



# Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 882/2018\*, \*\*

<i>Communication submitted by:</i>	Flor Agustina Calfunao Paillalef (represented by counsel, Pierre Bayenet)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	17 August 2018 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 23 August 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	5 December 2019
<i>Subject matter:</i>	Deportation to Chile
<i>Procedural issues:</i>	None
<i>Substantive issue:</i>	Risk of torture or cruel, inhuman or degrading treatment or punishment if deported to country of origin (non-refoulement)
<i>Articles of the Convention:</i>	3 and 22

1.1 The complainant, who was born on 28 August 1961, is Flor Agustina Calfunao Paillalef, a national of Chile and a member of the Mapuche indigenous people. She is subject to an order for deportation to Chile and considers that her deportation would constitute a violation by Switzerland of article 3 of the Convention. The State party has made the declaration pursuant to article 22 (1) of the Convention, effective from 2 December 1986. The complainant is represented by counsel, Pierre Bayenet.

1.2 On 23 August 2018, pursuant to rule 114 (1) of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to deport the complainant to Chile while the complaint was being considered. On 27 August 2018, the State party informed the Committee that no steps would be taken to deport the complainant to Chile while the Committee was considering her complaint.

\* Adopted by the Committee at its sixty-eighth session (11 November–6 December 2019).

\*\* The following members of the Committee participated in the examination of the communication: Essadia Belmir, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé and Bakhtiyar Tuzmukhamedov.



## Facts as submitted by the complainant

### *Defending the rights of the Mapuche indigenous people from Switzerland*

2.1 The complainant was born in Chile in the traditional territory of the Mapuche indigenous people, in Los Laureles, a hamlet of the Juan Paillalef community<sup>1</sup> in the municipality of Cunco, Araucanía region. The complainant is a member of the Mapuche indigenous people, which is asserting its rights to its traditional territory in the face of timber, hydroelectric and mining concessions granted by Chile to domestic and international companies, road construction without the consent of the indigenous people and the occupation of the land by large non-indigenous landowners.<sup>2</sup> The demands of the Mapuche are being met with violent reactions both from the Chilean authorities, including the militarized police known as Carabineros, and from individuals who have formed private armed militias. The Mapuche people are victims of assassinations, torture, the criminalization of their demands, set-ups involving judicial officials and the police, and the use of Act No. 18.314, the Counter-Terrorism Act, against their leaders. According to the complainant, the Mapuche are persecuted not for what they do but for who they are. For example, members of the complainant's family have had their houses set on fire on several occasions; one of the complainant's uncles was killed and his body was thrown into a burning house before the investigation was completed; the Mapuche are often detained and then released; they are assaulted; and some of them are serving long prison sentences under the Counter-Terrorism Act. The complainant states that there are approximately 80 court cases against her community, which is experiencing constant violence.

2.2 In 1996, the complainant moved to Geneva. She has since been active at the international level in the defence and promotion of the rights of the Mapuche people. For example, she is involved with the various United Nations treaty bodies and participates in the sessions of the Human Rights Council and the Expert Mechanism on the Rights of Indigenous Peoples in order to expose the violations suffered by the Mapuche people. In 2011, the traditional Mapuche authorities granted the complainant the title of Ambassador for the Collective and Individual Rights of the Mapuche People of the Mapuche Permanent Mission to the United Nations Office at Geneva; she has continued participating in the meetings of international bodies in that capacity.

2.3 Since 1996, the complainant has returned to Chile only three times, on short trips in 1998, 2003 and 2008. On her most recent trip, she was accompanied by representatives of the non-governmental organizations (NGOs) Paz y Tercer Mundo – Mundubat and Entrepueblos to pick up her 10-year-old niece, Remultray Cadin Calfunao, whose parents and brothers were in prison.

### *Application for asylum in Switzerland*

2.4 On 19 November 2008, the complainant submitted an application for asylum for her niece and herself with the Federal Office for Migration (which in 2014 became the State Secretariat for Migration). She attached a video, photos, court records, copies of laws and reports from international organizations to document the political persecution that their family has endured as a result of its claims to the ancestral lands of the Mapuche people. The application also included records of visits by the International Committee of the Red Cross to the Mapuche prisoners in her family and a report from the association Mapundial stating that the complainant could not return to Chile without fearing for her freedom and her physical and psychological integrity.

2.5 On 18 August 2010, the Federal Office for Migration rejected the complainant's application for asylum and issued an order for her deportation by 30 September 2010. In its decision, the Federal Office for Migration notes that Mapuche people in Chile who are

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<sup>1</sup> The community consists of 30 hectares on which there are 22 families and a total of about 120 people.

<sup>2</sup> The complainant notes that Chile is a party to the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization. That convention states that "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized" (art. 14), that "the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded" (art. 15) and that "the peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights" (art. 17).

trying to maintain their traditional way of life are involved in violent clashes with the Chilean security apparatus; however, it states that the complainant has been living in Switzerland since 1996 and that she “could therefore have applied for asylum much earlier had she really needed the protection of our country”. In addition, while the Federal Office for Migration acknowledges that, in the past, some defendants have been wrongly convicted by military courts hearing cases involving civilians, it is of the view that proceedings are now conducted publicly, allowing the media to draw attention to procedural irregularities. The Federal Office for Migration also notes that Chile is, in principle, able to afford protection to victims, observing that, in the case of the fire at the complainant’s family home, the judge decided not to bring charges given the lack of evidence and the absence of any provision in the Chilean legal system for a case to be brought against a person or persons unknown. Lastly, the Federal Office for Migration finds that there is no concrete evidence that the complainant might suffer the same fate as other tortured Mapuche persons and that there is therefore no well-founded fear of persecution justifying asylum.

2.6 On 20 September 2010, the complainant, on her own behalf and that of her niece, appealed the decision of the Federal Office for Migration; however, on 21 July 2011, the appeal filed on behalf of the complainant’s niece was removed from the court’s list, her niece having returned to Chile to rejoin her mother, who had been released from prison. On 6 February 2013 the complainant informed the Swiss authorities that her activities as Ambassador of the Mapuche Permanent Mission to the United Nations, in the context of which she works to expose the conduct of the Chilean State, could put her at risk in the event of her deportation.

2.7 On 11 June 2013, the Federal Administrative Court dismissed the complainant’s appeal, noting that, apart from a few isolated cases of police violence or miscarriages of military justice in cases involving Mapuche activists, there was no systematic repression and the complainant had not alleged any personal threat.

2.8 On 7 October 2013, the complainant submitted a request for reconsideration to the Federal Office for Migration on the grounds of worsening repression in Araucanía. She attached numerous supporting documents from university professors, NGOs and the Inter-American Commission on Human Rights, which had brought an action before the Inter-American Court of Human Rights in respect of criminal proceedings against seven Mapuche leaders, alleging that they constituted systematic repression of the Mapuche political movement.

2.9 On several occasions during the consideration of this final appeal, the complainant informed the State Secretariat for Migration of episodes of violence and ill-treatment suffered by members of her family in retaliation for having asserted their fundamental rights. On 17 September 2015, for example, the complainant noted that on 18 February 2015 her sister had been seriously injured in a suspicious car accident, in respect of which a complaint had been filed, with the description of an individual who had threatened her some months earlier;<sup>3</sup> that on 6 July 2015 her nephew had been assaulted by the police; and that on 16 July 2015 he had been hit on the head with a glass bottle by a private individual and had for a few minutes been unconscious.<sup>4</sup> On 4 November 2015, the complainant also informed the State Secretariat for Migration that her sister had been arrested and beaten by Carabineros upon her return from Washington D.C., where, on 19 October 2015, at the 156th session of the Inter-American Commission on Human Rights, she had reported the constant persecution of her family. As a result, the Commission requested the adoption of precautionary measures (No. 46-14 of 26 October 2015) in respect of the complainant’s sister and six other members of her family, in the light of the serious and urgent risk to their personal integrity; in its resolution it requested Chile to take the necessary measures to preserve their life and personal integrity.<sup>5</sup> On 6 June 2016, the complainant, attaching the complaint filed by her sister, also informed the State party’s authorities that armed men had wrecked her sister’s and her nephew’s homes in the Juan Paillalef community. Lastly, on 28 February 2017, the complainant stated that the community had suffered further violence

<sup>3</sup> Unique complaint number (RUC) 1500177665-4.

<sup>4</sup> The complainant had provided the criminal complaint, photographs of the assault and a press release.

<sup>5</sup> Inter-American Commission on Human Rights, resolution 39/2015 of 26 October 2015, precautionary measures No. 46/14.

in January 2017. Houses in the community had been hit by gunfire; although the police had been alerted by telephone, they had not come to the scene, so, after more shots had been fired, members of the family had decided to fell a tree to prevent access to their community and thereby protect themselves. The police had then turned up to remove the tree and arrest the complainant's sister for blocking the road. While attempting to defend his mother, the complainant's nephew had been hit by 38 bullet fragments. The complainant attached the complaint lodged by her family, a medical report and a copy of the cooperation agreement that she had entered into with the World Organization against Torture and the International Federation for Human Rights, whereby they would cover the costs in Switzerland of her nephew's surgical operation.

2.10 On 15 May 2017, the State Secretariat for Migration rejected the complainant's request for reconsideration and set her departure for 19 June 2017. Although it noted the existence of State repression, especially by Carabineros, who applied disproportionately severe measures and sometimes took individuals into police custody, the State Secretariat for Migration concluded that such police custody was immediately challenged by lawyers and human rights defenders before the courts, which, in accordance with the law, ordered the individuals' immediate release. The State Secretariat added: "It seems that these disproportionately severe measures are being applied only in Araucanía, the home region of the Mapuche. They are therefore of a regional nature. Consequently, [the complainant] could avoid such possible acts of violence by settling and staying in another part of the country." Lastly, the State Secretariat was of the view that the international prominence of Mapuche issues had the effect of protecting Mapuche leaders and activists, in particular, as the Chilean authorities could not afford to cause them serious harm for political reasons without provoking fierce protest.

2.11 On 13 June 2017, the complainant appealed the decision of the State Secretariat for Migration before the Federal Administrative Court, stating that international pressure had no protective effect, since persecution that had been condemned at the international level continued nonetheless, and recalling that not even the precautionary measures requested by IACHR had had the effect of protecting her family members. They were still being oppressed, arrested and imprisoned, and the aggressors were never punished. On 16 January 2018, the complainant informed the Swiss authorities that her sister had been violently arrested and detained for her opposition to the construction of a road through the traditional lands of the Mapuche people.

2.12 On 11 July 2018, the Federal Administrative Court dismissed the complainant's appeal, stating that the Mapuche people were not victims of collective persecution and that the problems encountered by the complainant's family merely reflected measures taken by the Chilean authorities against members of her family as a result of their activism, having nothing at all to do with the complainant. By letter of 19 July 2018, the State Secretariat for Migration gave the complainant a deadline of 16 August 2018 to leave Switzerland. On 14 August 2018, the complainant was informed that her request for an extension of her departure deadline, filed in the hope of regularizing her status, had been rejected.

### **The complaint**

3.1 The complainant claims that she has exhausted all available effective domestic remedies, as she applied to the Committee after the Federal Administrative Court's judgment of 11 July 2018, which upheld the rejection by the State Secretariat for Migration, on 15 May 2017, of her request for reconsideration of the decision of the Federal Office for Migration, dated 18 August 2010, by which her application for asylum was rejected.

3.2 The complainant submits that her deportation to Chile would be a violation of her rights under article 3 of the Convention, because, given her commitment to defending the fundamental rights of the indigenous people to which she belongs, she would be at risk of torture and other cruel, inhuman or degrading treatment or punishment,<sup>6</sup> both by the Chilean authorities and by private individuals. She claims that there is both a consistent pattern of violations of the human rights of Mapuche rights defenders and a situation of personal risk.

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<sup>6</sup> The complainant recalls that, according to the Committee's general comment No. 2 (2007) on the implementation of article 2 by States parties, articles 3 to 15 of the Convention apply equally to torture and ill-treatment.

3.3 With regard to the pattern of human rights violations affecting Mapuche rights defenders, the complainant asserts that the indigenous people to which she belongs is subjected to discrimination, repression and violence by the Chilean authorities and private armed militias. She states that various international bodies are aware of this situation and cites, in this regard, the Committee's concluding observations on the sixth periodic report of Chile, in which it noted both the confessions obtained from Mapuche activists under duress and the police brutality and excessive use of force against demonstrators, detainees and members of the Mapuche people during searches or raids in their communities.<sup>7</sup> The complainant also notes the serious concern expressed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism at the use of excessive force by the Carabineros and the investigative police during searches or raids in Mapuche communities and the lack of accountability for those crimes of excessive violence.<sup>8</sup>

3.4 Turning to the specific situation of the country's arbitrary application of the Counter-Terrorism Act to Mapuche leaders with a view to crushing all political opposition, the complainant refers to the work of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism following his mission to Chile, the main focus of which was the use of anti-terrorism legislation in connection with protests by Mapuche activists aimed at reclaiming their ancestral lands and asserting their right to collective recognition as an indigenous people.<sup>9</sup> She also refers to two press releases on this issue from the Office of the United Nations High Commissioner for Human Rights, dated 30 July 2013<sup>10</sup> and 6 October 2017 respectively.<sup>11</sup> In addition, the complainant notes that the Inter-American Court of Human Rights handed down a judgment ordering Chile to set aside the criminal convictions of seven members of the Mapuche community and a human rights activist who had been found guilty of acts of a terrorist nature.<sup>12</sup> Lastly, the complainant recalls the Committee's concluding observations on the sixth periodic report of Chile, in which it expressed its particular concern about the inappropriate application of the Counter-Terrorism Act and urged Chile to review its legislation and practice in that regard.<sup>13</sup>

3.5 With regard to the personal risk that deportation to Chile would entail for her, the complainant claims that she would suffer the same fate as the members of her family and community who, in defending the rights of the Mapuche people, are the target of disproportionate, brutal and repeated attacks carried out by the Chilean State and private armed militias. She submits that she too would be at risk of an inappropriate application of the Counter-Terrorism Act. She thus claims that, although she has not been personally targeted by those attacks, the precautionary measures requested by the Inter-American Commission on Human Rights bear witness to the situation that she would face if she were forced to return to Chile. In view of her commitment to defending the rights of the Mapuche people on the international stage, the complainant would be subjected to the same violence if she were to be forcibly returned to Chile.

3.6 The complainant states that her family is a particular target of acts of violence and repression. Her sister, Juana Paillalef, is the head of the community; her nephews, Waikilaf Cadin Calfunao and Jorge Landero Calfunao, former law students, are also passionate defenders of the rights of their people; and all her family members are often detained and imprisoned. Her sister was subjected to sexual violence and had a miscarriage as a result of her ill-treatment. The Hôpitaux Universitaires de Genève noted that Juana Paillalef, who had been threatened with death, given electric shocks and slashed with a small knife, who

<sup>7</sup> CAT/C/CHL/CO/6, paras. 20 and 22.

<sup>8</sup> See A/HRC/25/59/Add.2.

<sup>9</sup> Ibid.

<sup>10</sup> Office of the United Nations High Commissioner for Human Rights, "Statement by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", press release, 30 July 2013.

<sup>11</sup> Office of the United Nations High Commissioner for Human Rights, "UN experts urge Chile not to use anti-terrorism law against Mapuche indigenous peoples", press release, 6 October 2017.

<sup>12</sup> Inter-American Court of Human Rights, *Norín Catrín et al. (leaders, members and activist of the Mapuche indigenous people) v. Chile*, Merits, Reparations and Costs, judgment of 29 May 2014, Series C, No. 279.

<sup>13</sup> CAT/C/CHL/CO/6, paras. 18 and 19.

had scars compatible with the wounds made by rubber bullets and the results of blows and cuts with blades, and who had also endured a traumatic amputation of the fifth toe of her right foot, was experiencing chronic post-traumatic stress and depression, with a combination of physical injuries and psychological disorders forming a clinical pattern typical of that exhibited by victims of organized violence. The Hôpitaux Universitaires de Genève also noted that Waikilaf Cadin Calfunao was in a state of post-traumatic stress and that the complainant's mother, Mercedes Paillalef Moraga, was extremely worried about the complainant's return to Chile. The situation has been acknowledged by the Inter-American Commission on Human Rights, which, on 26 October 2015, requested that Chile adopt precautionary measures for the protection of the complainant's sister and six other members of her family (see para. 2.9). On 23 May 2016, the Commission requested the extension of those measures to three other members of the family.<sup>14</sup> Chile has not acted on these recommendations or taken any protective measures, allowing further ill-treatment to take place.

3.7 The complainant also points out that both State forces and landowners are responsible for the ill-treatment. Landowners, for example, have repeatedly set fire to the houses of community members; such actions even led to the death of one of the complainant's uncles, Basilio Coñuenao.<sup>15</sup> The many incidents already noted (see para. 2.9) include a series of death threats made in April 2015, when the family was threatened at night by individuals shouting that the house was going to be burned down and that everyone inside was going to die. These threats were repeated twice in the same year; the police, however, refused to register the family's complaints. In addition, in April 2016, men wearing helmets and bulletproof vests broke into their house; a few days later, they poisoned their dog, which died. These threats from private individuals are ongoing.

3.8 The complainant also notes that, according to the Committee's jurisprudence, her ethnic background is a factor to be taken into account,<sup>16</sup> as are her role and responsibilities in a movement opposing the Chilean authorities and her involvement in activities for the promotion and protection of human rights, which are bound to attract considerable attention from the authorities.<sup>17</sup> In addition, the complainant points out that the Committee also considers, in its jurisprudence, whether politically sensitive activities have been carried out in the host country,<sup>18</sup> as is her case.

#### **State party's observations on the merits**

4.1 On 19 February 2019, the State party submitted its observations on the merits of the complaint, arguing that nothing suggests that there are substantial grounds for fearing that the complainant would face a foreseeable, present, personal and real risk of torture or ill-treatment if she were returned to Chile. The State party therefore asks the Committee to find that the deportation of the complainant to Chile would not constitute a violation of its international obligations under article 3 of the Convention. It also submits that, since 1996, the complainant has returned to Chile in 1998, 2003 and 2008 and that she filed an asylum application only with a view to protecting her niece.

4.2 The State party refers to general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, in which it is stated that the author of a communication must show that he or she faces a foreseeable, present, personal and real risk of being subjected to torture in the event of deportation to his or her country of origin, that there must be substantial grounds for believing there is such a risk and that the allegations must be based on credible evidence. The State party also refers to the information that the Committee should take into account to conclude that there is such a risk, as set out in paragraph 49 of general comment No. 4.

<sup>14</sup> Inter-American Commission on Human Rights, resolution 33/2016 of 23 May 2016, precautionary measures No. 46/14.

<sup>15</sup> Court's internal number (RIT) 2359-2004, Unique complaint number (RUC) 04000228316-1, fire and death of Basilio Coñuenao, case dismissed.

<sup>16</sup> *Mutombo v. Switzerland* (CAT/C/12/D/13/1993), para. 9.4.

<sup>17</sup> *Faragollah et al. v. Switzerland* (CAT/C/47/D/381/2009), para. 9.6; and *Jahani v. Switzerland* (CAT/C/46/D/357/2008), para. 9.6.

<sup>18</sup> *Eftekhary v. Norway* (CAT/C/47/D/312/2007), para. 7.7.

4.3 With regard to the evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the State concerned, the State party submits that, in accordance with the Committee's jurisprudence, it is necessary to determine whether the complainant is at personal risk of torture, as the existence of a pattern of violations is not sufficient grounds for concluding that a person would be at risk of torture on returning to his or her country. In the present case, the State party is aware that the situation of some Mapuche activists in Araucanía is troubling in many respects but is of the view that not every Chilean Mapuche faces a risk of persecution. The State party, referring to a programme broadcast on France 24 on 26 October 2018,<sup>19</sup> argues that the unrest mainly involves activists who are part of a resistance group struggling for autonomy and who represent only a small minority of the Mapuche; consequently, no attempts are being made to harm either the Mapuche community as a whole or the complainant in particular.

4.4 Furthermore, the State party maintains that the complainant makes no mention of any acts of torture or ill-treatment to which she herself has been subjected. The State party is of the view that the reasons given by the complainant to explain why she did not encounter any problems with the Chilean State in 2008 – that she was accompanied by NGO representatives – are unconvincing, because if she had been on the radar of the Chilean authorities, it would have been easy for them to apprehend her during her stays in Chile in 1998 or 2003. The State party thus concludes that the allegations of torture or ill-treatment are unfounded.

4.5 The State party does not deny that the political activities undertaken by the complainant in Chile or elsewhere with a view to asserting the rights of the Mapuche minority have given her a certain visibility on the international stage. The State party submits, however, that the complainant does not demonstrate in what way her political or other peaceful activities as Ambassador of the Mapuche Permanent Mission to the United Nations have made her a target of the Chilean authorities. The State party notes the Committee's practice, according to which the family members of a person whose political prominence is likely to jeopardize his or her safety should be afforded the same protection when they carry out comparable activities and are exposed to risks of the same nature. However, it is of the view that the complainant is much less politically active than her sister, who is the leader of her community and an internationally known activist, or other members of her family in respect of whom, as a result of their activism and political activities, the Inter-American Commission on Human Rights requested the adoption of precautionary measures. The State party also notes that the discriminatory application of the Counter-Terrorism Act to Mapuche community activists alleged by the complainant is contested by the Chilean State, which, in its reply of 11 March 2014 to the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, stated that the Counter-Terrorism Act was used in Chile only in extraordinary circumstances and was not invoked in a systematic, habitual or discriminatory way against the Mapuche people or any other indigenous people.

4.6 Finally, with regard to the credibility of the allegations, the State party maintains that the complainant has admitted that she has never had any problems with the Chilean authorities, that she was able to renew her Chilean passport without encountering any obstacles and that on several occasions she requested permission to travel abroad to participate in public events in support of the rights of the Mapuche community, all of which strongly suggests that she does not fear that the Chilean State will issue a warrant for her arrest or take other steps to prosecute her.

#### **Complainant's comments on the State party's observations**

5.1 On 18 April 2019, the complainant submitted her comments on the State party's observations on the merits. She maintains that the information listed in paragraph 49 of the Committee's general comment No. 4 (2017) is non-exhaustive and that any other pertinent information must also be taken into account.

5.2 The complainant first notes that harassment and violations of the rights of minority groups can be evidence of a consistent pattern of human rights violations.<sup>20</sup> She then notes

<sup>19</sup> France 24, « Chili, la révolte mapuche », video reportage, 26 October 2018, available at: <https://www.france24.com/fr/20181026-reporters-chili-mapuche-terres-indigenes-conflit-occupation>.

<sup>20</sup> *Thiruganasampanthar v. Australia* (CAT/C/61/D/614/2014), para. 8.7.

that the sources she has cited (the Committee, special rapporteurs, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights) are independent and highly reliable and that they have reported a consistent pattern of human rights violations against Mapuche communities who are asserting their rights, including peacefully.

5.3 Addressing the violence to which members of her family have been subjected by private individuals, the complainant states that her family is neglected, isolated and defenceless against intrusion, violence and devastation, even though the precautionary measures requested by the Inter-American Commission on Human Rights on 23 May 2016 emphasize the obligation of States to protect indigenous peoples from violence and harassment, bearing in mind their right to be free from interference by persons using violent or other means to maintain or take control of their land, to the detriment of their rights.

5.4 With regard to her personal risk of being subjected to torture in the event of her forcible removal to Chile, the complainant notes that paragraph 28 of the Committee's general comment No. 4 (2017) refers to cruel, inhuman or degrading treatment or punishment to which "an individual or the individual's family were exposed" and that, according to paragraph 45 thereof, indications of personal risk may include the ethnic background and the political affiliation or political activities of the complainant and/or the complainant's family members. The complainant also notes that by systematically reporting human rights violations to international bodies, she is sharing in her sister's activism. In addition, she states that she was not covered by the precautionary measures requested by the Inter-American Commission on Human Rights simply because she was not in Chile at the time, and that the purpose of her stay in Switzerland is precisely to avoid being subjected to the same persecution as her family.

5.5 As for the evidence that she faces personal risk, the complainant states that many experts and organizations are calling for reconsideration of the deportation order. Mapuche communities in Chile,<sup>21</sup> human rights organizations in Chile,<sup>22</sup> a member of the Chilean parliament,<sup>23</sup> a member of the Human Rights Council Advisory Committee,<sup>24</sup> the coordinator for Chile at Amnesty International France<sup>25</sup> and university researchers and teachers specializing in the Mapuche issue<sup>26</sup> have spoken out in this regard.

<sup>21</sup> Statement of 5 August 2013 by the Mapuche authorities, according to which: "this deportation order exposes Flor Calfunao Paillalef to a risk of harassment or reprisals upon her return to Chile [...]. Given the prominence of our Ambassador, Ms. Calfunao, we have substantial grounds to believe that she could be subject to the repressive laws and sanctions that the Chilean authorities apply to our leading representatives"; and statement of 24 August 2013 by Gvbam Longko Pukunwiji mapu.

<sup>22</sup> Comisión Ética Contra la Tortura, a grouping of many internationally and nationally recognized associations [including Amnesty International and Servicio Paz y Justicia-Chile (Peace and Justice Service-Chile)], which confirmed that the complainant's freedom, integrity and life would be at risk if she were required to return to Chile; statement by Fundación Instituto Indígena de Temuco; and statement by Observatorio Ciudadano, a Chilean human rights organization affiliated with the International Federation for Human Rights.

<sup>23</sup> Statement of 14 August 2013 by Hugo Gutiérrez Gálvez, a member of the Chilean parliament, according to which: "This deportation order endangers the complainant's safety, as she has been threatened in our country. I therefore ask you to reconsider the order."

<sup>24</sup> Statement of 12 November 2013 by José Bengoa Cabello, former member of the Human Rights Council Advisory Committee: "Although Ms. Calfunao is not on trial in Chile, the situation that she and her family have experienced is extremely violent and will have repercussions on her mental health. For these reasons, the Swiss authorities are asked to show kindness and flexibility to ensure that Ms. Calfunao remains in the host country."

<sup>25</sup> Email from Jac Forton to Federal Councillor Simonetta Sommaruga: "The deportation of Ms. Flor Calfunao is likely to seriously jeopardize her physical and psychological integrity. Ms. Calfunao belongs to a community whose members are subjected to particular persecution and harassment by the law enforcement authorities. Her sister, Juana Calfunao, has been imprisoned for demanding that lands and territory appropriated by the Chilean State, large local landowners and mining or forestry companies be returned to her people. Her brother-in-law and nephew have also been arrested and tortured. Their community (the Paillalef community) has been devastated, twice burned down, as I myself have seen with my own eyes. This is the backdrop, the situation to which the Swiss Government is prepared to return Ms. Flor Calfunao. Clearly, she, too, will be harassed by the Chilean law enforcement agencies, who do not hesitate to torture Mapuche prisoners. The Swiss

5.6 Comisión Ética Contra la Tortura (Ethics Commission against Torture) noted that the prominence of the complainant, who on 6 March 2008 received the award “Femme exilée, femme engagée” from the city of Geneva, entails specific risks, since the animosity of the Chilean authorities, including law enforcement and security agencies, and of the paramilitary group operating in the region under the name Comando Hernán Trizano, threatens the existence of all Mapuche leaders. A deportation order would thus constitute a real risk to her freedom and life. Similarly, according to the former coordinator for Chile at Amnesty International France, the complainant would be returned against a backdrop of assassinations, torture, set-ups involving judicial officials and the police, and the criminalization of social protest: “A prisoner told me that he had been tortured into signing a statement implicating another person in acts of which that person was absolutely innocent. These people are sometimes in pretrial detention for six months to two years! The charges against them are often based on counter-terrorism legislation from the time of the dictatorship. Witnesses are often anonymous, hooded or even disguised, which makes a defence impossible [...]. The sentences are excessive: 15 years in prison for burning a truck or a corner of a field belonging to a company. The defendants claim this land because they consider it to have been usurped by successive Chilean governments even though Mapuche communities have deeds of ownership [...]. Police officers have already killed several demonstrators, in almost all cases by a bullet in the back. The police turn up in a hamlet between 4 and 5 o’clock in the morning and throw tear gas canisters into people’s houses. They do the same in schools. Many children have been hit by rubber bullets. The area is occupied by elite troops of the militarized police (Carabineros).” The complainant, he continues, “will inevitably suffer the same abuses and harassment to which the police have subjected her family. It is inconceivable that Ms. Calfunao should be sent back to a situation that is clearly a threat to her moral and physical integrity. I will say it again: it is my firm belief that she will inevitably be prosecuted and harassed by Chilean law enforcement agencies, which do not hesitate to fire on women and children.” In the same vein, an anthropologist and sociologist from the University of Lausanne states: “Although I understand that Chile is no longer on the list of countries where human rights are systematically violated, as they were during the dictatorship, I am shocked by the decision to deport Ms. Calfunao. Unfortunately, almost every day I record major violations of the rights of the Mapuche people, including their right to freedom and even to life, at the hands of the Chilean State [...]; the work of Ms. Calfunao, together with the fact that she is a member of a very politically active family and that she repeatedly criticizes the Chilean State at the United Nations and other international organizations, can apparently be understood as a threat to Chilean national security and thus considered to be terrorism, just like much Mapuche activism. People who are demanding the application of international law and asserting the particular collective rights inherent in their status as an indigenous people are detained on suspicion of committing or supporting violent acts.” According to this expert, “the deportation of Ms. Calfunao before the repeal of the Counter-Terrorism Act will place her in a dangerous situation of great risk to her physical and moral integrity. I understand that these allegations may baffle those unfamiliar with the Mapuche issue in Chile, who have trouble imagining that this State could still use masked witnesses and abusively detain people for longer than is provided by the law on police custody. But as long as the Counter-Terrorism Act remains in force, this will regrettably be the case.”

5.7 In reply to the State party’s argument that, to counter this personal risk, the complainant could live elsewhere in Chile, the complainant cites paragraph 47 of the Committee’s general comment No. 4 (2017), according to which “the deportation of a person or a victim of torture to an area of a State where the person would not be exposed to torture, unlike in other areas of the same State, is not reliable or effective”.

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Government is assuming great responsibility with regard to Ms. Calfunao’s physical and moral integrity.”

<sup>26</sup> Statement by Sabine Kradolfer of the University of Lausanne, an anthropologist and sociologist who has worked for nearly 20 years on the issue of the Mapuche people; a similar view was expressed by two other specialists in Mapuche issues, Irène Hirt and Anne Lavanchy, who have stated that there are objective reasons to believe that the mental and physical integrity of Flor Calfunao would be threatened if she were forced to return to Chile, and that her ethnic background, the history of repression of her community and her public prominence would make her particularly vulnerable in the event of her forcible return to Chile.

5.8 With regard to the State party's argument that, because the complainant has made three trips back to Chile, her fear of suffering violence or persecution lacks any credibility, the complainant submits that it was only after the first two trips (1998 and 2003) that she began to represent Mapuche communities in international organizations and that in 2008 she was accompanied by NGO representatives. She also notes that the situation in Araucanía has deteriorated alarmingly since 2009 and, for that reason, the attitude of the Chilean authorities during visits that took place more than ten years ago cannot be considered as evidence that she would not now face any risk to her safety. As for the State party's argument that her applications for a passport, which she has not obtained, demonstrate the absence of any risk of the Chilean State issuing a warrant for her arrest, the complainant submits that, regardless of whether she is in Switzerland, Spain or Argentina, the chances of a warrant being issued for her arrest are unchanged. Finally, she also notes that her niece, following her return to Chile, was subjected to violence and arbitrary arrest<sup>27</sup> and that she was covered by the precautionary measures requested by the Inter-American Commission on Human Rights. The argument put forward by the State party in order to question the complainant's credibility is therefore unpersuasive and should be rejected.

5.9 Lastly, documents in the file also show that many NGOs have consistently advised the complainant to seek asylum, but she has always felt reluctant to do so. She simply went on living her life as best she could and did not apply for asylum earlier because she had always hoped to return to Chile.

#### **Additional information from the complainant**

6.1 On 4 June 2019, the complainant transmitted to the Committee a letter of support, dated 18 April 2019, signed by several members of the European Parliament,<sup>28</sup> and a letter of support from her sister, both addressed to the State party and emphasizing the threat that the complainant's deportation to her country of origin would represent for her. They were transmitted to the State party the same day, for information.

6.2 On 15 July 2019, the complainant transmitted to the Committee a letter of support, dated 16 June 2019, from the Spanish trade union Confederación General del Trabajo. On 19 July 2019, this letter was transmitted to the State party, for information.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

7.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

7.2 In accordance with article 22 (5) (b) of the Convention, the Committee must ascertain whether the complainant has exhausted all available domestic remedies, although this rule does not apply where remedy procedures exceed a reasonable length of time<sup>29</sup> or are unlikely to bring effective relief to the alleged victim. The Committee notes that the State party has not commented on the admissibility of the complaint. The Committee has, however, ascertained that the complainant has exhausted all available domestic remedies. It therefore finds the communication admissible under article 22 of the Convention and proceeds with its consideration of the merits, as the complainant's claims under article 3 of the Convention are sufficiently substantiated for the purpose of admissibility.

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<sup>27</sup> On 28 April 2016, during a search, the complainant's niece was detained on spurious charges to justify those raids on people's homes. An application for protection of constitutional guarantees was filed on account of the lack of necessity and reasonableness of the operation and the disproportionate means used.

<sup>28</sup> Miguel Urbán Crespo, Estefanía Torres Martínez, Tania González Peñas, Xabier Benito Ziluaga, Ana Miranda De Lage and Marina Albiol Guzmán.

<sup>29</sup> *Asfari v. Morocco* (CAT/C/59/D/606/2014), paras. 8.1, 8.2 and 12.2.

*Consideration of the merits*

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22 (4) of the Convention.

8.2 The issue before the Committee is whether, by deporting the complainant to Chile, the State party would be in breach of its obligation under article 3 (1) of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment. The Committee notes first that the prohibition against torture is absolute and non-derogable and that no exceptional circumstances whatsoever may be invoked by a State party to justify acts of torture.<sup>30</sup>

8.3 In assessing whether there are substantial grounds for believing that the alleged victim would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment, the Committee recalls that, under article 3 (2) of the Convention, States parties must take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the country to which he or she would be returned. While the Committee is not of the view that there is currently in Chile a consistent pattern of gross, flagrant or mass violations of human rights, it nevertheless notes the specific nature of the present case and the complainant's allegations that, for asserting their fundamental rights, the Mapuche people face widespread and systematic violations of their fundamental rights, ill-treatment and political persecution. The Committee also notes the State party's arguments that not every Chilean Mapuche runs the risk of persecution and that the Chilean State denies the discriminatory use of the Counter-Terrorism Act against Mapuche activists. The Committee nevertheless observes that the State party has also acknowledged that Mapuche people who are trying to maintain their traditional way of life are involved in violent clashes with the Chilean security apparatus, that there have been miscarriages of military justice in trials of Mapuche activists, as well as police violence in Araucanía with disproportionately severe acts of repression by the State, and that, in general, the situation of some Mapuche leaders in Araucanía is troubling in many respects.

8.4 In addition, the Committee also notes that, according to the Special Rapporteur on the rights of indigenous peoples, the present situation of indigenous people in Chile is the outcome of a long history of marginalization, discrimination and exclusion, mostly linked to various oppressive forms of exploitation and plundering of their land and resources.<sup>31</sup> More specifically, the broadcast "Chili, la révolte mapuche", to which the State party refers in its observations, mentions "constant monitoring" and "systematic repression" in the rural areas inhabited by the Mapuche, who know that the "slightest misplaced comment could send them directly to prison". The Committee notes that this is the current situation, since the President of Chile, according to that broadcast mentioned by the State party, has made it a priority to respond with force and to clamp down on any Mapuche protest. In addition, the Committee on the Rights of the Child has urged Chile to "take immediate steps to stop all violence by the police against indigenous children and their families".<sup>32</sup> In the same vein, the Committee on the Elimination of Discrimination against Women mentions reports of excessive use of force by Chilean State agents against Mapuche women in Araucanía and calls on Chile to ensure that all forms of gender-based violence against Mapuche women committed by State agents at all levels, including the police, are duly and systematically investigated.<sup>33</sup> In the past, the Committee against Torture has itself noted the extraction of confessions from Mapuche activists under duress; police brutality and excessive use of force; impunity for human rights violations; and the use of the Counter-Terrorism Act to suppress demonstrations by Mapuche leaders demanding the return of their ancestral lands and collective recognition as an indigenous people.<sup>34</sup> The Committee notes that similar observations have been made by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Committee on the Elimination of Racial Discrimination, for its part, has expressed reiterated concern about

<sup>30</sup> General comment No. 2 (2007) on the implementation of article 2, para. 5.

<sup>31</sup> E/CN.4/2004/80/Add.3, para. 8.

<sup>32</sup> CRC/C/CHL/CO/4-5, para. 80 (d).

<sup>33</sup> CEDAW/C/CHL/CO/7, paras. 24 (f) and 25 (f).

<sup>34</sup> CAT/C/CHL/CO/6, paras. 18–22.

the disproportionate extent to which the Counter-Terrorism Act has been used against members of the Mapuche people in respect of acts related to their assertion of their rights and about the undue and excessive use of force against members of Mapuche communities, including children, women and older persons, by Carabineros and members of the investigative police during raids and other police operations. It is also concerned about the impunity with which such abuse is committed. It therefore recommends that, “as a matter of urgency”, the Counter-Terrorism Act be amended to specify exactly what terrorist offences it covers and to ensure that it is not applied to members of the Mapuche community for acts that take place in connection with the expression of social demands.<sup>35</sup> In addition, the Inter-American Court of Human Rights ordered Chile to set aside the criminal convictions of Mapuche individuals and activists upholding the rights of indigenous peoples for acts wrongly categorized by Chile as acts of terrorism. Finally, in the recent universal periodic review, it was recommended that Chile should investigate all accusations of unlawful killings, excessive force, abuse and cruel, inhuman or degrading treatment by law enforcement officers, including against indigenous Mapuche persons, and refrain from applying the Counter-Terrorism Act in the context of social protests by Mapuche people seeking to claim their rights.<sup>36</sup> In accordance with the categorization that emerged from the universal periodic review of Chile, the Committee against Torture concludes that Mapuche leaders are subjected to widespread torture and other cruel, inhuman and degrading treatment or punishment, from which protection should be provided under article 3 of the Convention.

8.5 Moreover, additional grounds must exist to indicate that the complainant would be personally at risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment,<sup>37</sup> in her specific circumstances.<sup>38</sup> Thus, in the present case, the Committee must also determine whether the complainant is personally at risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment if deported to Chile. The Committee recalls its general comment No. 4 (2017), according to which the non-refoulement obligation exists whenever there are “substantial grounds” for believing that the person concerned would be in danger of being subjected to torture in a State to which he or she is facing deportation, either as an individual or as a member of a group that may be at risk of being tortured in the State of destination. The Committee’s practice in such circumstances has been to determine that “substantial grounds” exist whenever the risk of torture is “foreseeable, personal, present and real”.<sup>39</sup>

8.6 The Committee recalls that paragraph 28 of its general comment No. 4 (2017) refers to torture and cruel, inhuman or degrading treatment or punishment to which “an individual or the individual’s family were exposed”. On account of their actions in defence of their fundamental rights, both the complainant’s sister and her nephew were tortured and assaulted on several occasions. Her nephew needed surgery, which was paid for in Switzerland by the World Organization against Torture and the International Federation for Human Rights. According to health professionals, her family members present a combination of physical injuries and psychological disorders forming a clinical pattern typical of that exhibited by victims of organized violence. The Committee also notes that the Inter-American Commission on Human Rights has requested precautionary measures in respect of various members of the complainant’s family. In addition, the Committee takes note of the complainant’s argument that the award “Femme exilée, femme engagée”, which she was granted by the city of Geneva, bears witness to her politically sensitive activities in Switzerland, which involve the systematic reporting of human rights violations to international bodies and thus make her an activist like her sister. Her commitment to defending the fundamental rights of the Mapuche indigenous people would thus result in her suffering the same fate as the members of her family and community who defend the rights of the Mapuche people and are the targets of disproportionate, brutal and repeated attacks by the Chilean State and private armed militias. The Committee observes that the complainant also fears that the Counter-Terrorism Act will be used against her and that her fears are considered justified by many experts, who note in particular that her repeated

<sup>35</sup> CERD/C/CHL/CO/19-21, para. 14.

<sup>36</sup> A/HRC/41/6, paras. 125.71 and 125.89.

<sup>37</sup> *Alhaj Ali v. Morocco* (CAT/C/58/D/682/2015), para. 8.3; *R.A.Y. v. Morocco* (CAT/C/52/D/525/2012), para. 7.2; and *L.M. v. Canada* (CAT/C/63/D/488/2012), para. 11.3.

<sup>38</sup> *Kalinichenko v. Morocco* (CAT/C/47/D/428/2010), para. 15.3.

<sup>39</sup> General comment No. 4, para. 11.

criticism of the Chilean State, like much Mapuche activism, may be understood as a threat to national security and thus as “terrorism”. Lastly, the Committee notes the complainant’s argument that she was not covered by the precautionary measures requested by the Inter-American Commission on Human Rights simply because she was not in Chile at the time.

8.7 The Committee notes the State party’s arguments that there is no well-founded fear of persecution justifying asylum, and no personal risk, since the measures taken by the Chilean authorities against members of her family as a result of their activism have nothing to do with the complainant, and that the complainant makes no mention of any acts of torture or ill-treatment to which she herself has been subjected. The Committee also notes the State party’s argument that, while the complainant’s rights advocacy work has given her some visibility on the international stage, she does not demonstrate how her political or other peaceful activities as Ambassador of the Mapuche Permanent Mission to the United Nations have made her a target of the Chilean authorities. In addition, the Committee notes that the State party considers the complainant to be far less politically active than her sister or other family members, whose activism and political activities led to a request for precautionary measures by the Inter-American Commission on Human Rights.

8.8 The Committee is nonetheless of the view that the complainant’s ethnic background, the persecution of Mapuche leaders in Araucanía – a fact acknowledged by the State party itself –, the acts of persecution and torture suffered by several members of her family and her conspicuous protest activities at the international level<sup>40</sup> are sufficient, taken together, to establish that she would personally run a foreseeable and real risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment if she were deported to Chile.

8.9 In view of the complainant’s arguments in paragraph 3.7, the Committee also considers it necessary to point out that States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities.<sup>41</sup> Moreover, ill-treatment inflicted by private individuals that Chile is unable to stop, acquiesces to or allows by failing to intervene is conduct for which the State, by providing its tacit consent, bears responsibility.<sup>42</sup> Impunity for such acts leads to the recurrence of violence. The Committee has made clear, as stated in paragraph 18 of general comment No. 2 (2007) on the implementation of article 2, that where State authorities know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate and prosecute such non-State officials or private actors, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible for consenting or acquiescing to such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction constitutes a form of encouragement and/or de facto permission.

8.10 Given the complainant’s personal and family situation, it is reasonable to assume that deporting her to Chile would put her at risk of torture or other cruel, inhuman or degrading treatment or punishment. The Committee notes that the principle of the benefit of the doubt, as a preventive measure against irreparable harm, must also be taken into account in adopting decisions on individual communications,<sup>43</sup> given that the spirit of the Convention is to prevent torture, not to redress it once it has occurred.<sup>44</sup> The Committee also reiterates that the deportation of a person or a victim of torture to an area of a State where the person would not be exposed to torture, unlike in other areas of the same State, is

<sup>40</sup> *Eftekhary v. Norway*, para. 7.7; *Jahani v. Switzerland*, para. 9.6; and *Faragollah et al. v. Switzerland*, para. 9.6.

<sup>41</sup> General comment No. 4, para. 30; *Elmi v. Australia* (CAT/C/22/D/120/1998), paras. 6.8 and 6.9; and *M.K.M. v. Australia* (CAT/C/60/D/681/2015), para. 8.9.

<sup>42</sup> *Dzemajl et al. v. Yugoslavia* (CAT/C/29/D/161/2000), para. 9.2.

<sup>43</sup> General comment No. 4, para. 51.

<sup>44</sup> *Alan v. Switzerland* (CAT/C/16/D/21/1995), para. 11.5.

not reliable or effective<sup>45</sup> and that such a measure makes even less sense in the case of an indigenous victim who is attached to his or her community and land.

9. The Committee, acting under article 22 (7) of the Convention, concludes that the deportation of the complainant to Chile would constitute a breach of article 3 of the Convention by the State party.

10. The Committee considers that the State party is required by article 3 of the Convention to reconsider the complainant's asylum application in the light of its obligations under the Convention and the present observations. The State party is also requested to refrain from deporting the complainant while her application for asylum is being considered.

11. Pursuant to rule 118, paragraph 5, of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of the present decision, of the steps it has taken to respond to the above observations.

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<sup>45</sup> General comment No. 4, para. 47.