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The Misuse of Terrorism Prosecution in Chile: The Need for Discrete Consideration of Minority and Indigenous Group Treatment in Rule of Law Analyses

Noah Bialostozky*

I. INTRODUCTION

¶1 Chile's misuse of the label of terrorism should not shield the government from accountability for human rights violations against the indigenous Mapuche. Despite significant progress in its transition to democracy, the prosecution of Mapuche under the Prevention of Terrorism Act ("Terrorism Act"), for acts not internationally considered to be terrorism, has caused significant erosion of rule of law principles in Chile. Rule of law principles continue to emerge as important barometers for national compliance with international human rights. Among the specific purposes of ensuring national adherence to rule of law principles is to protect minority groups from any discriminatory will of the government. Minority and indigenous groups are most vulnerable to breakdowns in the rule of law, and governments have recently exploited their vulnerability through counterterrorism measures. Concurrently, rule of law analyses are growing as mechanisms to promote a balance between counterterrorism and the protection of human rights. The terrorism prosecution of Mapuche in Chile thus exemplifies the need for discrete consideration of the treatment of minority and indigenous groups as part of rule of law analyses.

II. THE MAPUCHE CONFLICT IN CHILE

¶2 Since the arrival of the conquistadors to South America, the Mapuche nation has resisted settlement of their territory and has fought to maintain their way of life.¹ The

* JD, Northwestern University School of Law, expected May 2008; B.A. *cum laude* in Public Policy Studies, Duke University, 2003. This comment was inspired by my work at the ABA-UNDP's International Legal Resource Center in the summer of 2006. Many thanks to Hongxia Liu and Alan Budde for the opportunity to participate in the ABA's International Rule of Law Symposium. I am also indebted to Professor Steve Sawyer for his sharp commentary and generous support throughout the development of this article. Particular thanks also to my parents and brother who have been a source of constant love and guidance. This comment is dedicated to Stephan Shiffers, my late grandfather, who provided the inspiration for me to go to law school, and who was himself denied equal application of the law in his Austrian homeland.

¹ The Mapuche were the original inhabitants of the Southern Cone of South America before the conquistadors arrived in 1541. The Mapuche nation originally comprised both sedentary and nomadic communities who were primarily hunters and gatherers, shepherds, farmers and fishermen. They still live in small family groups under the authority of a Lonko (chief) in the rolling Central Valley south of the Bío-Bío River in what are now Region VIII and IX of Chile. LOUIS FARON, THE MAPUCHE INDIANS OF CHILE 1 (George and Louise Spindler, eds.) (1968).

Mapuche initially succeeded in fending off the Spanish and then the Chileans.² However, shortly after Chilean independence, the Mapuche were subject to a thirty-year military campaign into their territory ending with annexation in 1883.³ Following their annexation, the Mapuche were placed on reservations and by the 1920s were left with only a fragment of their ancestral lands.⁴

A. History of Land Conflict

¶3

Chilean government interest in Mapuche ancestral lands has changed over the past few decades. Since the fall of Augusto Pinochet in 1990, the Chilean government has turned to free market policies to promote economic development throughout the country. Since the 1970s, the government has subsidized firms in the forestry sector which has enabled rapid expansion of commercial tree plantations in the Araucanía region.⁵ In 2000, it was estimated that 1.5 million hectares of ancestral Mapuche territory had been planted with commercial trees. Throughout this period, the Mapuche nation has fiercely resisted the use of their ancestral land, and the relationships between the Mapuche communities, the government and forestry companies have continually deteriorated.⁶ Even with the establishment of the National Corporation for Indigenous Development (“CONADI”) in 1993,⁷ conflict has continued between the Chilean government and the Mapuche communities. In 1998, in an effort to coordinate their resistance, the Mapuche nation formed the Arauco Malleco Coordinating Group of Communities in Conflict (“CAM”) to support all Mapuche communities involved in conflicts over land.⁸ Protest activities undertaken by the CAM on behalf of the Mapuche nation have ranged from traditional non-violent demonstrations - such as marches, hunger-strikes and occupation of public buildings - to forceful acts, including blocking roads, occupation of disputed land, felling trees, and setting fire to manor homes, woods, crops, and machinery.⁹ Leaders of the CAM have admitted to engaging in violent actions in “defense of the

² Chile secured independence from Spain in 1810. *Id.* at 9.

³ HUMAN RIGHTS WATCH, *UNDUE PROCESS: TERRORISM TRIALS, MILITARY COURTS AND THE MAPUCHE IN SOUTHERN CHILE* 12 (2004) [hereinafter *UNDUE PROCESS*].

⁴ Larry Rohter, *Mapuche Indians in Chile Struggle to Take Back Forests*, N.Y. TIMES, Apr. 11, 2004, at A3.

⁵ Decree Law No. 701 of 1974 provides government subsidies for private forest development. Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Mission to Chile*, U.N. Doc. E/CN/4/2004/80/Add.3 (Nov. 17, 2003). The Araucanía region is Chile’s ninth administrative region (Region IX). Araucanía is one of two regions where a majority of Chilean Mapuche resides and where the conduct at issue in this paper took place.

⁶ As a result of the development of forest plantations, the soil on Mapuche land has lost its sources of water for drinking and irrigation. *Id.* In addition, during the 1990s, Mapuche lands were profoundly affected by other forms of economic development, including hydroelectric projects and road construction. In 2002, police hit Mapuche blocking access road to construction site for hydroelectric project, then arrested protestors and presented them to a military prosecutor. See *UNDUE PROCESS*, *supra* note 3, at 14-15.

⁷ CONADI’s functions are to administer the “Indigenous Land and Water Fund,” to subsidize the purchase of additional lands for Mapuche communities and to finance mechanisms to facilitate the solution of land conflicts and the provision of water. CONADI is comprised of a director appointed by the President of Chile, and a sixteen-person council that includes eight indigenous representatives proposed by indigenous communities but designated by the President. *Id.* at 12-13.

⁸ *Id.* at 17-18. All but one of the Mapuche sentenced for or accused of terrorism are said to belong to the CAM.

⁹ *Id.* at 15.

territory and self-defense of the communities.”¹⁰ However, despite the violent nature of some acts, CAM actions have been directed at resisting encroachment on their lands, not causing physical injury or death to persons. To date, the only person killed as a result of the land conflict has been a Mapuche; in 2002, a 17-year old Mapuche and CAM sympathizer was shot and killed by a police officer during a land protest.¹¹

B. Mapuche Prosecution under Terrorism Act

¶4

As incidents in opposition to land development mounted, the Chilean government came under increasing pressure to show results prosecuting the Mapuche.¹² Since 2001, the Chilean government has responded by employing the Terrorism Act to prosecute Mapuche defendants. Before 2001, significant efforts had been made to prosecute Mapuche for violent incidents with ordinary criminal charges such as arson, theft, and land grabbing.¹³ However, the government soon claimed that it was too difficult for prosecutors to convict Mapuche under the criminal code because of the procedural protections for defendants.¹⁴ Therefore, since 2001, the government has employed a modified form of the Terrorism Act that was first introduced and passed into law by the Pinochet government in 1984.¹⁵ The use of the Terrorism Act enables the Chilean government to implement different procedures than those in the ordinary criminal code, including several procedures that are arguably international due process and fair trial violations. Specifically, the law has enabled the government to gain prosecutorial

¹⁰ *Id.* at 18 (citing *Principales Razones de Arauco-Malleco: Recuperar ahora...el Territorio Usurpado*, WEFTUN, <http://www.weftun.cjb.net/> (last visited Aug. 16, 2007)).

¹¹ In attempting to quell CAM protest actions, the police response has often been abusive. Chilean police have often failed to distinguish peaceful protests from illegal actions, and have consistently mistreated and abused Mapuche protestors. *See Id.* at 46; *see also* Human Rights Watch, Human Rights News, *Chile: Mapuche's Convicted of Terrorism*, (Aug. 23, 2004), available at <http://hrw.org/english/docs/2004/08/23/chile9257.htm>[hereinafter Human Rights Watch News].

¹² UNDUE PROCESS, *supra* note 3, at 16.

¹³ The previous government of Eduardo Frei (1994-2000) initiated prosecutions against the Mapuche under the ordinary criminal code. *Id.* at 2.

¹⁴ In December 2000, a new code of criminal procedure designed to strengthen defendants' rights was introduced in Araucanía. The new code replaced the former inquisitorial procedure with an accusatorial one with oral trials open to the public and press. The new procedure has greatly enhanced the fairness, impartiality, and transparency of criminal trials. Also, trained public defenders are now guaranteed to defendants. *Id.* at 4, 20.

¹⁵ General Pinochet introduced the Prevention of Terrorism Act, Law No. 18,314, to deal with violent and non-violent opposition to his military dictatorship. *Id.* at 21. In January 1991, the Aylwin government introduced major amendments to the original Pinochet version of the statute and it was modified again in 2002 to harmonize the provisions with the new code of criminal procedure that had entered into force in 2000. According to the law, terrorist crimes are committed with the intention of producing in the population, or in part of it, a well-founded fear of falling victim to the same type of crime, either because of the nature and effects of the method used, or by evidence that the act was part of a premeditated plan to attack a specific group or category of persons. The law states that in certain cases a terrorist intention can be inferred from the use of weapons of indiscriminate or mass destruction, such as explosives, incendiary devices, and chemical or biological weapons. Otherwise, the burden is on the prosecutor to establish evidence of a terrorist intention. Terrorist crimes under the law are: murder; mutilation; infliction of wounds; kidnapping; hostage-taking; sending explosive substances; arson; derauling of trains; attacks on ships, planes, trains, and buses (including hijacking); assassination of the head of state and/or leading political, judicial, and religious figures, or of internationally protected persons; the detonation of explosive or incendiary substances that endanger life; and illegal association to commit any of these crimes. *Id.* at 22 (citing art. 2 of Law No. 18,314).

advantage through due process restrictions prohibited by the ordinary criminal code.¹⁶ For example, those charged with terrorist crimes can be subjected to lengthy pre-trial detention, more invasive investigation and testimony by “faceless” witnesses.¹⁷ Furthermore, conviction for terrorism significantly increases sentences and strips significant civil and political rights.¹⁸ The use of the Terrorism Act has enabled Chile to convict dozens of Mapuche for terrorist crimes.¹⁹

III. EROSION OF THE RULE OF LAW IN CHILE

¶5 The prosecution of Mapuche for terrorism marks a significant erosion of the rule of law in Chile. At its most basic, the rule of law refers to a legal system that exhibits the following principles: (1) the system is based on laws that have been legitimately enacted and publicly promulgated to guide people’s conduct; (2) the laws impose meaningful restraints on all members of society including the government; and (3) the laws are equally enforced and independently adjudicated. Although the wide variety of juridical beliefs and conceptions of sociopolitical order throughout the world give rise to numerous conceptions of the rule of law, these basic threshold principles have been well established.²⁰ Several rule of law principles are codified in international treaty law.²¹ Furthermore, basic rule of law principles have arguably become customary international

¹⁶ The anti-terrorism law allows the public prosecutor to conduct criminal investigations in secret for long periods; pretrial release is usually denied for months, sometimes for longer than the eventual sentence received; and defendants are not allowed to know the names of many of their accusers. Also, under the Act, judges are given wider powers to allow prosecutors to intercept correspondence, inspect computers, and tap phones than in normal criminal investigations. *Id.* at 20.

¹⁷ “Faceless” witnesses refers to the practice of withholding the identity of witnesses from defendants. During terrorist trials, these witnesses are presented in court behind screens and speak through voice-distorting microphones. *Id.* at 30.

¹⁸ Conviction under the terrorism law results in loss of citizenship. After completion of sentences citizenship can be restored, but only by a special law requiring an absolute majority of all members of Congress. In addition, those convicted of terrorism may not hold public office, teach in schools or universities, practice journalism, or lead political parties, trade unions, or student or professional associations for fifteen years. Constitution of Chile art. 9, *available at* <http://pdba.georgetown.edu/Constitutions/Chile/chile05.html>.

¹⁹ *See generally* UNDUE PROCESS, *supra* note 3.

²⁰ The rule of law takes on various conceptions, often characterized as “thick” and “thin” conceptions. However, the basic principles of a “thin” conception are threshold requirements that are common to all conceptions of the rule of law. *See, e.g.*, INTERNATIONAL BAR ASSOCIATION, RULE OF LAW RESOLUTION (2006); Office of the High Commissioner for Human Rights, Opening Statement by Mehr Khan-Williams, The Deputy Commissioner for Human Rights to the Expert Seminar on Democracy and the Rule of Law (Feb. 28, 2005), <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/221A641B1539DA08C1256FB7005D0B93?opendocument>. Thick conceptions of the rule of law begin with the basic principles of a thin conception but then incorporate other elements such as particular conceptions of human rights, economic arrangements, forms of government, etc. *See* Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?* 36 *GEO. J. INT’L. L.* 809, 828 (2005). The United Nations has defined the rule of law as including the basic principles described but also requires that laws are consistent with international human rights norms and standards. *See* The Secretary-General, *Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 6, U.N. Doc. S/2004/616 (2004).

²¹ International Covenant on Civil and Political Rights, art. 14, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (1976) (entered into force Mar. 23, 1976) [hereinafter ICCPR] (“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”).

law over the last half-century. Proponents of the rule of law as an analytical tool cite its basic principles as fundamentally necessary for democracy and a market economy to flourish. A rule of law system serves the development of democracy by ensuring independent enforcement of fundamental rights, including property rights and civil and political liberties.²² However, even in a non-democratic system, the rule of law may be able to ensure the protection of minorities from majority will.²³ Regardless of the form of government, without the rule of law, government officials are not bound by agreed standards of conduct, and the dignity and equality of all people is not affirmed. Furthermore, without the rule of law, the ability of all people to seek redress for grievances and fulfillment of societal commitments can be arbitrarily limited.²⁴

¶6 The Chilean government has arbitrarily limited the rights of Mapuche through its misuse of the Terrorism Act. Although the Terrorism Act was arguably legitimately enacted and promulgated,²⁵ the government's misuse of the law to advance its economic policy interests has resulted in erosion of the rule of law.

¶7 The Chilean government has eroded rule of law principles through (1) its failure to maintain an independent and impartial judiciary; (2) its unequal application of the law; and (3) its use of military tribunals for civilian cases.

A. *Lack of Judicial Independence*

¶8 The Chilean judiciary has not acted independently in adjudicating Mapuche terrorism cases. Judicial independence is fundamental to the rule of law and is codified in international treaty law.²⁶ An independent judiciary decides matters before them impartially, on the basis of facts and in accordance with the law, without any direct or indirect restrictions, improper influences, pressures, threats or interferences, from any source or for any reason.²⁷ Independent judges are not influenced by personal interests or relationships, the identity of the parties to a case, or external economic or political pressures.²⁸ Furthermore, an independent judiciary's decisions once rendered are

²² See generally Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF., 95 (Mar./Apr. 1998).

²³ See Michael Ignatieff, *Whose Universal Values? The Crisis in Human Rights* (1999) reprinted in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, 656 (Henry J. Steiner and Philip Alston eds.) (2000) ("And let us be explicit: democracy may not always be possible. Our best hope is for the rule of law. Authoritarian order which at least guarantees procedural fairness and due process is a good deal better than anarchy.")

²⁴ See Mary Robinson, former President of Ir., U.N. High Commissioner for Human Rights, *The Rule of Law: Striking a Balance in an Era of Terrorism* at the American Bar Association's International Rule of Law Symposium (Sept. 16 2006).

²⁵ Although the Act as originally enacted by the Pinochet government was likely not "legitimately enacted" by international standards, the Act was amended in 1991 as part of a wider effort to bring public security legislation inherited from the military government into line with human rights standards. See UNDUE PROCESS, *supra* note 3, at 21.

²⁶ ICCPR, *supra* note 21, at art. 14 ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.")

²⁷ United Nations Office of the High Commissioner for Human Rights [UNHCHR], *Basic Principles on the Independence of the Judiciary*, available at http://www.unhchr.ch/html/menu3/b/h_comp50.htm

²⁸ See BRENNAN CENTER FOR JUSTICE RESOURCES, QUESTIONS AND ANSWERS ABOUT JUDICIAL INDEPENDENCE (2001) available at http://www.brennancenter.org/resources/resources_jiqanda.html; see also G. Alan Tarr, *Judicial Independence and State Judiciaries*, reprinted in JUDICIAL INDEPENDENCE: ESSAYS, BIBLIOGRAPHY, AND DISCUSSION GUIDE, Teaching Resource Bulletin #6, American Bar Association Division for Public Education (1999) ("Judicial independence refers to the insulation of the judiciary from the influence of other political institutions, interest groups, and the general public.")

respected.²⁹ Judicial independence thus serves to maintain rule of law principles and check the undue accretion of power of other branches of government.

¶9 The Supreme Court of Chile has demonstrated a lack of judicial independence in their decisions regarding Mapuche defendants. The Supreme Court has reversed Mapuche acquittals based on legal reasoning not applied to similarly situated defendants and has intervened to remove a Judge that had rejected the prosecution's treatment of an arson attack as a terrorist crime. The Supreme Court decisions are likely a result of both judicial bias and external political pressures to promote the Chilean government's economic policy interests. High-profile members of government have been outspoken about the importance of dismantling the Mapuche leadership through judicial action to promote economic development in the region.³⁰ The government's promotion of judicial action has resulted in inappropriate external influence on the Supreme Court's purportedly independent review and erosion of the rule of law.

¶10 One likely result of external pressure was the Supreme Court's intervention into the local investigation of five Mapuche for setting fire to a pine plantation on the Poluco Pidenco estate, land that belongs to a Chilean logging company.³¹ In the middle of the investigation, the *Juez de garantía*³² Nancy Germany rejected the prosecution's treatment of the arson attack as a terrorist crime and denied prosecution requests for witness protection and anonymity. Judge Germany refused to incorporate arguments and evidence into the indictment that were not presented at the formalization hearing.³³ The Temuco Appeals Court upheld her decision, but in the following months high-ranking members of the Chilean government spoke out in opposition to Judge Germany's decisions. In April 2003, a Senator for the Araucanía region and an outspoken advocate for terrorism prosecution of Mapuche, decried Judge Germany's decision.³⁴ Furthermore, in October 2003, the Attorney General reportedly met the then-president of the Supreme

²⁹ [M]ost agree that a truly independent judiciary has three characteristics. First, it is impartial, judicial decisions are not influenced by a judge's personal interest in the outcome of the case. Second, judicial decisions, once rendered, are respected, and third, the judiciary is free from interference. Parties to a case, or others with an interest in its outcome, cannot influence the judge's decision. THE WORLD BANK GROUP, LEGAL INSTITUTIONS OF THE MARKET ECONOMY, JUDICIAL INDEPENDENCE: WHAT IT IS, HOW IT CAN BE MEASURED, WHY IT OCCURS (2001), available at <http://www1.worldbank.org/publicsector/legal/judicialindependence.htm>

³⁰ See, e.g., Unrepresented Nations and Peoples Organization, *Chile: Mapuches Convicted of Terrorism*, (Aug. 24, 2004), <http://www.unpo.org/article.php?id=1115>, (citing Undersecretary of the Interior, Jorge Correa, stating regarding the government's "triumph" convicting four Mapuches for terrorism: "the dismantling of the leadership of the Mapuche protests was the consequence of a successful and systematic intelligence effort called Operation Patience"; also stating that the "trials had contributed to pacifying Chile's southern provinces, troubled for years by land conflicts between Mapuche communities and forestry companies and private landowners."); see also Human Rights Watch News, *supra* note 11; see also UNDUE PROCESS, *supra* note 3, at 37.

³¹ The Poluco Pidenco estate is near Ercilla, Chile and belongs to the logging company Mininco. Human Rights Watch News, *supra* note 11.

³² The new Chilean Criminal Code established a *Juez de garantía*, a judge responsible for supervising the fairness of the criminal investigation and ensuring that defendants are not held in detention unless strictly necessary.

³³ Chilean criminal code stipulates that an indictment can only refer to facts and individuals referred to in the formalization hearing, although the nature of the charges in the indictment may be different. UNDUE PROCESS, *supra* note 3, at 35-36 (citing Art. 259(3) of the Code of Criminal Procedure (Chile)).

³⁴ Espina stated that "the interpretation of the jueces de garantía violates the letter and spirit of the anti-terrorist law that we approved in Parliament." *Id.* at 37 (citing EL GONG (Chile), April 16, 2003).

Court to protest Judge Germany's actions.³⁵ Also, on a routine visit to Temuco in 2003, a Supreme Court Justice made a special trip to a neighboring town to meet with and berate Judge Germany for her handling of the case.³⁶ Therefore, the outcome of the Poluco Pidenco case was likely not based on independent judicial review. Instead, the case was likely affected by both direct and indirect external pressure. The Chilean government sought to pacify the Araucanía region by dictating the judiciary's interpretation and application of the law.

¶11 The Supreme Court of Chile's decision in the Poluco Pidenco case was likely affected by both political pressure and the Justices' own lack of impartiality regarding the Mapuche. In the months following the Chilean government's pressure on the courts, the local prosecutor in the Pidenco case filed a disciplinary complaint against Judge Germany. After the Temuco Appeals Court ruled the complaint inadmissible, the prosecutor sent the complaint to the Supreme Court. The Supreme Court initially also ruled the complaint inadmissible, however, two months later, the Supreme Court reversed its own decision and stated that Judge Germany had overstepped her powers in rejecting the prosecutor's terrorism case. The Supreme Court then ordered the terrorist charges reinstated and removed Judge Germany from the case.³⁷ The Court invoked a statute that allows the Supreme Court to correct the faults and abuses that any judges or judicial officials commit in the course of their duties.³⁸ Therefore, the Supreme Court's decision was arguably consistent with an oversight function provided by Chilean law. However, given the political pressure to intervene in favor of the prosecution, the Supreme Court's actions should not be viewed in isolation. Although the Court was able to find a statute that could be applied to the circumstance involved, the political context of its ruling, its disregard for Judge Germany's reasoning based on the criminal code, and its own initial upholding of the Appeals Court's rejection of the complaint, all serve to demonstrate its lack of judicial impartiality and independence. Instead of ruling on the merits of Judge Germany's decision, the Court invoked a statute unrelated to the decision at issue. After the terrorist charges were reinstated, in August 2004, the five Mapuche members of the CAM were sentenced to ten years for "terrorist arson."³⁹

¶12 The Supreme Court's lack of independence and impartiality has not been isolated to the Pidenco case and is further demonstrated by its decision in the trial of the *lonkos*.⁴⁰ In a conflict over land, two *lonkos* from Araucanía were accused in December 2001 of setting fire to a well-known pine forest that belongs to a former agriculture minister and Supreme Court Justice who is a leading spokesman for property holders in the region.⁴¹ The *lonkos* were arrested and charged under the Terrorism Act. After over a year of pre-trial detention, the trial court acquitted them of "terrorist attacks and threats" because of insufficient evidence to proceed after statements made by "faceless" witnesses produced

³⁵ *Califican de 'mano blanda' a cuestionada jueza de Collipuli*, LA SEGUNDA (Chile), Oct. 22, 2003.

³⁶ UNDUE PROCESS, *supra* note 3, at 37. Several sources who requested anonymity informed HRW of the incident.

³⁷ *Id.* at 36 (citing Supreme Court ruling dated March 18, 2004).

³⁸ "[I]f it considers it convenient for the good administration of justice, the Supreme Court may correct on its own account the faults and abuses that any judges or judicial officials commit in the course of their duties." UNDUE PROCESS, *supra* note 3, at 36 (citing Art. 541 of the Organic Code of Courts (Chile)).

³⁹ UNDUE PROCESS, *supra* note 3, at 36.

⁴⁰ *Lonkos* is the Mapuche word for community leaders. Pascual Pichún and Aniceto Norín from Araucanía were the leaders accused in this case.

⁴¹ Rohter, *supra* note 4.

by the prosecution were set aside.⁴² On appeal, the Supreme Court ordered a retrial, upholding the prosecutor's claim that the trial court had not stated clearly its grounds for rejecting prosecution evidence.⁴³ The Supreme Court overruled the trial court's findings, made over twelve days in public proceedings, in favor of its determination made after only a few hours of hearings.

¶13 The Supreme Court's hasty conclusion, that is not easily reconciled with a fundamental principle of both Chilean and international law,⁴⁴ is suspicious given the sociopolitical context of the case involved.⁴⁵ As written in dissent by one of the five Supreme Court judges, the Court's order violated the presumption of innocence canon adopted by Chile's new criminal code.⁴⁶ The apparent lack of impartiality is further amplified by a comparison of the Supreme Court's reasoning in a different annulment appeal. In August 2003, the Supreme Court ruled against an appeal requesting annulment of a conviction in a rape case. The Court applied the reasoning of the dissent in the *lonkos* case, stating that courts are not required to substantiate the grounds for rejecting prosecution evidence in such detail as is required for conviction.⁴⁷ Although the circumstances of the appeals were different, the circumstances and facts of the cases are not material to the comparison. Instead, the comparison demonstrates that the same Supreme Court applied a different standard, one that is hard to reconcile with Chilean law, when ruling on the Mapuche acquittal. The Court therefore arguably failed to act as an impartial judicial body, allowing the sociopolitical context of the Mapuche conflict to influence its application of the law.

B. *Un-equal Application of the Law against Mapuche Defendants*

¶14 The unequal application of the law is further evidenced by inconsistencies between prosecutions of ordinary criminal defendants and the Mapuche defendants prosecuted under the Terrorism Act. Rule of law principles dictate that laws are to be equally enforced. Furthermore, under the new Chilean criminal code enacted in 2000, several due process guarantees were enacted to preserve the equal application of the law. The code established a *Juez de garantia*, a judge responsible for supervising the fairness of the criminal investigation and ensuring that defendants are not held in detention unless strictly necessary. Moreover, under the criminal code, defendants may request their release pending trial and have their pre-trial detention periodically reviewed.⁴⁸ However, the guarantees available to ordinary criminal defendants under the new code are often

⁴² Stavenhagen, *supra* note 5, at 17. "Faceless witnesses" are arguably a violation of international law. Article 14.3(e) of the ICCPR provides that: "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality. . . to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

⁴³ In September 2003, the *lonkos* were sentenced to a prison term of five years and one day for posing a "terrorist threat." *Id.*

⁴⁴ ICCPR art. 14(2) states that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law."

⁴⁵ Stavenhagen, *supra* note 5, at para. 40.

⁴⁶ In his dissenting opinion, Milton Juica stated that the law did not require the court to specify the reasons for rejecting prosecution evidence in the judgment, while the court was obliged to exactly specify its grounds for accepting evidence for a conviction. *UNDUE PROCESS*, *supra* note 3, at 34.

⁴⁷ *Id.* at 35.

⁴⁸ *UNDUE PROCESS*, *supra* note 3, at 20.

denied to Mapuche accused of terrorist crimes. Under the Terrorist Act, the public prosecutor is allowed to conduct criminal investigations in secret for long periods; pretrial release can be denied for months, sometimes for longer than the eventual sentence received; defendants are not allowed to know the names of many of their accusers; and judges are given wider powers to allow prosecutors to search for evidence than in ordinary criminal investigations.⁴⁹ Although Chile has made strides in providing equal protection of the law to accused criminals, defendants accused of homicide, rape and other ordinary crimes are afforded more procedural protections than Mapuche accused of terrorist crimes.

C. Use of Military Courts for Civilian Cases

¶15 Another violation of rule of law principles is Chile's continued use of military courts for civilian cases. International human rights bodies have consistently rejected the use of military tribunals to try civilians under any circumstances.⁵⁰ Specifically, Chile's use of military tribunals for civilian purposes violates the rule of law principles embodied in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR").⁵¹ Chilean military courts do not predictably guide people's conduct, do not impose meaningful restraints on the government, do not apply the law equally or impartially, and thus do not abide by rule of law principles.

¶16 Civilians who are accused of crimes against police officers, or are plaintiffs in cases of police abuse, are brought before military courts. Chilean law requires all complaints against police to be investigated by military prosecutors and to be heard in largely secret written procedures by military courts. Furthermore, military judges do not have formal legal training and are subject to military chain-of-command.⁵² Military chain-of-command enables external pressure and inhibits judicial independence. Also, the use of military tribunals has enabled *de facto* impunity for police charged with abuse against Mapuche.⁵³

¶17 Because of the continuing land conflict, Mapuche civilians have repeatedly gone before military courts.⁵⁴ However, despite their frequent appearances in military courts, Mapuche are not the only civilians under the jurisdiction of military courts. Nevertheless, the jurisdiction of military courts over all civilians does not preclude

⁴⁹ *Id.*

⁵⁰ The Human Rights Committee has rejected use of military tribunals to try civilians under any circumstances. See United Nations Human Rights Committee, *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (art. 14)*, (Apr. 13, 1984). The Inter-American Court has also stated that civilians should not be tried by military courts. *Durand and Ugarte v. Peru*, judgment of Aug. 16, 2000, Series C no. 68, paras. 117 and 118. See also *Ocalan v. Turkey*, App. No. 46221/99, 37 Eur. Ct. H.R. 238 (2003) (holding that the use of military judges raised doubts as to the independence and impartiality of the Turkish courts in question based on Article 6 of the European Convention on Human Rights).

⁵¹ See ICCPR, *supra* note 21, at art. 14. Chile ratified the ICCPR in 1972.

⁵² UNDUE PROCESS, *supra* note 3, at 48.

⁵³ The UN Human Rights Committee has specifically condemned Chile's use of military tribunals for civilian cases. See ICCPR Human Rights Committee, *1999 Annual Report to the General Assembly*, para. 205, U.N. Doc. A/54/40, 21 (October 1999) (stating that power of military courts to conclude civilian cases contributes to impunity for serious human rights violations of military personnel); see also UNDUE PROCESS, *supra* note 3, at 43.

⁵⁴ See UNDUE PROCESS, *supra* note 3, at 48-56.

Chile's violation of rule of law principles. In fact, Chile arguably violates the international human rights of all civilian defendants brought before military courts.⁵⁵ Furthermore, even in an analysis limited to a national scope, the procedures applied in military courts violate the fundamental rule of law principle of equal application of the law. The use of military courts has precluded the provision of equal due process guarantees to those provided for similar charges brought in ordinary criminal courts.

D. *Misusing the Label of Terrorism to Rule by Law*

¶18 Chile is using the law and anti-terrorism language to effectuate its desired economic policies. Instead of ensuring the equal protection and application of the rule of law, the government is ruling *by law* by differentiating the application and interpretation of the law based on the parties involved. The government has discriminatorily restricted judicial protections provided to Mapuche defendants through its use of the Terrorism Act.⁵⁶ Moreover, the government is using the label of terrorism as a pretext to maintain a facade of rule of law as it violates basic rule of law principles. The government's use of anti-terrorism language has been vital in shaping the sociopolitical discourse regarding the land conflict.⁵⁷ The discourse has enabled the government to prosecute and convict Mapuche for terrorism based on actions that, if committed by other Chileans, would likely constitute ordinary crimes.⁵⁸

¶19 However, despite any transgressions with regard to the Mapuche, Chile is widely regarded to have achieved significant progress in its transition to democracy and adherence to rule of law principles.⁵⁹ Chile has made significant strides developing judicial institutions and codes consistent with international standards. Nevertheless, looking merely at the establishment of formal structures and revised codes fails to acknowledge that the rule of law is also an issue of norm-creation.⁶⁰ The rule of law arguably comprises a complex relationship between both formal legal structures and sociopolitical norms and values.⁶¹ Inevitably, a society with an effective institutional framework will only exhibit the rule of law if the internal legal discourse is also

⁵⁵ See *Durand and Ugarte v. Peru*; *Ocalan v. Turkey*, *supra* note 50.

⁵⁶ The notion of ruling *by law*, as opposed to the rule *of law*, is loosely based on John Rawls' theory of governing behind the veil of ignorance. According to Rawls, agents who did not know their position in society would choose to affirm the equality of basic rights. Behind the veil of ignorance, governments would thus only make decisions that differentiate groups when removing the difference would worsen the situation of the worst-off members of society. John Rawls, *Original Position*, reprinted in STANFORD ENCYCLOPEDIA OF PHILOSOPHY available at <http://plato.stanford.edu/entries/original-position/>.

⁵⁷ See Mary Robinson, former President of Ir., U.N. High Commissioner for Human Rights, *The Rule of Law: Striking a Balance in an Era of Terrorism* at the American Bar Association's International Rule of Law Symposium (Sept. 16 2006) ("language is vital in shaping our reactions: the words we use to characterize an event may determine the nature of our response.").

⁵⁸ There is no evidence that the Prevention of Terrorism Act has been used to prosecute others for conduct similar to Mapuche actions.

⁵⁹ See CNW Group, *Economic Freedom and Rule of Law key to ending Latin America's years of stagnation and poverty*, available at <http://www.newswire.ca/en/releases/archive/November2006/02/c7355.html>; see also THE WORLD BANK GROUP, *WORLD BANK GOVERNANCE INDICATORS, CHILE (2006)* available at www.worldbank.org/wbi/governance/govmatters5 [hereinafter *WORLD BANK INDICATORS*].

⁶⁰ Rosa Brooks, *The New Imperialism: Violence, Norms and the Rule of Law*, 101 MICH. L. REV. 2275, 2285 (2003) (stating that the rule of law is also an issue of norm-creation).

⁶¹ *Id.*

consistent with rule of law principles.⁶² One of the law's, and thus the government's, functions is to provide a framework for settling disputes by categorizing actions as types of violence, and by giving the types of violence meaning in the cultural fabric of society.⁶³ Therefore, even if an institutional structure that is procedurally consistent with rule of law principles is established, there remains the danger that the government can rule by law to achieve desired policy ends. A government can rule by law by controlling the internal legal discourse and categorizing criminal actions to achieve the government's discriminatory policy interests.

¶20

The Chilean government has ruled by law by effectively attaching different criminal labels to the same actions undertaken by individuals in different ethnic groups. The Chilean government has attached the label of terrorism to Mapuche acts of arson and community organizing.⁶⁴ Thus, the government has attached a label of terrorism to acts that have not been internationally recognized as terrorist actions.⁶⁵ Every terrorist crime in the Terrorist Act besides arson involves a direct threat to human life, liberty, or physical integrity. The detonation of explosive or incendiary substances, the only other terrorist crime in the Act whose underlying conduct does not directly imply a threat to life, liberty or physical integrity, is required by the Act to "endanger life" to be considered terrorism.⁶⁶ Terrorist arson is not qualified by the requirement that it

⁶² See Laura Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1485 (2002) ("Conflict may be endemic – but law and legal process provide a framework for setting boundaries to that conflict and a language for bridging differences.").

⁶³ See Brooks, *supra* note 60, at 2314. However, the cultural fabric of society in the context of terrorism likely must now be perceived with a global scope, as the label of terrorism even in a national context takes on its global meaning.

⁶⁴ Those charged with the crime of "illicit terrorist association" have at times merely committed the act of being an active member of the CAM. See Stavenhagen, *supra* note 5, at paras. 56 and 87.

⁶⁵ See Prevention of Terrorism Act, *supra* note 15. There is international consensus that terrorism involves acts directed at injury or death of people, not acts against property or political organization and dissent. The Inter-American Convention Against Terrorism AG/Res. 1840 (XXXII-O/02) (June 3, 2002) does not define terrorism (Chile became a party to the Inter-American Convention Against Terrorism in 2004), but refers to previous International Conventions on Terrorism; the only convention that is referred to that includes definition of terrorism is the International Convention for the Suppression of Financing of Terrorism that defines terrorist crimes as: those [i]ntended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. International Convention for Suppression of the Financing of Terrorism art. 2 (1) (a)(b) (1999). Also, the European Convention on the Suppression of Terrorism 27.I.1977 only considers attacks on life, liberty, and physical integrity to be extraditable offenses. See also the definition of the High-level Panel convened by the Secretary-General who defined terrorism as: "any action . . . that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or to abstain from doing any act." UN General Assembly, Fifty-Ninth Session, Agenda Item 55, *Secure World Report: follow-up to the outcome of the Millennium Summit*, U.N. Doc. A/59/565, ¶ 164, (Dec. 2004) available at <http://www.un.org/secureworld/report.pdf> [hereinafter *Secure World Report*]. Although Mapuche actions were arguably intended to compel government conduct they were not aimed at causing death or serious bodily harm.

⁶⁶ Terrorist crimes under the law are: murder; mutilation; infliction of wounds; kidnapping; hostage-taking; sending explosive substances; arson; derailing of trains; attacks on ships, planes, trains, and buses (including hijacking); assassination of the head of state and/or leading political, judicial, and religious figures, or of internationally protected persons; the detonation of explosive or incendiary substances that endanger life; and illegal association to commit any of these crimes. See Prevention of Terrorism Act, *supra* note 15, at art. 2.

endanger life, and thus arson as broadly constructed by the Act does not meet the requisite level of gravity to be a terrorist crime based on international definitions of terrorism.⁶⁷ In Chile, arson is also included as a crime against property in the ordinary criminal code.⁶⁸ Thus, by prosecuting Mapuche actions as “terrorist arson” and “illicit terrorist association,” the government has attached both the national and international connotative significance of terrorism to Mapuche conduct that has not targeted human life. Once labeled as terrorists, even legitimate social protest actions taken by Mapuche are likely tainted with socially detrimental meaning. Chile has thus portrayed the Mapuche as not only committing socially detrimental actions, but committing actions that are a threat to democratic values and international peace and security.⁶⁹ The government has been able to control the sociopolitical discourse by supplementing their unequal application of the institutional judicial framework with the rhetorical use of terrorist language.⁷⁰ This combination has served to misrepresent arguably legitimate social protests as a threat to national and international security, and legitimize the government’s use of the anti-terrorism law.⁷¹

¶21 The unequal application of the law combined with the rhetorical use of terrorist language has also precluded the Mapuche from a framework that allows for productive sociopolitical discourse. Chile’s use of the terrorist label has not only reinforced prejudices against the Mapuche,⁷² but has effectively prevented them from engaging in the judicial and sociopolitical discourse that a rule of law framework is meant to enable.

¶22 Nevertheless, despite prejudices that may develop against offending groups, the law in any society must attach criminal labels to violent actions to maintain order. Chile argues that the terrorism prosecutions of Mapuche are appropriate to maintain order and security.⁷³ The Mapuche nation has indeed resorted to violent actions that must be

⁶⁷ As explained by Human Rights Watch, serious crimes have been committed by the Mapuche, but the crimes are against property and not against human life or liberty. *See* Rohter, *supra* note 4, at 1.

⁶⁸ UNDUE PROCESS, *supra* note 3, at 23.

⁶⁹ The global “war on terror” has promoted the meaning of terrorism as actions attacking freedom and rule of law principles. *See* Inter-American Convention Against Terrorism, *supra* note 65.

⁷⁰ *See, e.g.,* Ernesto Barros, an interior ministry official, stating in reference to the Mapuche prosecutions: “It is legitimate to use [the Terrorism Act] in relation to people who resort to terror.” Alain Devalpo, *Chile’s Mapuches are left out of the party*, LE MONDE DIPLOMATIQUE (2005) available at <http://mondediplo.com/2006/02/09mapuches>. The forestry industry association (Corporación de la Madera), has also called on the government to squelch “Mapuche terrorist tactics.” Daniela Estrada, *Indigenous Activists Demand Fair Trials*, Int’l Press Service, Sept. 3, 2004, available at http://www.americas.org/item_16257. Discourse on the Mapuche conflict in Chile now largely involves discussion of “terrorist fires” and “illegal terrorist association,” as well as comparisons with groups such as Al-Qaeda. Even if ultimately not found to be similar to Al-Qaeda and other terrorist groups, the terrorist language used is itself damaging and stigmatizing. *See* Rohter, *supra* note 4; *see also* Gretchen Gordon, *Chile’s Terror Duplicity*, 26 MULTINATIONAL MONITOR 5 (May/June 2005).

⁷¹ Human Rights Watch has observed that the Mapuche are “seen as violent agitators who are opposed to the economic development of the country and advocate secession of the Araucanía from the state.” UNDUE PROCESS, *supra* note 3, at 15.

⁷² *See* UNDUE PROCESS, *supra* note 3, at 4; *see also* Rohter, *supra* note 4, at 3 (“By using terrorist law, the government has not only succeeded in disarticulating Mapuche groups, it has also robbed them of the moral prestige and sympathy they once enjoyed.”).

⁷³ The Chilean government has justified its use of the Prevention of Terrorism Act against the Mapuche based on order and security. For example, at a March 2002 Senate debate, Alberto Espina, Senator for the Araucanía region, argued that violent Mapuche groups should be combated “[w]ith the full rigor of the law, since their conduct has created a state of insecurity and fear that is incompatible with the full functioning of the rule of law.” UNDUE PROCESS, *supra* note 3, at 15 citing (Comisión de Constitución, Legislación, Justicia y Reglamento, *Informe de la Comisión de Constitución, Legislación, Justicia y Reglamento*,

criminally prosecuted, and discretion has long been afforded to national sovereigns to determine appropriate measures to maintain domestic order. Furthermore, despite many international definitions on terrorism, there is no single consensus definition.⁷⁴ Thus, Chile arguably is properly using its discretion as a national sovereign in defining and prosecuting terrorism. Moreover, Mapuche actions arguably constitute terrorism under international definitions.⁷⁵ However, the absence of a consensus international definition does not mean that terrorism is an indescribable form of violence or that states are not subject to restrictions in developing responses.⁷⁶ Derogation from international human rights treaty obligations must only occur in times of “public emergency” that “threaten the life of the nation.”⁷⁷ Furthermore, derogation based on national security must be viewed in the context of other feasible remedies to the Mapuche land conflict. Even if Chile is afforded discretion on how to best preserve domestic security, the government must not derogate from fundamental human rights as prescribed by the ICCPR, including the international restriction on discrimination based solely on ethnic origin.⁷⁸ Therefore, the unequal application of the law against Mapuche defendants would likely remain a violation of Chile’s international obligations.

¶23

Nevertheless, Chile’s great strides in transitioning to democracy and developing rule of law institutions arguably should preclude international criticism of any rule of law erosion. The international community should arguably defer to Chile’s sovereign discretion because a vast majority of country practices have been found to conform to international rule of law principles.⁷⁹ However, critical rule of law analyses designed to ensure human rights protections should not only be applied to governments exhibiting large-scale rule of law breakdowns. In fact, the Chilean government’s widespread

recaído en el encargo que le hiciera el Senado respecto del conflicto Mapuche en relación con el orden público y la seguridad ciudadana en determinadas regiones, Boletín No. S680-12 (July 9, 2003)).

⁷⁴ See Secure World Report, *supra* note 65, at para. 11.

⁷⁵ Recent international definitions of terrorism have concluded that terrorism is any action that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or to abstain from doing any act. *Id.* at para. 164. An argument could be made that Mapuche actions have been intended to harm civilians to compel the Chilean government from pursuing their economic policies on the disputed lands, however, no one has been injured by Mapuche actions.

⁷⁶ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, para. 7 (2004).

⁷⁷ See Office for the High Commissioner of Human Rights, *Terrorism and Human Rights*, U.N. Doc E/Cn.4/Res/2003/68 (Apr. 25, 2003) available at <http://www.unhchr.ch/terrorism/index.html>. No derogation is ever allowed from the non-derogable rights listed in ICCPR arts. 4 and 27. For example, it is never allowed to discriminate solely based on ethnic origin. See also Inter-American Convention on Terrorism, *supra* note 64, at art. 15 (“measures carried out under this Convention shall take place with full respect for the rule of law, human rights and fundamental freedoms”).

⁷⁸ Under the ICCPR, certain rights are non-derogable and any derogation from the other rights guaranteed by the Covenant must be made in strict conformity with ICCPR art. 4. See also U.N. General Assembly Resolution 57/219 (Dec. 18, 2002) (“Affirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.”); ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 519 (Bianchi, Andrea ed.) (2004); Office of the High Commissioner of Human Rights [OHCHR], *Protecting Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. Doc. A/Res/57/219/18 (Dec. 2002); Committee Members of the Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, (July 11, 2002) (“Human rights guarantees should never be disregarded.”); Office of the High Commissioner for Human Rights, *Protection of human rights and fundamental freedoms while countering terrorism*, U.N. Doc E/CN.4/Res/2003/68, ¶ 3, (Apr. 25, 2003) available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2003-68.doc.

⁷⁹ WORLD BANK INDICATORS, *supra* note 59, at 110.

respect for, and adherence to, rule of law principles, arguably makes its willful disregard of rule of law protections with regard to Mapuche even more irreconcilable. The government has had opportunities to promote reconciliation and discourse in the Mapuche conflict consistent with rule of law principles. In 2002–2003, a special Chilean Senate committee met for more than a year to discuss the public security aspect of the Mapuche land conflict. Fifteen prominent landowners that had suffered attacks testified to the committee, but only one Mapuche representative was invited.⁸⁰ Additionally, CONADI, the mechanism designed to mediate between government and Mapuche land interests, has been ultimately controlled by the government’s economic interests.⁸¹

IV. POTENTIAL REMEDIES FOR THE MAPUCHE

¶24 Chile’s failure to adhere to rule of law principles, that has enabled violation of Mapuche human rights, could be addressed in both national and international fora. However, because the nature of the violations involve a domestic failure to afford procedural safeguards to Mapuche, traditional domestic legal remedies are likely not a practical solution. Therefore, non-judicial domestic remedies and international quasi-judicial remedies are likely the best current remedial options to address Mapuche grievances.

A. Domestic Remedial Options

¶25 Over the past decade, the international community has attempted to press the Chilean government into amending the Terrorism Act and reforming their treatment of the Mapuche nation.⁸² As evidenced by the terrorism prosecutions, the Indigenous Peoples Act of 1993⁸³ does not provide adequate protection for Mapuche human rights. In the past few years, a national and international campaign lobbying for the release of Mapuche imprisoned for terrorism urged the Chilean President to find a solution. The lobbying campaign elicited a government promise to put top priority on a bill that would have set the prisoners free. However, in September 2006, after several delays, the Senate voted against the bill.⁸⁴ Despite the bill’s defeat, the campaign demonstrated a growing national and international recognition of the failures of the Chilean state with regard to the Mapuche.⁸⁵ Using this momentum, civil society in Chile, with the support of

⁸⁰ UNDUE PROCESS, *supra* note 3, at 17.

⁸¹ For example, the construction of a dam in Araucanía on Mapuche ancestral lands went ahead, against the express wishes of the indigenous communities affected, only after then-President Eduardo Frei intervened to secure its approval by the national environmental agency and by CONADI. Moreover, two CONADI directors who had opposed the dam were then fired in quick succession. *Id.* at 14.

⁸² See ICCPR Human Rights Committee, 1999 Annual Report to the General Assembly, A/54/40, (Oct. 21, 1999). Regarding Chile, the Committee stated: “[t]he Committee is concerned that hydroelectric and other development projects might affect the way of life and the rights of persons belonging to the Mapuche.” See also Stavenhagen, *supra* note 5.

⁸³ Adopted in 1993, Act No. 19,253 recognized rights that were specific to indigenous peoples and expressed Chile’s intention to establish a new relationship with them. Stavenhagen, *supra* note 5, at 7.

⁸⁴ The bill was defeated 20 to 13, with two abstentions. The bill was submitted by Senators Alejandro Navarro and Juan Pablo Letelier of the Socialist Party (PS) and Guido Girardi of the Party for Democracy (PPD). Daniela Estrada, *Chile: Closed Door for Prisoners Galvanizes Mapuche Mobilization*, Inter-Press Service News Agency, Sept. 8, 2006, available at <http://www.ipsnews.net/news.asp?idnews=34656>.

⁸⁵ There is significant debate regarding the proper treatment of indigenous groups and their right to self-

sympathetic members of Parliament and international NGOs, should continue to push for various legislative reforms. Ideally, legislative reforms would include constitutional reform to explicitly recognize indigenous rights, and ratification of the International Labor Organization's ("ILO") Convention 169 on Indigenous Rights.⁸⁶ Chile is the only country in the Latin American region with a sizeable indigenous population that has not ratified the ILO Convention.⁸⁷ Also, Human Rights Watch has made further recommendations for domestic legislative reform to address the abuse of the Terrorism Act by the Chilean government.⁸⁸

¶26 However, domestic legislative changes, even if made, remain unlikely to effectuate real change for the Mapuche without adherence to rule of law principles and a fundamental change in the sociopolitical characterization of the Mapuche conflict. Until the normative characterization of Mapuche grievances changes, legislative reform may not be able to overcome the stigma of terrorism. Although perhaps not achievable through discrete legislative reform, actions should be taken to promote both judicial and sociopolitical frameworks for public discourse regarding the conflict.⁸⁹ Initial progress in re-characterizing the Mapuche conflict can be achieved by institutional adherence to rule of law principles. Furthermore, the government should publicly recognize that despite the criminal nature of some Mapuche actions, many of their protest actions are lawful and in response to legitimate social demands.⁹⁰

B. International Remedial Options

¶27 International human rights bodies may offer Mapuche individuals a forum to address their grievances. The Inter-American system has the capacity to handle individual complaints against state parties to the American Convention on Human

determination. It is not possible within the scope of this paper to explore the various views on proper nation-state treatment of indigenous peoples.

⁸⁶ Rodolfo Stavenhagen, UN Special Rapporteur on the situation of human rights and fundamental freedoms, has submitted several domestic legislative recommendations to improve Chile-Mapuche relations. Included in his proposals are constitutional reforms to give constitutional recognition to indigenous peoples and Chilean ratification of the International Labour Organization Convention No. 169. The Governments that have succeeded the Pinochet regime have proposed constitutional reform and ratification of ILO Convention No. 169, but all proposals have been rejected by the Chilean Parliament. Stavenhagen, *supra* note 5, at para. 58. Among the rights of indigenous peoples recognized under the ILO Convention are the "[r]ights of ownership and possession of the peoples concerned over the lands in which they traditionally occupy." International Labor Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, entry into force Sept. 5, 1991, *available at* <http://www.unhchr.ch/html/menu3/b/62.htm>.

⁸⁷ Ratification status of International Labor Organization Convention 169, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> (last visited Dec. 10, 2006) (stating that Argentina, Bolivia, Brazil, Colombia, Paraguay and Peru have ratified the Convention).

⁸⁸ Included in their recommendations are legislative removal of the anti-terrorism law and ending the use of military tribunals for civilians. See *UNDUE PROCESS*, *supra* note 3, at 9-10.

⁸⁹ See U.N. General Assembly, *International Decade of the World's Indigenous People*, U.N. A/RES/49/214 (Feb. 17 1995) (encouraging governments to seek "means, in consultation with indigenous people, of giving indigenous people greater responsibility for their own affairs and an effective voice in decisions on matters which affect them."); see also Conference on Security and Cooperation in Europe, *Report of the CSCE Meeting of Experts on National Minorities, July 1-19, 1991*, reprinted in 30 INT'L LEGAL MATERIALS 1692-1702 (Nov. 1991) (stating that over the long-term, minority issues are best resolved in a rule of law framework).

⁹⁰ See Stavenhagen, *supra* note 5, at Executive Summary.

Rights.⁹¹ Additionally, Mapuche could file individual complaints against Chile to the United Nations (“UN”) Human Rights Committee.⁹²

¶28 The Mapuche could file a complaint to the UN Human Rights Committee claiming that Chile has breached its obligations under the ICCPR. Specifically, the Mapuche could rely on the rule of law protections provided by Article 14 and the non-discrimination provisions of Article 2.⁹³ However, the Human Rights Committee has no powers of enforcement and thus even if it did hear the Mapuche complaint, it could do little more than condemn the Chilean government.

¶29 A case brought in the Inter-American system may have more promise. In a case before the Inter-American Court, the Mapuche could claim a breach of Chile’s obligations under the American Convention on Human Rights. The Mapuche could argue that Chile has violated both the fair trial provisions of Article 8 and the non-discrimination provisions of Article 1.⁹⁴ Also, the Mapuche could argue that both the prosecution for terrorism and the use of military tribunals constitute violations of the Convention. Chile would likely argue that their prosecutions were necessary to preserve order and security. Furthermore, Chile would argue that the Terrorist Act was lawfully enacted. However, the Mapuche could rebut Chile’s argument on two grounds. First, the Mapuche could rely on the Inter-American Convention against Terrorism that provides that counterterrorism measures must be carried out with full respect for the rule of law, human rights and fundamental freedoms.⁹⁵ Even if the Court finds that Mapuche actions constitute terrorism, the Inter-American Court has stated firmly that, even in emergency situations, a State may not derogate from rule of law protections.⁹⁶ Secondly, Chile may

⁹¹ Chile ratified the American Convention on August 8, 1990.

⁹² Chile is a state party to the Optional Protocol to the ICCPR. See Office of the United Nations High Commissioner for Human Rights [OHCHR], Optional Protocol to the ICCPR, New York, 16 December 1966, <http://www.ohchr.org/english/countries/ratification/5.htm> (last visited Aug. 18, 2007).

⁹³ ICCPR art. 14.1 states that: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 2 states that: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁹⁴ American Convention on Human Rights, “Pact of San Jose, Costa Rica,” opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123, available at <http://www.oas.org/juridico/english/Treaties/b-32.html> [hereinafter American Convention]. Article 8 of the American Convention provides several due process guarantees and states in § 1 that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal.” However, the American Convention, although modeled after the ICCPR, notably does not contain a parallel provision to Article 27 of the ICCPR which recognizes the rights of members of minority groups. The Inter-American Democratic Charter art. 9, Sept. 11, 2001, 40 I.L.M. 1289, 1290, available at http://www.oas.org/charter/docs/resolution1_en_p4.htm, does provide for the “promotion and protection of human rights of indigenous peoples and migrants,” but this Charter remains a non-binding resolution.

⁹⁵ Inter-American Convention Against Terrorism, *supra* note 65, at art. 1. However, Chile only ratified the Convention in August 2004 and thus could argue that their obligations under the Convention only began in 2004.

⁹⁶ Habeas Corpus in Emergency Situations (arts. 27(2) and 7(6) of the American Convention), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987) (“There exists an inseparable bond between the principle of legality, democratic institutions and the rule of law . . . The judicial guarantees essential for the protection of human rights not subject to derogation, according to 27.2 of the Convention, are those to which the Convention expressly refers in arts 7.6 and 25.1, considered within the framework and the principles of art. 8, and also those necessary to the preservation of the rule of law.”).

not rely on domestic law to breach international obligations. The *pacta sunt servanda* principle of international law, codified in the Vienna Convention on the Law of Treaties, holds that States must execute in good faith the treaties they adhere to and the international obligations arising from them.⁹⁷ The Inter-American Court of Human Rights has explicitly invoked the principle, stating that: “[p]ursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfillment.”⁹⁸ Therefore, Chile can arguably not rely on the Terrorist Act to violate their international obligations.

¶30 Nevertheless, whether a Mapuche complaint would reach the Inter-American Court depends on a referral by the Inter-American Commission.⁹⁹ Given the large number of human rights violations that persist in the region,¹⁰⁰ and the difficulties of enforcement, the Inter-American system may not be able to provide relief to the Mapuche. However, the Inter-American Court has had success engendering change in Chilean domestic laws.¹⁰¹ Furthermore, the Inter-American Commission has shown considerable interest in indigenous rights issues. In July 2006, the Commission held a thematic hearing regarding the manner in which several OAS countries violated the collective property rights of indigenous peoples with respect to their lands and natural resources.¹⁰² Therefore, the Inter-American system may provide a forum to redress Mapuche grievances and to pressure Chile to take domestic action to adhere to rule of law principles and protect Mapuche rights.

V. THE NEED FOR DISCRETE CONSIDERATION OF INDIGENOUS AND MINORITY GROUPS IN RULE OF LAW ANALYSES

¶31 Although the Inter-American system could provide a forum for Mapuche grievances, it may not be able to generally deter further abuses of indigenous rights under the label of counterterrorism. Rule of law analyses are mechanisms that could serve to publicize violations of indigenous and minority group rights, and generate international

⁹⁷ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* Jan. 27, 1980.

⁹⁸ Inter-American Court of Human Rights, International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (arts. 1 and 2, American Convention on Human Rights), Advisory Opinion OC-14/94 of December 1994, Series A No. 14, para. 35.

⁹⁹ The procedure for handling individual complaints under the American Convention begins with the Inter-American Commission. The Court may consider a case that is brought either by the Commission or by a state party to the Convention. Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture* 12 HUM. RTS. Q. 439, 440 (1990).

¹⁰⁰ See Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not yet an Ox*, reprinted in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 32 (David Harris and S. Livingstone, eds.) (1998).

¹⁰¹ In 2001, the Inter-American Commission ruled that Chile’s prohibition on the film “The Last Temptation of Christ” violated Article 13 of the American Convention. “The Last Temptation of Christ” Case, Judgment of February 5, 2001, Inter-Am Ct. H.R. (Ser. C) No. 73 (2001), *available at* <http://www1.umn.edu/humanrts/iachr/C/73-ing.html>. In January 2004, Chile changed its film classification system to abolish film censorship. See United States Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices 2003: Chile*, (Feb. 25, 2004), <http://www.state.gov/g/drl/rls/hrrpt/2003/27890.htm>.

¹⁰² Indian Law Resource Center, Indigenous Organizations and Peoples Denounce how Panama, Guatemala, Costa Rica and Nicaragua Violate their Collective Property Rights to their Lands and Natural Resources in a Hearing before the Inter-American Commission on Human Rights (July 28, 2006), <http://www.indianlaw.org>.

discourse on the importance of protecting such groups despite the exigencies of counterterrorism. Rule of law analyses measure the extent to which a country adheres to rule of law principles in various sectors of society. The role of human rights in national counterterrorism policy has entered rule of law discourse, and there is substantial acknowledgement in the international community that the “war on terror” threatens rule of law principles and thus should be monitored in this context. The “war on terror” has effectively created a continual circumstance of crisis, allowing states to erode rule of law principles on the premise of maintaining national security. In the “war on terror,” as in past times of crisis, the emphasis on national order and security has involved curtailment of human rights.¹⁰³ In this context, the indiscriminate use of the terrorism label has provided cover for many countries trying to escape their human rights obligations and engage more easily in direct or indirect persecution of minority groups.¹⁰⁴ However, in rule of law analyses to this point, despite consideration of the need to balance human rights and counterterrorism, there has been very little discrete consideration of the precarious position of indigenous and minority groups.

A. Indigenous and Minority Groups are Most Vulnerable to Rule of Law Erosions Resulting from Counterterrorism Measures

¶32

Indigenous and minority groups are often the first to suffer from erosions of the rule of law as a result of counterterrorism measures.¹⁰⁵ As evidenced by the Mapuche example in Chile, use of the terrorism label can serve to disguise the persecution of minority groups as legitimate actions within a rule of law system. The situation in Chile is not isolated, and in Latin America “terrorist” has often replaced “communist” as means to justify suspension of basic rights of indigenous people and to avoid dialogue over issues such as land and resources.¹⁰⁶ Furthermore, countries around the world have used terrorism language as a pretext to persecute minority groups.¹⁰⁷ Given the growing

¹⁰³ See Mary Robinson, *supra* note 57; Bianchi, *supra* note 78, at 519 (stating that international terrorism has caused some states to adopt emergency legislations allowing derogation from international human rights obligations); see also *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding establishment of internment camps for all persons of Japanese ancestry based on dangers of WWII); James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), in JAMES MADISON, WRITINGS 639 (Jack N. Rakove ed., 1999) (criticizing four laws passed by the U.S. Congress in 1798 in anticipation of war with France that authorized detainment or expulsion of ‘dangerous’ aliens and curtailed press criticism of government).

¹⁰⁴ Minority Rights Group International, *Global ‘War on Terror’ has become a Global War on Minorities*, (Sept. 8, 2006), http://www.minorityrights.org/news_detail.asp?ID=394; see also Mary Robinson, *supra* note 57 (“The reality is that by responding in this way the United States has, often inadvertently, given other governments an opening to take their own measures which run counter to the rule of law and undermine efforts to strengthen democratic forms of government.”).

¹⁰⁵ One of the most distinctive features of minority rights and legal protection is that minorities need the greatest legal protections during times of crisis. See generally *Korematsu*, *supra* note 101.

¹⁰⁶ Theodore McDonald, lecturer in Anthropology and Social Studies at Harvard, has stated that in many places in Latin America the term “terrorist” has replaced “communist” as a means to justify suspension of the basic rights of indigenous people and to avoid dialogue over ongoing issues such as land and resources. Minority Rights Group International, *supra* note 103. See also Office of the High Commissioner of Human Rights [OHCHR], *Protecting Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. Doc. A/Res/57/219/18 (Dec. 2002) (drawing attention to the dangers inherent in the indiscriminate use of the term “terrorism” and the resulting new categories of discrimination).

¹⁰⁷ The United States has been widely charged with violating minority rights. See, e.g., Human Rights Watch, *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, (June 2005), <http://hrw.org/reports/2005/us0605/us0605.pdf> (“since the attacks of September 11, 2001, at

prominence of rule of law analyses as indicators of human rights compliance, and the concurrent increase of counterterrorism measures that erode rule of law principles and enable human rights abuse of minority and indigenous groups, discrete consideration should be given to the treatment of such groups in rule of law analyses.

B. Rule of Law Analyses Recognize the Need to Balance Human Rights with Counterterrorism Policy

¶33

Rule of law analyses have the potential to generate significant international recognition of the need to protect minority and indigenous groups from misuse of the label of terrorism. The rule of law continues to emerge as a fundamental indicator of judicial development and the protection of human rights. Furthermore, rule of law principles have been advanced as essential to preserving democracy over the long-term.¹⁰⁸ Moreover, even in countries where democracy may not be feasible, the rule of law has been cited as an important benchmark for ensuring human rights protections.¹⁰⁹ Adherence to the rule of law has been specifically cited as a necessary safeguard to prevent human rights abuses in the name of counterterrorism efforts¹¹⁰ and prominent international jurists recognize that a balance must be struck between counterterrorism measures and adherence to the rule of law.¹¹¹ In 2005, the United Nations Expert

least seventy men living in the United States – all Muslim but one – have been thrust into a Kafkaesque world of indefinite detention without charges, secret evidence, and baseless accusations of terrorist links.”). The use of terrorism language has spread to countries all over the world. The violent repression of Muslim Uighurs in China, the ongoing denial of rights for Kurds in Turkey and the Russian occupation of Chechnya have all violated international human rights obligations and have all been explained away as a contribution to the “war on terror.” Also, the United Kingdom passed the Anti-Terrorism Crime and Security Act in 2001 and since September 11, 2001 almost 950 people have been arrested under the Act, the majority of them Muslim. Preti Taneja, *Global War on Minorities*, Oct. 2, 2006, http://www.tompaine.com/articles/2006/10/02/global_war_on_minorities.php (last visited Aug. 18, 2007). Canada also changed its laws in response to 9/11, the Anti-Terrorism Act allows government to make “preventive arrests.” See Department of Justice Canada, *Royal Assent of Bill C-36, The Anti-Terrorism Act*, http://www.justice.gc.ca/en/news/nr/2001/doc_28217.html (last visited Aug. 18, 2007). Representatives from Arab and Muslim groups stated that the police has targeted their groups under the Act. See Public Safety and Emergency Preparedness Canada, *Review of the Anti-Terrorism Act*, (Feb. 14, 2005) <http://www.psepc.gc.ca/media/sp/2005/sp20050214-en.asp> (last visited Aug. 18, 2007); see also HUMAN RIGHTS WATCH, *BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA’S UNTOUCHABLES* (1999), available at <http://www.hrw.org/reports/1999/india/> (“Dalit activists are jailed under preventive detention statutes to prevent them from holding meetings and protest rallies, or charged as ‘terrorists’ and ‘threats to national security.’”).

¹⁰⁸ Kay Bailey Hutchinson, *Democracy and the Rule of Law*, 39 INT’L. LAW. 663, 664. (stating that the rule of law promotes democratic principles such as curbs on executive power through checks and balances, freedom of the press, freedom of worship, etc.). See also U.N. General Assembly, *United Nations Millennium Declaration*, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc. A/55/49 (2000) [hereinafter Millennium Declaration] (stating that strengthening rule of law is a vital part of strengthening human rights and democracy).

¹⁰⁹ Ignatieff, *supra* note 23.

¹¹⁰ The Club de Madrid, a group of former heads of states from countries in all regions of the world that works to strengthen democracy throughout the world, addressed the issue of counterterrorism and the rule of law in 2005. CLUB DE MADRID: TOWARDS A DEMOCRATIC RESPONSE: THE CLUB DE MADRID SERIES ON DEMOCRACY AND TERRORISM VOL. III, THE INTERNATIONAL SUMMIT ON DEMOCRACY TERRORISM AND SECURITY 15, 49 (March 2005) [hereinafter Club de Madrid] (“[t]he global phenomenon of terrorism points to the increasing need for . . . scrupulous respect for the rule of law.”).

¹¹¹ Mary Robinson, *supra* note 57, at 4 (“the violations of human rights standards that have occurred in the name of this so called war – no matter how necessary it is to counter terrorism – have caused tremendous damage to the efforts by many to strengthen the rule of law.”).

Seminar on Democracy and the Rule of Law recognized that recent responses to terrorism have resulted in erosion of rule of law principles and human rights violations, and emphasized that states must uphold their human rights obligations through adherence to the rule of law when confronting terrorism.¹¹² Additionally, the International Commission of Jurists, in its 2004 Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, stressed that states must adhere strictly to the rule of law in adopting measures aimed at suppressing acts of terrorism. Furthermore, the Commission concluded that a mechanism should be established to monitor the relationship between counter-terrorism and human rights.¹¹³

C. Rule of Law Analyses have thus far Failed to Discretely Consider Treatment of Minority and Indigenous Groups

¶34

Despite growing recognition that rule of law principles are fundamental to balancing human rights with counterterrorism measures, rule of law analyses have thus far failed to provide discrete consideration of the continued threat the use of counterterrorism measures pose to indigenous and minority groups. As noted, in the context of confronting terrorism, rule of law analyses often properly acknowledge the need to strike a balance between the rule of law and counterterrorism generally. Furthermore, when discussing the protection of human rights in confronting terrorism, several rule of law analyses properly identify the principle of non-discrimination as in specific need of monitoring.¹¹⁴ However, in the rule of law analyses examined, despite blanket prohibitions on non-discrimination, an explicit nexus between counterterrorism measures, rule of law erosion, and the effects on minority and indigenous groups was not drawn.¹¹⁵ Certainly the principle of non-discrimination, if properly maintained, would

¹¹² The Expert Seminar was convened by the Office of the High Commissioner for Human Rights based on a mandate by the Commission on Human Rights (Resolution 2003/36) to organize a second expert seminar to examine further the interdependence between democracy and human rights, with a focus on the rule of law, and to report on the conclusions of the seminar to the Commission at its sixty-first session. EXPERT SEMINAR ON DEMOCRACY AND THE RULE OF LAW, CONCLUSIONS AND RECOMMENDATIONS 14 (Mar. 2005) available at <http://www.ohchr.org/english/issues/democracy/seminar2.htm> [hereinafter EXPERT SEMINAR ON DEMOCRACY AND RULE OF LAW].

¹¹³ The Commission was founded in Berlin in 1952 and its membership is composed of sixty eminent jurists who are representatives of the different legal systems of the world. INTERNATIONAL COMMISSION OF JURISTS, THE BERLIN DECLARATION: THE ICJ DECLARATION ON UPHOLDING HUMAN RIGHTS AND THE RULE OF LAW IN COMBATING TERRORISM (Aug. 2004) available at http://www.icj.org/IMG/pdf/Berlin_Declaration.pdf [hereinafter ICJ Berlin Declaration] (declaring that states must adhere strictly to the rule of law in adopting measures aimed at suppressing acts of terrorism and that a mechanism should be established to monitor counter-terrorism and human rights, but failing to identify indigenous/minority groups as those in need of special protection.).

¹¹⁴ Club de Madrid, *supra* note 109, at 32 (“The fundamental and overriding principle of non-discrimination must be respected at all times especially in counter-terrorism measures adopted by states.”). See also ICJ Berlin Declaration, *supra* note 112, at 2 (“To that end, counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination.”).

¹¹⁵ See EXPERT SEMINAR ON DEMOCRACY AND RULE OF LAW, *supra* note 112 (no mention of concern for indigenous or minorities); ICJ Berlin Declaration, *supra* note 113 (failing to identify indigenous/minority groups as being in need of special protection); Millennium Declaration, *supra* note 108 (resolving to strengthen capacity to respect minority rights, and to fight international terrorism, without drawing any link to minority rights). But see Club de Madrid, *supra* note 110, at 48 (acknowledging that “[a]ll measures of racial profiling and other discriminatory practices against minorities and particular social and religious communities must be eliminated”). However, the Club de Madrid did not explicitly link discriminatory

provide minorities with the necessary legal protections. Furthermore, protection is arguably provided to these most vulnerable groups through international pronouncements specifically tailored to their circumstance.¹¹⁶ However, even resolutions such as the UN Draft Declaration on the Rights of Indigenous Peoples do not draw an explicit nexus between counterterrorism policy and indigenous and minority rights.¹¹⁷

¶35 The Mapuche conflict demonstrates that terrorism language can be severely detrimental to indigenous group rights through the erosion of rule of law principles.¹¹⁸ Thus, given that minority groups are most vulnerable to abuses resulting from erosions in the rule of law, there remains a need to promote consideration of the precarious position of indigenous and minority groups with respect to counterterrorism policy. The express inclusion of the treatment of indigenous and minority groups in rule of law analyses would provide specific, symbolic analysis of this ongoing form of discrimination. The situation in Chile demonstrates that a comprehensive rule of law analysis requires discrete consideration of minority and indigenous treatment.

D. Chilean Rule of Law Index Score Demonstrates the Need for Discrete Consideration of Minority/Indigenous Treatment to Provide a Comprehensive Rule of Law Analysis

¶36 The World Bank has undertaken a Rule of Law Index to present a comprehensive rule of law measurement as part of their 2006 World Governance Indicators.¹¹⁹ Specifically, the Rule of Law Index measures the extent to which agents have confidence in and abide by the rules of society, in particular the quality of contract enforcement, the police, and the courts.¹²⁰ The Rule of Law Index reflects the statistical aggregation of survey and poll responses on the quality of governance.¹²¹ In 2006, Chile scored in the 87th percentile and received the highest score in South America. The Chilean score was based on the aggregate data of fifteen polls and surveys.¹²² The fifteen sources each provided an aggregation of responses on particular rule of law attributes.¹²³ Despite the

practices to counterterrorism efforts. The Club de Madrid did, however, recognize the importance of the inclusion and integration of minority and diaspora communities into societies.

¹¹⁶ The protection of indigenous groups is codified in various charters and declarations. See, e.g., Inter-American Democratic Charter, supra note 94; Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). However, there is no binding international law that explicitly protects indigenous groups.

¹¹⁷ See *Id.*

¹¹⁸ See Mauricio Buendia, *Chilean Injustice Against the Mapuche People: Acquitted, but still Incarcerated*, GIRALUNA (Chile), Aug. 2005, available at http://www.americas.org/item_22664.

¹¹⁹ In 2005, the World Bank performed the latest update of their worldwide governance indicators covering 213 countries and territories and measuring six dimensions of governance: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption. WORLD BANK, 2006 WORLD GOVERNANCE INDICATORS, available at www.worldbank.org/wbi/governance/govmatters5.

¹²⁰ The Index's rule of law scoring is based on a number of factors. Rule of Law Sources, 2006 World Governance Indicators, <http://info.worldbank.org/governance/kkz2005/pdf/rl.pdf> (last visited Aug. 18, 2007).

¹²¹ The surveys and polls are aggregated as reported by a number of survey institutes, think-tanks, non-governmental organizations, and international organizations. *Id.*

¹²² The Chart can be seen at http://info.worldbank.org/governance/kkz2005/sc_chart.asp by clicking on the "List" for Rule of Law, 2005, in the Statistical Table for all Governance Indicators for Chile.

¹²³ See, e.g., Cingranelli-Richards Human Rights Dataset, Factors considered for Chile, <http://info.worldbank.org/governance/kkz2005/pdf/HUM.pdf> (last visited Aug. 18, 2007) [hereinafter CIRI Humans Rights Dataset]. The Cingranelli-Richards ("CIRI") Human Rights Dataset provided a

wide variety of factors considered, none of the fifteen sources expressly considered the treatment of minority or indigenous groups as part of their rule of law analysis.¹²⁴ Furthermore, no source expressly considered the effects of counterterrorism measures on the rule of law.¹²⁵

¶37 Admittedly, the World Bank Index is largely tailored to business interests and threats posed by rule of law erosion to the security of foreign investment. However, the Index is presented as a comprehensive measurement reflecting more than rule of law principles applied merely to business interests. Furthermore, as a development institution involved in technical assistance to further human rights protection throughout the world, the World Bank has consistently emphasized the importance of the rule of law and good governance.¹²⁶ Thus, the World Bank Index should arguably consider the factors most likely to erode the rule of law and enable human rights violations. Given the current geopolitical climate, counterterrorism policy is a significant factor that should be considered in rule of law analyses.¹²⁷ Furthermore, indigenous and minority groups are specifically vulnerable to erosions in the rule of law and thus merit discrete consideration in any thick conception of the rule of law. The express inclusion of minority and indigenous treatment in rule of law analyses would provide a more comprehensive indicator of a country's adherence to rule of law principles.

¶38 Nevertheless, Chile's World Bank Index score reflects the significant progress made in its transition to democracy. The score demonstrates that the government adheres to rule of law principles in a large majority of sectors of Chilean society. However, despite widespread adherence to rule of law principles, the treatment of minority and indigenous groups must be given discrete consideration to provide a comprehensive index of the rule of law in Chile. A judicial system that has made significant strides in maintaining the rule of law can easily disguise its mistreatment of groups like the

measurement on the independence of the judiciary based on human rights violations compiled by the U.S. State Department and Amnesty International. The CIRI Dataset contains standards-based quantitative information on government respect for thirteen internationally recognized human rights for 192 countries. *See also* Economist Intelligence Unit survey factors for Good Governance Indicators, *at* <http://info.worldbank.org/governance/kkz2005/pdf/EIU.pdf> (last visited Aug. 18, 2007). The Economist Intelligence Unit ("EIU") aggregated data on violent crime, organized crime, fairness of judicial process, enforceability of contracts, speediness of judicial process, confiscation/expropriation, intellectual property rights protection and private property protection. EIU is a for-profit organization producing analysis and forecasts of the political, economic and business environment in more than 180 countries. The EIU was founded in 1949 and is based in London. In 1997, the EIU launched two quarterly publications which contain governance measures: the Country Risk Service and the Country Forecasts.

¹²⁴ Not one of the fifteen sources used in the World Bank's rule of law analysis of Chile directly considered the treatment of minorities or indigenous groups. *See, e.g.*, World Economic Forum, Global Competitiveness Report, <http://info.worldbank.org/governance/kkz2005/pdf/GCS.pdf> (last visited Aug. 18, 2007). *But see* the CIRI Human Rights Dataset, *supra* note 123, that does consider imprisonments based on race or ethnicity as part of its Voice and Accountability Indicator. Also, questions regarding the treatment of minorities or indigenous groups may have been included as part of the surveys or polls, but this consideration was not reflected in any descriptions of data collected.

¹²⁵ One of the sources considers "political terror" as a factor in measuring political stability. *See* CIRI Human Rights Dataset, *supra* note 123.

¹²⁶ *See* WORLD BANK INDICATORS, *supra* note 59; *see also* Paul Wolfowitz, Good Governance and Development: A time for Action, The World Bank Office of the President, Apr. 11, 2006, <http://hochiminh.usconsulate.gov/uploads/images/MglcbzuXJTbncXV82D2kwQ/AR04052006E.pdf>.

¹²⁷ Prominent international jurists state that rule of law analyses should consider counterterrorism policy. *See supra*, notes 110-113. Though perhaps a controversial assertion, it is assumed for the purposes of this paper that counterterrorism policy is rightly considered as part of rule of law analyses.

Mapuche that comprise a very small percentage of the population and thus the litigation case-load.¹²⁸ Furthermore, human rights protections are not only applicable to countries that exhibit wholesale breakdowns in the rule of law, but are also necessary in societies perceived to be crisis-free. The manifest intent of rule of law principles and international human rights is to protect individuals from government abuse. In fact, the protection of minorities was a major impetus of the modern human rights movement and the correlated notion that a state no longer has absolute internal control over its citizens.¹²⁹

VI. CONCLUSION

¶39 Just as striking a balance between the rule of law and counterterrorism poses a developing challenge in the current geopolitical climate, the tools necessary to ensure human rights compliance within this state of affairs must be adjusted accordingly. Rule of law principles are fundamental to the protection of human rights, and thus the maintenance of the rule of law with regard to those most vulnerable should be considered in any rule of law analysis. Rule of law analyses that discretely consider the treatment of indigenous and minority groups can provide a significant tool for monitoring the protection of human rights in the current geopolitical climate of counterterrorism.

¹²⁸ According to the 2002 Chilean Census, Mapuche constitute 4% of population.

¹²⁹ See generally *Minorities Treaty*, Versailles, (Jun. 28, 1919); see also Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights idea in the Twentieth Century*, 14 HUM RTS. Q. 447, 450, (1992) (stating that early 20th century minorities treaties, imposed on the states of Central-East Europe and the Balkans, guaranteed that all nationals would be equal before the law and would enjoy the same civil and political rights).