last guarantee the defenders have of the full validity of their rights.

ii. The reinforced obligation of the States to guarantee the rights of human rights defenders, its relationship with conventionality control and the role of the judiciary in criminalization cases.

The confirmation of the serious risk faced by human rights defenders, which in both the region and Chile is increasingly characterized by subjecting these people to sophisticated criminalization processes, depriving them of their freedom through extensive preventive detention and subject to trial without evidence, mandates to reflect on what are the obligations of the State and what measures must be taken by its judicial authorities to effectively guarantee the right to defend rights.

The answer to this question should not only consider the situation of risk faced by defenders, but also the purpose pursued through the reprisals faced by victims of criminalization, which is to inhibit their complaints, silence their claims and weaken the basis of the rule of law.

Therefore, preventing acts of violence, including criminalization, and avoiding impunity is important not only to protect the life, freedom and integrity of defenders, but also to generate a greater safe space to denounce matters of public interest and, therefore, increase confidence in the functioning of the judicial system.⁷³

The conjunction of the grave risk faced by defenders, with the high impact that the violation of their rights has for the whole society, has led to the recognition by international law, especially within the framework of the IAHRs, that the general obligations that States have - to respect, protect and guarantee the exercise of human rights - **have a reinforced character when it comes to human rights defenders**.⁷⁴ This means

⁷⁰ See for example INDH, Informe anual revela las trabas que deben sortear los defensores de los derechos humanos en Chile, 29 de noviembre 2011, only available in Spanish at: <https://www.indh.cl/informe-anual-revela-las-trabas-que-deben-sortear-los-defensores-de-los-derechos-humanos-en-chile/>; INDH, Comunicado de Asociaciones y personas en defensa de los derechos de la niñez y adolescencia mapuche, October 12th 2011, only available in Spanish at: <https://www.indh.cl/comunicado-de-asociaciones-y-personas-en-defensa-de-los-derechos-de-la-ninez-y-adolescencia-mapuche/>. See also, <https://defensoresydefensoras.indh.cl/>.

⁷¹ See for example, Amnesty International, The Criminalization of Indigenous Peoples Leader in Chile, April 23rd 2018, available at: <https://www.amnesty.org/es/latest/news/2018/04/la-criminalizacion-de-lideres-de-pueblos-indigenas-en-chile/>. See also complaints of Amnesty International and Frontline Defenders on preventive detention and criminal process without sufficient evidence of Machi Francisca Linconao, mapuche authority and environmental defender. See La Tercera, *Directora ejecutiva Amnistía Internacional Chile: “Hay una preocupación por la criminalización al pueblo mapuche”*, February 22nd 2017, only available in Spanish at: <https://www.latercera.com/noticia/directora-ejecutiva-amnistia-internacional-chile-una-preocupacion-la-criminalizacion-al-pueblo-mapuche/>, Front Lines Defenders, Criminalization of Machi Francisca Linconao, may 10th 2018 available at: <https://www.frontlinedefenders.org/es/case/criminalisation-machi-francisca-linconao>

⁷² The Observatory of Mining Conflicts in Latin America, Cuando tiemblan los derechos: Extractivismo y Criminalización en América Latina. Noviembre 2011. Pag. 51. Only available in Spanish.

⁷³ Inter-American Court of Human Rights, Case of Human Rights Defender *et al.* v. Guatemala, Judgement of August 28th, 2014 *Preliminary objections, merits, reparations and costs*), Serie C N° 283. Para. 142 http://www.corteidh.or.cr/docs/casos/articulos/seriec_283_ing.pdf

⁷⁴ Viviana Krsticevic, “Superar la impunidad: El alcance de las obligaciones reforzadas en la investigación de amenazas y asesinatos de periodistas en el sistema interamericano”, noviembre 2017, page. 8. Only available in Spanish. *Publication pending*.



that, when faced with cases that present certain patterns of human rights violations against this group, States must implement due diligence in a particularly rigorous way in order to prevent rights violations and conduct with special diligence and through thorough and prompt investigations regarding the cases that are denounced⁷⁵. Judges should always initiate and promote investigations considering as a starting point the work that the defender performs and the context in which the alleged incriminatory facts against him/her could have occurred, among other factors.

International law has established the reinforced nature of state obligations on several occasions, based mainly in considerations of the situation of a particular group, the contexts of systematic violations, or the role that certain people play by virtue of their profession, among other factors⁷⁶. In the jurisprudence of the IAHRs, two main elements that determine the reinforced nature of the State's obligations stand out. On the one hand, the situation of a vulnerable group by virtue of a practice or pattern of violation of rights (for example, differentiated obligations under practices of serious violations against LGTBI persons, or members of a political party, trade unionists, indigenous peoples), and, on the other hand, the role of certain activities in the functioning of democracy, as is the case of journalists or human rights defenders⁷⁷. These two indicators are not exclusive to each other, as in fact happens with defenders, and there are even numerous cases where intersectional factors influence to make the situation of the affected person even more complex⁷⁸.

The reinforced nature of the obligations derives from the fact that, as established by the IA Court, the obligation to guarantee the rights recognized in the American Convention must respond to the conditions and situations of the individuals and groups subject to rights⁷⁹. Thus, the IA Court has affirmed that:

“...in addition to the general obligations to respect and guarantee rights, pursuant to Article 1(1) of the Convention, special obligations are derived from these, which are determined according to the particular needs for protection of the subject of law, either owing to his personal situation or to the specific situation in which he finds himself.²³⁹ In this regard, the Court recalls that in certain situations, the States have the obligation to adopt all necessary and reasonable measures to guarantee the right to life, personal liberty and personal integrity of individuals who find themselves in situations of special vulnerability, particularly as a consequence of their work, whenever the State is aware of a situation of real and immediate danger, and has reasonable possibilities of preventing or avoiding that danger”⁸⁰

⁷⁵ Viviana Krsticevic, “Superar la impunidad: El alcance de las obligaciones reforzadas en la investigación de amenazas y asesinatos de periodistas en el sistema interamericano”, noviembre 2017, page. 8. Only available in Spanish. *Publication pending*.

⁷⁶ Viviana Krsticevic, “Superar la impunidad: El alcance de las obligaciones reforzadas en la investigación de amenazas y asesinatos de periodistas en el sistema interamericano”, noviembre 2017, page. 8. Only available in Spanish. *Publication pending*.

⁷⁷ *Ibid.*

⁷⁸ Viviana Krsticevic, “Superar la impunidad: El alcance de las obligaciones reforzadas en la investigación de amenazas y asesinatos de periodistas en el sistema interamericano”, noviembre 2017, page. 8. Only available in Spanish. *Publication pending*.

⁷⁹ Inter-American Court of Human Rights, Case of Human Rights Defender *et al. v. Guatemala*, Judgement of August 28th, 2014 (*Preliminary objections, merits, reparations and costs*), Serie C N° 283. Para. 141 http://www.corteidh.or.cr/docs/casos/articulos/seriec_283_ing.pdf. See also, Inter-American Court of Human Rights Case of the Pueblo Bello Massacre *v. Colombia*, Judgment of November 25, 2006, (*Interpretation of the Judgment of Merits, Reparations, and Costs*), Serie C N° 140. Para. 111 http://www.corteidh.or.cr/docs/casos/articulos/seriec_159_ing.pdf

⁸⁰ Inter-American Court of Human Rights, Case of Human Rights Defender *et al. v. Guatemala*, Judgement of August 28th, 2014 (*Preliminary objections, merits, reparations and costs*), Serie C N° 283. Para. 141 http://www.corteidh.or.cr/docs/casos/articulos/seriec_283_ing.pdf



In the particular case of human rights defenders, the Inter-American Court of Human Rights has recognized the risk these people face and the importance of them being free from threats, violence and criminalization in order to carry out their work⁸¹. Specifically, the Court has stated that: “...the State’s obligation to guarantee the rights to life and personal integrity of an individual is increased in the case of a human rights defender.”⁸²

These reinforced obligations imply that the State needs to adopt specific prevention and protection measures that are tailored to the situation of human rights defender in order to guarantee their rights. These may include the application of reinforced measures of protection or investigation in consideration of their work in contexts of conflict or where patterns of silencing are present, including when criminalization and recurrent threats are widely documented⁸³. In particular, the Inter-American Court has considered that States must “... provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity.”⁸⁴

The reinforced nature of state obligations regarding human rights defenders is also recognized by the United Nations Special Rapporteur on the situation of human rights defenders. The Rapporteur has established that, according to the Declaration and international treaties “...the critical role of those provisions in supporting progress in societies towards the effective enjoyment of human rights, and the vulnerable situation of human rights defenders in certain countries, the Special Rapporteur considers that States have heightened obligations to respect and protect the rights of those defenders.”⁸⁵

Therefore, a consequence of the recognition of the reinforced obligations *vis-à-vis* defenders is that in any circumstance it is appropriate to evaluate the violations committed against this group with the highest and strictest standard.⁸⁶

This reinforced nature of the obligation applies particularly on criminalization cases, since only the State can and must ensure that criminal proceedings are not used as persecution tools against human rights defenders. For this, the Judiciary must implement a strict scrutiny of legality in cases of criminal complaints against human rights defenders and strictly enforce the guarantees of due process, including for the admission, assessment and weighting of the evidence, for the adoption of measures of deprivation of liberty during the criminal process, and for the conclusion of the processes in reasonable time. In particular, the State's inexcusable obligation to restrictively apply preventive detention acquires a distinct dimension in

⁸¹ Inter-American Court of Human Rights, Case of Nogueira de Carvalho *et al.* v. Brasil. Judgement of November 28th, 2006 (*Preliminary objections and merits*) Serie C N 161. See, Inter-American Court of Human Rights, Case of Yarce *et al.* v. Colombia. Judgement of November 22nd, 2016 (*Preliminary objections, merits, reparations and costs*) Serie C N° 325. See, Inter-American Court of Human Rights, Case of Kawas Fernández Vs. Honduras. Judgement of April 3rd, 2009 (*Merits, reparations and costs*) Serie C N° 196.

⁸² Inter-American Court of Human Rights, Case of Human Rights Defender *et al.* v. Guatemala, Judgement of August 28th, 2014 (*Preliminary objections, merits, reparations and costs*), Serie C N° 283. Para. 142 http://www.corteidh.or.cr/docs/casos/articulos/seriec_283_ing.pdf

⁸³ Viviana Krsticevic, “Superar la impunidad: El alcance de las obligaciones reforzadas en la investigación de amenazas y asesinatos de periodistas en el sistema interamericano”, noviembre 2017, page. 8. Only available in Spanish. *Publication pending*.

⁸⁴ IACHR, Report No.54/12, Case 12.775, Merits, Florentín Gudiel Ramos, Makrina Gudiel Alvarez *et al.* v. Guatemala Para. 204 https://iachr.ils.edu/sites/default/files/iachr/Court_and_Commission_Documents/2016-2017/human_rights_defender_005_report_on_merits_mar_2012.pdf

⁸⁵ Report to the UN General Assembly of the Special Rapporteur on the situation of human rights defenders, Michel Forst, July 15, 2019. Para. 29

⁸⁶ Viviana Krsticevic, “Superar la impunidad: El alcance de las obligaciones reforzadas en la investigación de amenazas y asesinatos de periodistas en el sistema interamericano”, noviembre 2017, page. 8. Only available in Spanish. *Publication pending*.



the case of criminal proceedings against human rights defenders, since preventive detention is used as a tool for silencing and impeding the work of the defender.

The control of conventionality that must be implemented by judicial authorities, and in particular judges, becomes especially relevant in criminalization cases of human rights defenders, since this is the tool that allows judges to meet international standards and incorporate them into their decisions to comply with the State's international obligations. In this regard, the Inter-American Court has indicated that:

“[All] the authorities of a State Party to the Convention have the obligation to exercise "conventionality control" between acts or omissions and internal norms and the American Convention, in such a way that the interpretation and application of national law be consistent with the international obligations of the State regarding human rights. This control of conventionality must be carried out within the framework of their respective competences and the corresponding procedural regulations and in this task, State authorities must consider not only the treaty, but also the interpretation that the Inter-American Court has made, as this Court is last interpreter of the American Convention.”⁸⁷

In cases of criminalization, where the judiciary is in a position to avoid or contribute to the violation of rights, the strict application of the control of conventionality alongside the reinforced obligations approach is fundamental and determines the difference between an act according to law and a wrongful act. This has recently been recognized by the Supreme Court of Justice of Chile, stating that:

“That the constitutional mandate also imposes on the organs of the State the burden of respecting and promoting the essential rights that emanate from human nature, by virtue of which the human rights doctrine has assigned to national judges the duty to ensure the respect and guarantee of the rights that the States parties to the system have to realize. Thus, through the control of conventionality, national judges are part of the inter-American system in the protection of the standards of compliance and guarantee of such rights, depending on the consequences of this analysis of the functions that each justice operator has, being the obligation of all, the authorities and members of the State, to interpret systematically and integrally the provisions that inform the legal system, in such a way that their determinations keep the highest correspondence and compatibility with the international obligations sovereignly acquired by the latter.”⁸⁸ [the translation is ours]

Therefore, through the control of conventionality it is an obligation of the Judiciary to analyze the additional situations or conditions that may be relevant to understand the aggressions or dynamics of impunity, such as, for example, the existence of patterns, *modus operandi*, background, characteristics of victims or perpetrators, to the extent that they can generate different obligations or particular considerations⁸⁹.

⁸⁷ I/A Court H.R., Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs. Judgment of February 4, 2019. Series C No. 373. Para. 129 (Only in Spanish)

⁸⁸ Corte Suprema de Justicia de Chile, AD-1386-2014, 16 de mayo de 2019, considerando 9. Citando a: Nash Rojas, Claudio. “Comentarios al trabajo de Víctor Bazán”. “El control de convencionalidad, incógnitas, desafíos y perspectivas”, en Justicia Constitucional y Derechos Fundamentales. El Control de convencionalidad. Editores Víctor Bazán y Claudio Nash, Centro de Derechos Humanos, Facultad de Derecho, 2011, pág. 60.

⁸⁹ Viviana Krsticevic, “Superar la impunidad: El alcance de las obligaciones reforzadas en la investigación de amenazas y asesinatos de periodistas en el sistema interamericano”, noviembre 2017, page. 8. Only available in Spanish. *Publication pending*.



IV. THE CASE OF ALBERTO PASCUAL CURAMIL MILLANAO.

The Lonko Alberto Curamil Millanao is a 45-year-old Mapuche leader, an environmental rights advocate, a highly respected spokesperson for the Alianza Territorial Mapuche (ATM) who has dedicated his life to the protection of rivers and forests in the Araucanía region⁹⁰. In recognition of his work, in 2019 he was awarded the Goldman Prize in the South and Central America category.⁹¹ This award is given every year to six environmentalists selected rigorously throughout the world and is considered by many as an "Environmental Nobel" who recognizes the "extraordinary actions" that men and women perform to protect nature, often risking their lives.⁹²

According to the jury that awarded the Prize, the importance of the role of Alberto Curamil Millanao lies in having organized some sectors of the Mapuche people of La Araucanía to stop the construction of two hydroelectric projects in the sacred Cautín River, in central Chile. “...*The destructive projects, canceled in late 2016, would have diverted hundreds of millions of gallons of water from the river each day, harming a critical ecosystem and exacerbating drought conditions in the region. In August 2018, Curamil was arrested and remains in jail today. Colleagues believe that he was arrested because of his environmental activism.*”⁹³

According to the Goldman Environmental Prize Foundation:

“One of the legacies of Chile’s 30-year dictatorship under Augusto Pinochet was the privatization of Chile’s water resources. The country’s national water code, adopted in 1981, eliminated water as a common good for the people and handed ownership of this resource to the highest bidders. The impacts of this were especially felt by the Mapuche, who depend upon rivers for their livelihood and consider these waters sacred.

Between 2010 and 2015, at the height of a megadrought, Chile’s minister of energy announced a massive energy plan that included 40 large hydroelectric projects on Araucanía’s rivers. As part of that plan, the government and two private energy companies—SwissHydro and Agrisol—planned to build, without consulting Mapuche communities, two multi-million-dollar hydro projects on the Cautín River, in the heart of Mapuche territory. Those projects, known respectively as the Alto Cautín and the Doña Alicia, could divert over 500 million gallons of water per day from the Cautín River for power generation. Reducing the amount of water flowing in rivers greatly increases the amount of sediment in the water, harming fish and other wildlife, destroying the natural flow of water, and eroding the sensitive riparian ecosystems along the edge of the sacred Cautín River.”⁹⁴

⁹⁰ See: <https://www.nodal.am/2019/04/el-lider-mapuche-detenido-alberto-curamil-es-condecorado-con-el-premio-nobel-verde-2019/>. See also, <https://www.bbc.com/mundo/noticias-48092751>.

⁹¹ See <https://es.mongabay.com/2019/05/chile-alberto-curamil-mapuche-encarcelado-premio-goldman/>.

⁹² *Ibid.*

⁹³ See <https://www.goldmanprize.org/recipient/alberto-curamil/>.

⁹⁴ Ver: <https://www.goldmanprize.org/recipient/alberto-curamil/>



Due to the peaceful protests held in opposition to these projects, on February 3, 2014 Alberto Curamil Millanao was arrested on Temuco by police and special forces⁹⁵. As documented, one of the police officers drew his pistol, aimed and threatened him, and along with other police officers threw him to the ground and slammed his head, ribs and legs⁹⁶. After being handcuffed and taken to the police car, he was repeatedly beaten. The events, reported in 2014, took 4 years to be resolved by the justice system determining a sentence of 541 days in prison with the benefit of conditional remission of the penalty for one of the police officers for illegal use of force.⁹⁷

In addition, Alberto Curamil Millanao participates as spokesperson for the Alianza Territorial Mapuche (ATM), an organization that channels a series of political demands made by the Mapuche communities, seeking the protection of their rights. This organization has been pointed out in a report by the police's Intelligence team, as one of the organizations responsible for the violence in La Araucanía⁹⁸. This report specifically identifies, among other people, Camilo Catrillanca, a young man who was shot dead in the head by the police and Alberto Curamil.⁹⁹

Without prejudice to the legitimate power and duty of the State to investigate acts of crime, this background is relevant for the analysis of the way in which Alberto Curamil has become involved in this criminal proceeding and the determination of his procedural situation. Thus, the case that this Court has on decision involves the accusation of Alberto Curamil for various crimes, including his alleged participation in the robbery of the Los Héroes compensation fund on April 24, 2018 as part of a group of at least 5 people who entered with their faces covered and from which two fled¹⁰⁰. According to the accusation, Alberto Curamil, he would have been one of the people who fled.

According to the information obtained from the file available on the website of the Judicial Branch of Chile, on August 13, 2018, the Deputy Prosecutor of Lautaro asked the Judge for a reserved hearing to obtain judicial authorization to carry out intrusive proceedings and in a reserved manner¹⁰¹. This hearing was held on August 13, 2018, what exactly was discussed on this hearing and what actions were authorized and carry on are unknown, what were the test measures that were discussed or what were the foundations of the decision by the judge are also unknown. On August 14th, a registration order was issued, which was carried out at Curamil's domicile, and a hearing was held, where Alberto Curamil Millanao was charged as a participant in the theft of the compensation fund and put automatically on preventive detention.

The imputation of Curamil is fundamentally based on an anonymous complaint made through the "secure complaint" program of the Under Secretary for Crime Prevention of the Ministry of Interior and Public Security¹⁰², through which citizens can call to deliver information about crimes they have been witness, disclosing relevant data on places and / or people involved in any wrongfulness without the name or place

⁹⁵ : <https://www.indh.cl/wp-content/uploads/2014/07/querella-werken-Pascual-Curamil.pdf>

⁹⁶ *Ibid.*

⁹⁷ See <http://www.resumenlatinoamericano.org/2018/09/06/nacion-mapuche-condenan-a-carabinero-por-salvaje-golpiza-contra-lonko-alberto-curamil-en-2014-pero-el-uniformado-no-pisara-la-carcel/>

⁹⁸ <https://ciperchile.cl/2018/11/27/informe-policial-secreto-camilo-catrillanca-estaba-en-la-mira-de-carabineros/>

⁹⁹ *Ibid.*

¹⁰⁰ Complaint presented by the Intendencia de la Región de la Araucanía. April 25th 2018. Review judiciary page of the Republic of Chile. Only available in Spanish. <https://reformaprocesal.pjud.cl/ConsultaCausasJsFWeb/page/panelConsultaCausas.jsf>

¹⁰¹ Document review in the electronic file available in the Judiciary webpage of Chile. Only in Spanish.

<https://reformaprocesal.pjud.cl/ConsultaCausasJsFWeb/page/panelConsultaCausas.jsf>

¹⁰² See <http://www.denunciaseguro.cl/>



of the caller being registered¹⁰³. While this reporting modality is done to protect whistleblowers, “...not knowing who the source of the information is makes it more difficult to assess the credibility of the information provided and may preclude the possibility of seeking further clarification.”¹⁰⁴

The complaint, allegedly made on April 25, 2018, identified Alberto Curamil and other persons as the persons who assaulted the Compensation Fund. However, according to the file analyzed, the existence of the anonymous complaint was not brought to the Court or notified to the defense on time¹⁰⁵. Thus, in the detention control hearing on August 15, 2018, the delivery of all the records to the defense was ordered, but the copy of the investigative file received by the defense on August 27 did not include such anonymous complaint¹⁰⁶, which hinders the exercise of the right to defense and violates due process.¹⁰⁷

The existence of an anonymous complaint that identifies people by name and surname even though they were with their faces covered, and the obstruction of access to the complaint by defense attorneys arouses several concerns, especially considering the patterns identified above. In this context, there is a great concern that some witnesses of the fact that until that moment had declared not being able to recognize the assailants for being with their faces covered, proceeded then to identify Alberto Curamil and the other denounced as responsible for the criminal act.

On March 14, 2019, the Prosecutor closed the investigation and filed charges against Alberto Curamil Millanao and the other defendants. There appears not to be other significant evidence on the presence of Curamil in the scene of the crime that is not based or derived from the anonymous complaint. At the same time, the defense has presented evidence of Mr. Curamil being on a different location at the time of the crime, that does not appear to be duly analyzed in the accusation. The accusation states that there is evidence that Alberto Curamil Millanao pointed a gun at the victim of initials L.A.M.B. and that later along with the other defendants took the victim to the front of the cashier. It is not clear, however, how it was possible to identify from the images who each accused was and what they were doing.

On the other hand, it should be noted that in parallel to this process, Alberto Curamil's family has received and denounced various acts of harassment and threats. For example, on January 16, 2019, Mrs. Isabel Caño Nahuelpi - Curamil's partner – denounced being victim of harassment by officials of the Police Investigation Police (PDI), since police officers entered her home without a court order, asking questions insistently and without identifying themselves properly¹⁰⁸. Likewise, relatives and neighbors of Ilof Radalko have denounced the continued presence of unidentified vehicles on the roads, which stop and monitor the people who inhabit the sector, particularly the Curamil family¹⁰⁹. In fact, the PDI has gone to the Mexico School of Curacautin, where 8 years old Weliwen, one of the children of Alberto Curamil, studies and asked him about his mother, and has also questioned school teachers. Belén Yanira Curamil Caño, worker of the Pancho Curamil community and daughter of Alberto Curamil, has also reported having been followed up at different times and days, and anonymous intimidating calls¹¹⁰.

¹⁰³ *Ibid.*

¹⁰⁴ United Nations. Resource Guide on Good Practices in the Protection of Reporting Persons. 2016. Pag. 56

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*



The sum of these and other factors, especially his role as an environmental defender and Lonko Mapuche, plus the context in which the events take place and the irregular criminal proceedings against him, deserve concern that we are sure this Hon. Court will share. The criminal proceedings against Alberto Curamil Millanao include several of the patterns that international organizations have identified in cases of criminalization of human rights defenders and that we have highlighted throughout this *amicus*.

It is our respectful intention that the international rights and obligations described here and that the Chilean State has voluntarily assumed through the ratification of international human rights treaties, serves for the administration of justice in this case to this Honorable Trial Court.

Undoubtedly, this Honorable Court is at a historic moment to express through its judgment in this important case the international standards and the obligations that correspond to the members of the judiciary not only to prevent the Chilean State from incurring on an international wrongful but to ensure that criminal law is not used as a weapon of persecution of human rights defenders and thereby strengthen and rescue the important role of the Judiciary in the construction of a democratic society.

V. CONCLUSION

The lonko mapuche Alberto Curamil Millanao is an indigenous leader, defender of human rights of the environment and as such integrates a group specially protected by international law based on the high risk he faces and the important contribution that his work makes to democracy and the rule of law. The State has a reinforced obligation to guarantee his rights so that he can carry out his work without discrimination, criminalization or violence of any kind. The State also has a reinforced duty to investigate and guarantee him access to justice so that violations of his rights do not remain in impunity.

One of the practices frequently found in the region, and in Chile, is the submission of human rights defenders to criminal proceedings in an abusive manner, which seek to hinder their work, intimidate and silence those who defend human rights. Various international bodies have found patterns and practices that characterize these processes and that can help identify them promptly. This *amicus* systematizes these patterns, which are largely present in the criminal proceedings against the lonko Alberto Curamil Millanao and that this honorable Tribunal has for decision.

In the case of complaints and cases of human rights violations, the judiciary has a fundamental role, since it constitutes the main guarantee for access to justice, the determination of the truth and the establishment of reparations to the damage occurred. In order to fully comply with this purpose and avoid the international responsibility of the State, the Judiciary must meet and consider the international standards that derive from the international treaties and commitments assumed by the State and it must carry out a strict control of conventionality, verifying that these international commitments translate into their decisions.

In cases of criminalization of human rights defenders this role of the judiciary becomes even more critical, since it depends of the Judiciary that judicial decisions are according to law and adjusted to the control of conventionality as well as informed by the reinforced obligations of the State. From the role of judiciary



depends that the criminal proceedings to which human rights defenders are subjected do not result in human rights violations of the defender, which can make the State international responsible for violating human rights.

This Hon. Court is presented with the opportunity to ensure that this criminal proceeding is not a persecution against Mr. Curamil.

We remain at your disposal for any clarification you deem pertinent.

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