# Criminalization, Securitization and other Forms of Illegalizing Indigenous Contestations in Chile: Responses from Constitutional Law and Inter-American Jurisprudence on Mapuche People's Rights

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# Criminalization, Securitization and other Forms of Illegalizing Indigenous Contestations in Chile: Responses from Constitutional Law and Inter-American Jurisprudence on Mapuche People's Rights

**Jessika Eichler* and Pablo Barnier-Khawam**

## Abstract

This article critically examines the contemporary 'securitization paradigm' adopted throughout the Chilean jurisdiction. Emphasis is placed on its explicit misuse and its arbitrary effects on the Mapuche people in light of Chile's anti-terrorism legislation. The law thereby assumes a twofold function. 'Judicialization strategies' are employed by different organs of the State, resulting in the criminalization and ultimately the silencing of indigenous protest and forms of representation in the public space. These potentially transform relations between the State and its subjects, demanding a repositioning of indigenous agendas and representation under the constitutional umbrella. Conversely, judicialization also assumes a mediating role through the virtuous effects of international law and Inter-American human rights jurisprudence. The newly commencing constitutional era may further spur such developments, potentially exerting essential decolonizing effects on State institutions and society at large.

**Keywords**: anti-terrorism law; criminalization; judicialization; Mapuche people; securitization

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## 1. Introduction

A critical reading of Chilean constitutionalism suggests the prevalence of a neo-liberal legal order adopted by the Pinochet regime (Meller 1993), being embraced by post-authoritarian governments until today. In fact, privatization policies have been affecting various sectors and with it the enjoyment of fundamental rights, touching upon social security and pension schemes (Needleman 2005; Posner 2019), discriminate access to water (Gallagher 2016), and the right to education while enlarging the private sector and private property. States like Chile demonstrably gave up on sovereign powers in that regard, ceding respective powers to the private sector (Thornhill 2019) in accordance with the 'subsidiary State' doctrine as defined by Guzmán Errázuriz (1992), the main writer of the Chilean Constitution. Inspired by the neo-liberal doctrine, Guzmán elaborated a negative approach of subsidiarity; this materializes in the first article of the Constitution. Subsidiarity is commonly defined as a principle according to which 'individuals can only develop freely in society when what they can accomplish by their initiative is not given or taken away from them by a higher authority' (Evans and Zimmermann 2014: 1). Guzmán's negative approach on this thus refers to the retreat of the State to let the main aspects of society be self-regulated by the market (Ortúzar Madrid 2015).

As a response, a consensual democracy model was established in the aftermath of Pinochet's dictatorial regime; yet, the former seems to have vanished in recent years (Díaz de Valdés 2017). In the light of exhausted democratic means to spur systemic reforms, civil society movements have adopted extra-formal measures to demand due consideration of basic socio-economic rights in both ad hoc policies and larger constitutional developments (Vogt 2019). Two key moments merit particular mentioning in that regard: the first one concerns the 2011–12 student protests demanding largescale educational reform, changes in political institutionality and tax legislation (Arrué 2012); the second civil society movement 'Chile despertó' similarly called for social justice, including changes in salary, pension schemes, health, and transport, eventually proposing a new social contract in light of failing political responses (Folchi et al., 2019). The situation of Mapuche people proves particularly emblematic of the underlying politics of dispossession, being confronted with the disproportionate burden of land concessions in extractive industries including deforestation and intensive monocultures of pine and eucalyptus trees. Such pressures find exacerbated expression where indigenous rights defenders find themselves exposed to criminalization and other procedures (Didier et al., 2019).

In this article, we take such bad practice as a starting point, shedding light on its arbitrariness while exploring its functionality in political discourse, and legislative initiatives, and contextualizing its meaning in constitutional debates. Emphasis is placed on illegal practice as such, its creators—including agents of the State, passive observers and perpetuating forces such as the media (particularly those owned by powerful corporations)—and ultimately those subjected to its arbitrariness, namely Mapuche people. In the case at hand, criminalization will be understood as a strategy employed against a social or political movement mainly triggered by a judicial system that allows for political measures of repression. We similarly approach criminalization by placing emphasis on different executive regimes, or, in other words, *securitizing actors*, 'actors who securitize issues by declaring a ... referent object ... existentially threatened' (Buzan et al., 1998); these cannot, however, work in the absence of an audience, that is, society at large. Securitization is an intersubjective process which relies on diverse strategies to convince an audience of the legitimacy of

transforming an object into a security matter. Here, the role of the Chilean press is fundamental. Several scholars note the oligarchic ownership of the main Chilean newspapers as well as the close relationships between their owners and the political sphere, as well as the use of a conflict-like vocabulary to designate the actions taken by Mapuche organizations (Segovia Lacoste 2016; Van Dijk 2005). For instance, Pablo Segovia Lacoste analyses articles published in the Chilean newspaper, *El Mercurio*, and demonstrates the use of expressions related to a context of war such as 'incendiary attacks', 'red zone', 'military strategy', 'withdrawal', or 'firearms'. Such intersubjective process finds particular expression in socio-political spheres, perpetuating the perverse logics of stereotyping and discriminatory practice by means of the law and its societal embracement.

Major emphasis will, however, be placed on those creating such legal orders, that is, different governments in place and the ones subjected to their targeting policies. The former assumes a constructing and transforming function in that regard, namely 'by labeling [an issue] as *security*, an agent claims a need for and a right to treat it by extraordinary means' (Buzan et al., 1998). Such a labelling process proves illustrative of the 'cherry picking' exercise of legal norms and 'testing the(ir) limits' in the context of extraordinary regimes within the ordinary ambits of (constitutional) law. Indeed, a detailed analysis might be needed to uncover agendas, policy objectives and targeted populations, underlying securitization and its legal manifestations.

We, therefore, approach indigenous rights violations by disentangling securitization and judicialization strategies in a two-tiered way. On the one hand, these come to the fore where criminalization policies are enacted by the Chilean government or militant measures taken by corporate entities. Such judicialization is played out to the detriment of Mapuche people in violation of constitutional and international law (section 2). Further reaching conclusions may be drawn. The erosion of basic legal standards almost inevitably opens debates on necessary constitutional transformations oriented towards a rethinking of the State and its subjects (section 3). Conversely, responsive action has come to be embedded internationally through processes of norm creation, as embraced by the Inter-American human rights system in particular (section 4). Judicialization processes have thus adopted a reverse meaning; these have come to be internationalized, applying indigenous rights standards to the situation at hand.

## 2. Criminalizing Mapuche people in contemporary Chile: judicialization, securitization, anti-terrorism laws and other instruments of silencing

The criminalization of the Mapuche people strictly started with the democratic transition in 1989. However, a brief review of the historical process leading to current conditions is necessary for understanding the Mapuche people's epistemological (Millalén Paillal et al., 2006) and territorial subjugation, key moments being the military occupation of the Araucanía in the 1880s (Bengoa 2014), or as materializing in the general context of a Termination Policy that would only pause during the agrarian reform between 1970 and 1973 under the Unidad Popular administration (Boccara and Seguel Boccara). During the colonization period, from the sixteenth century until the nineteenth century, a dialectical relation between the Mapuche and the colonizer produced an alternation between negotiations, through the organization of parliaments, and military conquests. The first recognition of Mapuche people's rights, since the independence of Chile, came in the

1970s. The election of the socialist Salvador Allende in 1970 as the president of Chile thus sparked a period of consideration for the Mapuche people's political and economic situation, especially through agrarian reform. This process brutally ended with the coup d'état on 11 September 1973.

The political doctrine implemented by the military junta, with Augusto Pinochet at its head, took its inspiration from the strategic thought of the French and US American armies, especially in their methods of counter-insurrection. This doctrine, dubbed the 'National Security Doctrine' (NSD), strives to eliminate an 'internal enemy' (Leal Buitrago 2003). The Chilean case is characteristic of a hard-line implementation of the NSD as 'the only protection [for national security] is to wage a full-scale war against this unscrupulous and persistent foe' (Pion-Berlin 1989), namely the agents of Marxism. The majority of the Mapuche are included in this category due to their political involvement with Allende's agrarian reform. Previously, they had handed over a draft bill to the socialist president during the second Mapuche congress in Temuco in 1970. The bill reflected their autonomist political ambitions, as well as their will to reclaim their original lands that they had already started to recover through illegal occupation. This endeavour was thus part of the motivation to clamp down on the Mapuche, as the 1979 decree-law n°2.568 adopted under the Pinochet regime demonstrably envisaged: namely through the annihilation of indigenous land titles whenever these would undergo (territorial) division (Martínez Neira 2004).

With the democratic transition in 1989, a political agreement was reached between the indigenous representatives, mainly Mapuche, and the candidate for the Coalition of Parties for Democracy (*Concertación de Partidos por la Democracia* or *Concertación*), Patricio Aylwin, that entailed constitutional recognition, the creation of a corporation for indigenous development and the passing of a bill on indigenous rights (Acuerdo de Nueva Imperial 1989). However, this institutional agreement fell short of implementation. The constitutional recognition is still unachieved and the ratification of ILO Convention 169 that juridically binds the State to implement a process of consultation on matters that could affect indigenous peoples in their way of living only occurred in 2008 (Doran 2017a).

In fact, the lack of positive response from the Chilean State to Mapuche claims is at the heart of the process of formalized ignorance and reflects a common constitutional rationale, making active use of the mundane tools of the rule of law and equality regimes, targeted towards indigenous peoples by way of illegalizing ordinary forms of participation in the public life of the State. Indeed, institutionalized channels to negotiate with indigenous peoples remain largely absent from the daily operating of the State. Instead, the State appropriates the tools of the criminal justice system, most notably by means of penal sanctions inflicted on Mapuche representatives,detrimentally affecting Mapuche collective identity and, ultimately, the movement(s) as a whole. Such forms of criminalization illustrate the way the Mapuche have come to enter proceeding phases of judicialization (Le Bonniec and Cloud 2019).

Initially, the Mapuche were not considered a priority target to clamp down on for the early authoritarian regime, unless they were part of political parties considered as an internal enemy. This strategy started changing in the 1980s with the decree-law n°2.568 and its understanding of indigenous peoples as obstacles to economic development, impeding them from being recognized as peoples per se. However, indigenous peoples were never directly targeted as political actors despite their organizational efforts in establishing structures of representation, such as the organization 'Admapu' in the 1980s. The ascription to a Marxist political ideology is currently no longer designated as an existential threat to the

State as it was under the Pinochet regime; however, belonging to another people—other than society's non-indigenous majority—and the right to self-determination it entails has come to be regarded as sufficient to be classified as such, criminal law becoming the State's most well-known strategic tool. Therefore, the current situation is characteristic of a shift of target in principle, from leftist groups to indigenous peoples. To explain the underlying reasons for this change, the process of 'securitization' is paramount and may directly allude to the social construction of 'threat' or, alternatively, imply a strategic judicial move of framing social protest and other civic participation as a threat to the State or as constituting a 'national' emergency. This, in turn, legitimizes the adoption of exceptional measures, allowing for derogations from human rights. Securitizing an issue thus means transforming it into a security matter. Thereby, 'the issue is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure' (Buzan et al., 1998: 23–24). This process stresses the importance of the actions of the State in designating the threat and implementing measures to counter it.

The securitization of the Mapuche movement(s) has resulted in the deaths of several young Mapuche activists, cases of torture, unjustified imprisonment and forged cases (Le Bonniec 2003). Political alternance does not truly qualify the nature of repression, including the way such repression materializes in practice; empirical evidence, however, reveals increased forms of repression attributable to rightist governments (Rojas Pedemonte and Miranda 2005). Since 1997 when trucks belonging to timber companies were burnt by Mapuche activists who were, in turn, repeatedly targeted, the Mapuche movement(s) has started wielding a non-institutional repertoire of collective action (Tilly 1986). This repertoire mainly relies on the recovery of territory that had been appropriated by private companies during the dictatorship (Pairicán Padilla 2013), even if different specific forms of recuperation have been wielded by Mapuche actors. From this time on, the Chilean State has deployed a military strategy, mobilizing the special forces of the police and creating special units with, for instance, the '*Commando Jungla*' inspired by the struggle against the FARC in Colombia (Segovia 2018). This policy resulted in the arrest of several activists who were detained pending trial and accused of infraction against national security. These were mainly traditional authorities who often belonged to the same family or community, and had Mapuche names, thus controverting the mainstream theory of foreign and illegal aid coming to support the Mapuche movement(s) (Le Bonniec 2003).

Several young Mapuche fell victim to the *Carabineros* (Chilean police), among them Alex Lemun, aged seventeen in 2002; Matías Catrileo, aged twenty-three in 2008; Jaime Mendoza Collio, aged twenty-four in 2009; and Camilo Catrillanca, aged twenty-four in 2018. José Huenante who went missing in 2005 at the age of sixteen, is considered the first forced disappearance of the democratic period (Diario y Radio UChile 2018). Persecution of Mapuche who show involvement in the defence of human rights is widespread in Chile. The case of Alberto Curamil is typical in that sense. Imprisoned on three occasions for struggling against the construction of hydroelectric dams on the river Cautín, he was impeded from receiving the 2019 Goldman prize for Latin America awarded for his grassroot environmental activism.

Non-Mapuche people, especially women, are also persecuted for participating in the Mapuche struggle. Macarena Valdès, who started a protest against a hydroelectric plant in 2016, was hanged in her house, the killing being disguised as suicide. Patricia Troncoso was condemned to ten years of jail for having participated in an operation to recover land. She went on a 100-day hunger strike with other Mapuche and was then fed intravenously,

an action strongly condemned by Amnesty International (Passmore 2014). Both women maintained strong relationships with Mapuche activists due to family relationships and their fight for the Mapuche cause. Patricia Troncoso and many others were condemned under the anti-terrorism law n°18.314 passed under the dictatorship in 1984 to clamp down on oppositional political groups (Ministerio del Interior 1984). Anti-terrorism legislation has however been continuously applied throughout the post-authoritarian era, including amendments in 1991 and 1997.

Indeed, the law plays a key facilitating role in this persecution, by accommodating dedicated protest action (while partly illegal) under the umbrella of anti-terrorism legislation. The legal reform of law 18.314 of 1991 associates pre-existing offences with terrorist offences, such as homicide, voluntary violence, airplane hijacking, and arson. The reform, however, did not change the procedural derogatory measures of the law, such as preventive detention in high-security prisons, anonymous witness testimony (*testigo sin rostro*), not allowing the defence to carry out a counter-interrogation, a reverse burden of proof requiring the accused to establish the absence of a terrorist motive (thus violating the presumption of innocence), or the possibility for State representatives to become plaintiffs besides the Public Prosecutor's Office and the aggrieved complainant (Carvajal-del Mar 2014). Another amendment to the law was adopted in 1997 under Eduardo Frei Ruiz Tagle's government allowing the incrimination of individuals for 'inciting violence', and to hand down sentences of thirty years (Doran 2017a). Other reforms of the law were implemented, especially after the hunger strike of Mapuche prisoners in 2010, to modify the definition of terrorist grounds. The legislator rendered the so-called 'terrorist purpose' null and void, for the 'use of incendiary means' no longer to be sufficient to be classified as terrorist purpose, instead, it legally enshrined a single motive, that of provoking unjustified fear in the population (Carvajal-del Mar 2014). However, the reforms did not resolve the problem of vagueness regarding definition of a terrorist motive, which remains unsatisfactory, not living up to the principle of legality of the American Convention on Human Rights as stated in the 2014 decision *Aniceto Norín Catrimán, Juan Patricio Marileo Saravia, Víctor Ancalaf Llaupe et al. (Leaders, Members and Activists of the Mapuche indigenous People) vs. Chile*.

The actors of the State thus reactivate several regulative instruments inherited from the doctrine of national security, such as the law on the interior security of the State (Ministerio del Interior 1958), the anti-terrorism law (Ministerio del Interior 1984), or the state of emergency, frequently demanded by business groups in the Araucanía, the region where many Mapuche live (Cerda-Guzman 2018). Besides, prominent Mapuche actors, such as Aucán Huilcamán, denounce the repetitive use of the state of catastrophe (2014), one of the four states of emergency defined by the Constitution in its article 43, and applied in the Araucanía region by mobilizing the military (La Izquierda Diario 2019). Carolina Cerda-Guzman also stresses that since 2010, twenty presidential decrees have been adopted, declaring a natural catastrophe (Cerda-Guzman 2018). She thus analyses the lack of justification in several cases and the absence of judicial control that could counterweight the executive power, echoing criticisms raised by Mapuche activists that the state of catastrophe was put in place by the executive branch to reinforce the militarization of the Araucanía region, rending their persecution somewhat systematic.

These judicial tools inherited from the dictatorship have thus remained at the disposal of State authorities since the democratic transition. Understanding these dynamics in the light of the securitization process and their utilization allows us to determine the logic of

justification that persists against Mapuche activists. The parliamentarian debates on law 19.253 endorsed by the Ministry of Planification and Cooperation, eventually adopted in 1993 and dubbed the 'indigenous law', supposedly aims to foster the development of indigenous peoples, but is actually detrimental to the indigenous collective struggle for self-determination. This begins with the very definition, being void of any subjective criteria, limiting legal protection to indigenous 'ethnicities' rather than 'peoples' while safeguarding indigenous 'integrity and development in accordance with their customs' (Article 1(2)). The legal consequences are manifold, including disallowing collective rights holding, thereby denying access to collective rights claims. Indeed, a close reading reveals inherent contradictions, promoting the protection of indigenous lands which are subject to external registration processes, addressing land exploitation and promoting so-called development, considering at the same time ecological equilibrium. Broadly speaking, the law reflects the extreme reticence to integrate the term 'people' due to its possible secessionist implications and the rupture it implies with the indivisibility of the Republic (Cámara de Diputados de Chile 2018; Senado de Chile 2018). Illustratively, the term of 'self-determination' is absent from the parliamentary debates, and those of 'autonomy' and 'consultation' are far from being central to the discussions, while they are key elements of the rights of indigenous peoples, as seen in articles 3 and 4 of the UN Declaration on the Rights of indigenous Peoples (UNDRIPS) and the indigenous and Tribal Peoples Convention, 1989 (No. 169) to some extent (Anaya 2004; Barelli 2011; Barnier-Khawam and Quane 2022).

A deeper analysis of securitizing practice and the tools developed under Chile's persisting security paradigm may be needed here. According to securitization theory, these are regulatory instruments such as policy regulations, the constitution and the like that 'seek to "normalize" the behaviour of target individuals … [and] call for enablement skills, that is skills that allow individuals, groups and agencies to make decisions and carry out activities, which have a reasonable probability of success' (Balzacq 2011). The laws inherited from the dictatorship are the first main regulatory instruments of securitization, employed to label the Mapuche movement(s) a 'threat'. Furthermore, the practices of the agents of the State that produce external pressure upon individuals and groups to make them uphold the regulatory instruments could be considered 'capacity tools'. These are, for instance, the practices of surveillance, intelligence and detention that materialize the repression the Mapuche undergo.

The individual-oriented conception of territoriality becomes instrumental here, as wielded by the agents of the State through their capacity tools, illustrating the logic of justification—or rather the ideology—that underlies the securitization of the Mapuche movement(s). Of course, other ideological considerations cannot be ignored, such as those relating to racism and economic motivations respectively, which materialized with the spread of prejudice against the Mapuche (Quilaqueo et al., 2007) and with the repudiation of the Mapuche by entrepreneurs on behalf of business interests (Moya Díaz et al., 2018). Relatedly, securitization strategies have been employed to strike down any initiatives by the Mapuche movement(s) in allegedly fragmenting the unity of the State. The logic of justification mobilizing the struggle against terrorism further echoes the logic of the 'internal enemy' of the National Security Doctrine.[1] Thus, the judges applying the anti-terrorism law, the newspapers spreading the idea of an anti-terrorist struggle, the parliamentarians and

1 The author is indebted to María Fernanda Barrera Rodríguez for this idea. Cf. her unpublished study carried out at the Universidad de Chile, Instituto de Asuntos Públicos and entitled The Immigrant

the executive calling for and implementing the legislation of the dictatorship, are all a part of the securitization process that defines such an 'enemy to the unity of the Chilean State'.

Yet, the securitization process is not exempt from resistance. The Special Rapporteurs on the rights of indigenous peoples, both Rodolfo Stavenhagen (UN Human Rights Council 2003) and James Anaya (UN Human Rights Council 2009), strongly criticize the use of the anti-terrorism law against the Mapuche. Furthermore, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, denounces the lack of action of the Chilean State to tackle the multiple and profound causes of violations relating to land conflict, or political, economic and educational exclusion (UN Human Rights Council 2014). However, the securitization process has not decreased in magnitude ever since it assumed a formative role since the end of the 1990s. The Center for Research and Defense South recently filed a civil lawsuit against the State of Chile for 'manipulating evidence by State agents, resulting in an accusation on terrorist grounds' (González 2020), and thus sparked a process of desecuritization, as understood by Ole Wæver (1995), which contested the legitimation of classifying the Mapuche movement(s) as a security issue.

Yet, Wæver's approach of desecuritization 'lacks . . .a clear definition of politization' (Aradau 2004) that could overcome the Schmittian understanding of politics that *securitization* entails, that is distinguishing between 'friend' and 'enemy' (Williams 2003). Much merit lies in disentangling such top-down discourse and the very construction of 'security' by the State. Drawing on Balibar's theory of emancipation to deepen the understanding of *desecuritization*, Aradau first states that 'no one can be emancipated by an external decision. It is those who have been considered dangerous who need to speak to re-shape the relations that institutions have fixed along the lines of security' (Aradau 2004). In that sense, 'emancipation functions as a strategy of dis-identification' (Aradau 2004: 405), to dismantle the associations of certain groups with a security issue and thus to include them in the political community at large. Balibar adds that 'the whole history of emancipation is not so much the history of the demanding of unknown rights as of the real struggle to enjoy which *have already been declared*' (emphasis in the original) (Balibar 2002).

In the case of the Mapuche, international law in particular exerts emancipatory functions by establishing or reinforcing a number of safeguards in the field of collective rights, demanding strict observation by Chile's institutions of the State. It thereby assumes the position of, first, a complementary instance of oversight with the objective of ensuring human rights compliance as established by domestic and international law, and, second, as a jurisprudence creating mechanism with far-reaching conclusions in the fields of participatory rights, consultation and consent in particular (see Inter-American Court of Human Rights's *Saramaka vs. Suriname* and *Sarayaku vs. Ecuador* decisions), lying at the heart of indigenous peoples' emancipatory potential. Beyond its desecuritizing impacts, international law serves as an 'emancipatory tool for vulnerable people' (Merry 2006) or as a 'weapon of the weak, turning authority back on itself' (Comaroff and Comaroff 2008). The proceduralization of land, resource and participatory rights promoted by international law (see, for example, Rodríguez-Garavito 2011) thereby acts as a crucial facilitator for translating voices into the public sphere, eventually countering security paradigms as embraced by domestic orders.

as an 'Internal Enemy'. Analysis of the relationship between migration and security, during and after the Cold War in Chile (2018).

Relatedly, security is a key concern for the Mapuche people and a right in itself; in fact, insecure situations and environments prevent the enjoyment of other collective rights. Research in the neighbouring field of minority rights illustrates the necessity of orienting security towards community perspectives. Most notably, *insecurity* is intrinsically related to psycho-social impacts which are, in turn, provoked by the collective experience of inter-alia discrimination, persecution, flight, loss of language or cultural assimilation (Carbonneau et al., 2017). Regional jurisprudence similarly establishes core responsibilities in that regard, including obligations to adopt measures to protect indigenous peoples' *security*, identity and lifestyle (see, for example, ECtHR *Case of D.H. and Others vs. Czech Republic* 2007, *Case of Chapham v. UK* 1996). Ever since the 1990s, security paradigms have gone through a conceptual reopening towards considering people's subjective experience (Tadjbakhsh 2005). Some have found deeper levels of institutionalization, among others economic, food, health, environmental, personal, community and political security, following basic human development jargon (Inter-American Institute of Human Rights 2010). In the case of indigenous peoples, the right to security clearly assumes a collective dimension, being granted to indigenous peoples as distinct peoples (art.7(2) UNDRIPS). While mostly derivative from the underlying premise to fulfil the right to housing or to food, the right to a *secure environment* similarly proves relevant for Mapuche people's particular needs arising under the State-centric 'national security' paradigm and policies of criminalization. This concerns their basic needs as relating to physical integrity and habeas corpus, due process, dignity and the prohibition of torture, inhuman or degrading treatment or punishment, as well as collective public expression, of assembly and institution-building. In that sense, security needs have found express articulation under broader discourses and policies of 'national security' ever since their first adoption under the late Pinochet regime.

The second important dimension of the desecuritization process currently perceptible is the change in the nature of the audience that supported the anti-terrorist arguments. Initiate on 18 October 2019, the social movement dubbed 'Chile woke up' (*Chile despertó*) was subjected to forms of repression used against the Mapuche which were applied to most Chileans this time. Diverse forms of symbolic solidarity between non-indigenous Chileans and the Mapuche emerged, such as the predominance of the most commonly used Mapuche flag (*Wenufoye*) during the demonstrations in Santiago, which would in turn downgrade the legitimacy bestowed on the anti-terrorist campaign at large (Huenchumil 2019a,b). It remains to be seen to what extent such forms of citizen participation become formalized, hence judicialized in the context of Chile's current constitutional reform which may reverse the securitization process adopted since the Pinochet regime.

## 3. Transforming the state and its subjects under regimes of criminalization and undemocratic action

The transformative forces of criminalizing social protest and indigenous movements by means of domestic policies require a rethinking of the State and its subjects. The judicialization of undemocratic control and failing constitutional monitoring functions necessarily question the traditional role of the State as rights guarantor (Tomuschat 2014) and holder of ultimate sovereignty (Anaya 2004), and with it its constitutional architecture. In fact, it has been argued elsewhere that the very institutional imposition and exogenous territoriality facilitated destruction of Mapuche's traditional forms of organization (Le Bonniec

2003); the constitutional route thus proves fundamental to understanding indigenous peoples' leverage in positioning collective claims.

Unlike constitution-making in neighbouring States, Chilean constitutionalism in the early 1980s needs to be understood in the light of its adoption by an authoritarian State under Pinochet. In fact, its early beginnings are commonly attributed to a fraudulent plebiscite (Atria 2013), requiring a reopening of the drafting process. Chilean constitutionalism could similarly be criticized based on its mono-subject, unicentric, colonial orientation towards Chilean people as a whole, falling short of recognizing indigenous peoples as autonomous subjects and shapers of the State (Boccara and Seguel-Boccara 1999; Molinet Huechucura 2011). Collective demands for recognition of indigenous sovereignty and territorial autonomies remain limited to grassroots aspirations without consideration in the constitutional realm or legislative measures, with the exception of a somewhat modest attempt to categorize and codify indigenous identities in the early 1990s (according to Law 19.253, 1993). Other forms of recognition would be restricted to formalities without reaching agreement or distinguished outcomes. Illustrative of this may be the five processes of institutional consultation held between 2009 and 2017 (four under the Bachelet administrations), including a dedicated indigenous Constituent Process (*Proceso Constituyente Indígena*), all steered towards enhanced forms of indigenous participation in State bodies; the establishment of indigenous institutions at State level such as ministries, units or councils; constitutional reform projects; recognition of indigenous rights; as well as consultation procedures and environmental impact assessments (Tomaselli 2019). Broad questions of recognition demonstrably shaped the constitutional reform process, particularly the Proceso Participativo Constituyente Indígena (Donoso and Palacios 2018), and as articulated under the umbrella of constitutional recognition processes starting with Pinochet's demise (Toledo Llancaqueo 2006).

More far-reaching demands have come to be articulated in debates leading to the Constitutive Assembly (*Convención Constitucional*) being entirely elected by the people (Tricot 2020), including the recognition of the plurinational State and collective rights having first found articulation during the constituent process under Bachelet in 2016/17 (Aylwin 2020). The former would eventually include seventeen seats out of 155 in total reserved for indigenous representatives, hence proportionally representing Chile's indigenous peoples. The constituent organ itself would commit to demilitarizing indigenous territories, putting an end to measures to repress Mapuche territories, granting pardon to Mapuche political prisoners, supporting the direct application of C169 and UNDRIPS, calling for guarantees to protect persons of indigenous origin deprived of their liberty, and implementing justice policies oriented towards integral reparation, both individually and collectively, for victims of persecution, political imprisonment and systematic human rights violations (Convención Constitucional 2021).

Most discernibly, constitutional law has fallen short of attributing 'peoples' status to indigenous communities; such legal framework has been maintained until today and thus resists progressive demands for collective rights, self-determination and the like. In fact, it was argued elsewhere that the very notions of State control and permanent sovereignty are considered a 'licence to disregard (indigenous) claims . . . (however) taking the value of self-determination seriously speaks in favour of constraints on State authority, rather than a world in which States monopolize jurisdictional or meta-jurisdictional authority' (Armstrong 2017; Hirschl and Shachar 2019). Mapuche people's influence thus remains limited to informal, unsystematic procedures or as materializing in indigenous law and

governance across local community contexts. The role of indigenous peoples as active subjects, makers or shapers of the State deserves deeper reflection here.

Accounts differ as to Mapuches' 'shaping' and 'making' (Cornwall and Gaventa 2000) potential in transforming the neo-colonial State. In light of massive social protests, recent constitutional debates have been reassumed, mainly raised by strong social movements towards redesigning the neo-liberal constitution in force. The 'Agreement for social peace and a new constitution' signed by the main Chilean political parties on 15 November 2019 proposes to organize a plebiscite for a new constitution, the result of which was the victory of the 'approve' and 'constitutional convention [assembly]' options by 78 per cent on 25 October 2020. Accordingly, socio-economic, including workers', rights are to be stipulated, by way of constitutionalizing reforms that had been launched by the first Bachelet administration such as by introducing a pensions system (Posner 2019). Society's demands are manifold, yet primarily concern mitigating inequalities, reforming privatized sectors including education, health, pensions and water (Vogt 2019), and a new human rights catalogue. It remains to be seen to what extent competent delegates will reform the Miltonian constitution based on minor governmental intervention in the market and public services (Bremmer 2019) and opt for a degrowth-oriented plural economic system championed by neighbouring Andean States in their endeavours to constitutionalize indigenous cosmovisions and rights (Gudynas 2011; Acosta Espinosa 2015; Escobar 2014; Solón 2017). Bachelet's promise to constitutionally enshrine a 'common home' (*la casa de todos*) for all Chileans (Díaz de Valdés 2017; Zapata Larraín 2015) needs to be related to indigenous collective struggles and understood in a context of pluralism and diversity.

In fact, a turn towards social democratic paradigms may not suffice to translate indigenous specific demands and special rights into the Chilean order of fundamental rights. Constitutional drafting processes in Bolivian and Ecuadorian legal orders have demonstrated the need for stipulating other plural rights and rule of law(s) alongside economic reform which has found accommodation under so-called New Latin American Constitutionalism (Ávila Santamaría 2011), paying tribute to inter-alia the collective nature of indigenous rights and their all-embracing, interdependent rights. Owing to considerable economic pressures and the lengthiness of legal drafting processes, respective laws and regulations are yet to be adopted in their full scope, exceptions forming dedicated legislation to implement UNDRIPS or sector-specific consultations laws. The recent decreasing electoral turnout in Chile may, however, suggest political failure in addressing marginalized groups in similar ways (Barrios-Suvelza 2018; Álvarez 2017). In fact, ALBA (*Bolivarian Alternative for the Americas*) States including Venezuela, Nicaragua, Ecuador and Bolivia substantively advanced indigenous rights, and indigenous political participation while being criticized for largely concentrating and centralizing political power to the detriment of other branches of the State (Díaz de Valdés and Verdugo 2019). Such constitutional grassroots tools have remained excluded from the Chilean model of the State and post-authoritarian reconstruction, by means of, for instance, amendments. Despite strong political and judicial institutions, indigenous demands remain rather largely ignored (Aróstica et al., 2019) and fail to enter the realm of the State and institutions. This may be attributed to the scarcity of recognized instances of representation; Chile's recognized indigenous entity 'CONADI' (National Corporation for indigenous Development) barely accommodates indigenous representation through the seven consultative indigenous representatives elected by those disposing of an indigenous quality certificate. Yet, the CONADI assumes a weak institutional role vis-à-vis and within the State as it is only a corporation part of the

Ministry of Social Development and adopts ostensible positions while neglecting or compartmentalizing a wide range of indigenous bottom-up demands (Vergara et al., 2004).

In fact, inherent contradictions remain as to indigenous peoples (as opposed to 'people') as social political agents in and of the State, resulting in antagonistic attitudes adopted by the Chilean State and forest companies while intensifying the State's opposition towards such novel agency (Le Bonniec 2003). Two conceptual streams have critically engaged with the relationship between Mapuche people and the Chilean State. The first one portrays such relationship through the lenses of State violence, confrontation and domination (Le Bonniec 2003); the perverting effects of criminal law illustrate the misuse against those subjects the State is called upon to protect—constitutionally speaking and as demanded by international law. A somewhat more moderate reading of Mapuche-State relations relates to the importance of dialogue which materializes most prominently in agreements or assumes a 'taming' role in contentious situations including conflicts (Litmu 2018; Vargas Hernández 2019). Conversely, failure to engage in intercultural dialogue with Mapuche people has been described as one persistently ignored demand by the Chilean State; further challenges include respect for the respective 'other', compliance with internationally recognized rights and reaching constructive agreements (Aylwin 2019). Such challenges need to be seen in the light of a history of imposition, articulated through current alienations from intercultural cohabitation by the Piñera Administration (Aylwin 2019).

Such positioning falls short of considering Mapuche people as autonomous subjects, limiting any articulation of indigenous sovereignty in both past and present relations with the State (Boise Ramay 2009). We might be inclined to term this a form of 'legal regression' in the light of the moderate attempts of enacting treaty law between independent Chile of 1818 and the Mapuche (Clavero 2010; Huilcamán Paillama 2014) in today's Chile or the 'judicialization' of oppressive inter-actor relations, declaring indigenous peoples objects of the law under the umbrella of sophisticated formalization processes. Indeed, indigenous subjects become absorbed by a homogenous State to the detriment of plural recognition practice; in fact, the Chilean State has demonstrably promoted liberal market principles and private property (Levil Chicahual 2006), neglecting plural systems and collective rights oriented towards indigenous identities. This might, in turn, require a repositioning vis-à-vis the State, public policies and civil society (Campos et al., 2018), particularly in the light of a unitary, centralist Chilean State and its orientation towards 'integrationist and ethnic indigenism' (Levil Chicahual 2006) or what Bengoa has termed 'respectful integration' (2014). indigenous demands, however, fall short of claiming radical transformations in turn; instead, sovereignty-oriented revindications remain limited to autonomies within the (territorial) realm of the State and hence alien to secessionist agendas (Marimán 2012). Similar attitudes become apparent among indigenous academics who explicitly distinguish between territorial demands and the broader struggle for self-determination or autonomies; these fall under the immediate scope of the State and its institutions, being currently curtailed by a somewhat minimalistic constitutional framework. As a result, claims primarily find expression as part of and as placed under the umbrella of the State's political life or as traditional *sui generis* forms of the State's political life (Curín Paillavil and Valdés Huecul 1999; Marimán 2012). Instead, struggles have been accommodated under the collective objective of 'ethnic coexistence of difference' in the sense of cultural self-determination (Marimán 2012), resembling the Taylorian 'politics of recognition' (1994) or a way of formalizing such demands in the sense of the Kymlickan group-differentiated or 'multicultural citizenship' (Kymlicka 2013).

However, the events of *Lumaco* in December 1997 when several Mapuche burned trucks belonging to forestry companies mark a qualitative change in the Mapuche movement(s) and its relations with the State (Pairicán Padilla 2013). The demands for individual and collective titles of property of specific lands start to be articulated as part of a radical project of 'liberation' (from the Chilean State), and the rebuilding of the Mapuche nation. Its ideological origins may be traced back to the ideas articulated by the 'Coordination Arauco-Malleco' (CAM), which was established after the events of Lumaco to coordinate the recovery of territories among several communities. As its leader, Héctor Llaitul, asserted: 'That is why we appreciate any proposal for autonomy and self-determination as such, as long as it reflects the historical demands of our people. How can we move forward in this direction? Our answer is clear: a process of territorial and political recovery' (Llaitul and Arrate 2012).

Mapuche people's demands need, however, to be understood against the background of undemocratic action (discussed in the following section), ruling out plural recognition processes and attempts to subjugate indigenous peoples. The criminalization of social protest and specific targeting of indigenous rights defenders need to be placed in the context of subject-State relations: reforms in the criminal justice system have gradually enhanced the powers exerted by the prosecutor while worsening conditions of the accused (Aylwin et al. 2013), for instance, prolonging pretrial detention, archiving correspondence, limiting prison visits etc. (Human Rights Watch, Observatorio de Derechos de los Pueblos Indígenas 2004). Such a penal regime has found particular application in the case of the Mapuche people, as relating to territorial demands or in the light of political rights (Human Rights Watch, Observatorio de Derechos de los Pueblos Indígenas 2004). A gradual deterioration of indigenous rights has thus accompanied penal reforms at the same time as powers have found new articulations, increasing competence and leverage of the State to the detriment of its most marginalized subjects, Mapuche people and human rights defenders.

## 4. Responses from the Inter-American human rights system to Chilean constitutionalism: internationalizing judicialization in a reverse sense

Constitutional developments under post-authoritarian regimes are taken as a starting point to appreciate the challenges related to the collective demand for (indigenous) sovereignty and self-determination under the State's somewhat static architecture. The position of indigenous peoples' as autonomous subjects are disentangled in the light of a degrading rule of law regime, owing to the recent resurgence of neo-liberal paradigms and constitutional decay. The Chilean case merits further exploration in that regard, being illustrative of a complex entanglement of different legal spheres to establish venues for indigenous rights and defenders' claims to become articulated. In fact, Inter-American jurisprudence has demonstrated considerable capacity in uncovering the emancipatory potential of the law (Merry 2006), most notably, by articulating collective rights, including standing, doing justice to the particularities of indigenous collective forms of organization and institutionalization, and ultimately strengthening indigenous collective forms of representation. Judicialization could be understood in a two-fold way: first,as a procedural tool of collective expression, building on the Court's evolutionary interpretation of governance and property rights; and, second, as following the Court's tradition in building on the constitutional traditions of State parties in developing ground-breaking jurisprudence on

indigenous peoples' rights, emblematic being the right to prior consultation, land and resource rights, cultural identity and spiritual rights as well as environmental rights. In that sense, mutual learning processes have proven pivotal in enhancing indigenous peoples' rights in the region.

Interactions between the Inter-American *Jus Commune* and domestic constitutionalism embraces three main academic debates in that regard. As a precondition to any internationalization of judicialization, constitutional guarantees need to comply with international legal standards. In the *Almonacid Arellano v. Chile* decision before the Inter-American Court of Human Rights, the doctrine of conventionality control found first mention, attributing relevant competence to the Inter-American Court in determining respective measures to be taken at domestic levels, requiring judges to adhere to the latter (Carozza and González 2017).[2] Albeit ambiguously, (dissenting) opinions reveal difficulties in conferring such powers to the Inter-American Court of Human Rights: accordingly, powers in exercising conventionality control may very well be maintained by domestic judges, as argued by Inter-American judges García Ramírez and Ferrer MacGregor (Carozza and González 2017). The conservative approach taken at domestic levels becomes prevalent in the Chilean court culture:[3] Inter-American judge Vio Grossi from Chile exemplifies such a position, defending the principles of subsidiarity and complementarity of the Inter-American human rights system (Burgorgue-Larsen 2018). A middle ground finds expression in the so-called *effet utile* doctrine focusing on international law itself rather than its interpreters. Similarly, emphasis may be placed on internalization efforts and the application of international standards as argued by Inter-American judge García-Sayán, or alternatively, on transnational conversation suggested in *Atala Riffo and Daughters v. Chile* (Carozza and González 2017). The Chilean political-historical context proves particularly relevant in terms of competing norms: Chile's amnesty laws clearly contradict the State's international obligation to investigate and prosecute gross and massive human rights violations perpetrated by the Pinochet regime (Contesse 2017a).

(Failing) constitutional guarantees further need to be understood in the political context of their very creation and operationalization. Under Pinochet's dictatorial regime, military juntas were considered constituent powers (González-Jácome 2017) to the detriment of democratic rule and guarantees including the basic criteria of representative democracy. Accordingly, all other branches of power underwent some form of subjugation leaving little space for articulation and decision-making while contributing to a shrinking political space (González-Jácome 2017) and the constitutionally imposed neo-liberal basis of the State. At the same time, the Chilean courts became exposed to such ideological orientation, becoming 'insulated from the rough and tumble of democratic politics . . .largely limited to protecting property rights and commercial predictability, along with some classic liberal negative freedoms' (Brinks and Blass 2017). In that sense, the court system has been described as limited in scope of authority to 'reshape the political landscape across multiple substantive domains' (Brinks and Blass 2017). In fact, constitutional-political

2 To be clear, the Court unequivocally states that 'domestic authorities ensure that all the effect of provisions embodied in the ACHR are not adversely affected by the enforcement of laws which are contrary to its purpose (such as amnesty laws) and that have not had any legal effects since its inception'; see Almonacid judgement as discussed in Contesse 2017b.

3 For further debates on the role of regional decisions on Chilean constitutional law, see Ivanschitz Boudeguer 2013.

entanglements (Garretón and Garretón 2010) continued to find articulation after the fall of Pinochet's regime. Most notably, the Constitutional Court declared the Rome Statute unconstitutional when Pinochet was arrested in London, revealing its 'political animosity against extraterritorial foreign and international criminal jurisdiction' (Correa 2003). Other limits to progressive legal developments may have been posed by a passive role assumed by the Chilean Constitutional Court, demonstrated by unambitious presidents of the Court, a broad reluctant attitude to exercising its powers and prioritizing its political survival over its possible powers, and its submission to political leaders (Brown and Walle 2016). This has demonstrably jeopardized peoples' access to justice (Merhof 2015).

At the same time, indigenous voices were translated differently into the domestic legal sphere throughout the so-called ("Concertation") period, starting with the fall of the Pinochet regime in 1989. Existing research highlights the difficulties in protecting indigenous collective rights in light of many conservative constitutional and supreme courts in Latin America as well as a somewhat weak civil society sector, lacking any 'concerted strategy of judicialization of collective rights' (Gloppen and Sieder 2007; Sieder 2007). A different picture may be drawn in neighbouring Ecuador and Bolivia as well as Colombia and Mexico where the route towards the Inter-American Court of Human Rights has demonstrably revealed transformative potential for indigenous collective rights (Herencia Carrasco). These contrasting contexts between Chile and the neighbouring States render the present focus particularly worth-while, that is the criminalization of the Mapuche People.

A lot of hope is thus placed in the Inter-American Court and Commission on Human Rights in fostering, first, its frontrunner role in enhancing indigenous rights across the region, pushing for compliance while monitoring implementation with its judgements and, second, its inspirational undertakings to develop transformative potential by responding to persisting security paradigms more generally. The Latin American *Jus Commune* thereby assumes considerable counterveiling powers—we may say it formalises responses vis-à-vis the domestic paradigm of securitization, by mainstreaming non-discriminatory treatment. Indeed, differential treatment may concern participants of social protest or the way stereotyping may lead to inter-alia delegitimising indigenous territorial rights, violations of due process rights, including arbitrary preventive detention or unjustified deprivation of liberties. Notably, the landmark decision *Norín Catrimán vs. Chile* provides a contextualized understanding of the misuse of penal law and arbitrary application of Chile's anti-terrorist legislation against the Mapuche par excellence. According to the Commission's Report No.176/10, the case distinguishes itself by its selective application of anti-terrorist legislation to the detriment of indigenous Mapuche people in Chile. This concerns Mapuche leaders (*Lonkos*) in particular, representing those accused in the so-called 'Lonko trials' (Richards 2010). The case(s) also awoke the need for avoiding arbitrary interpretation and for making use of relevant elements existing in international criminal law (D'Ávila Lopes and Pereira dos Santos 2018). More precisely, the Commission maintained that the very vagueness of such legislation would allow for its arbitrary application, that is, allowing 'the introduction of elements, such as the ethnic origin of the accused, their position as leaders and/or their link to the Mapuche indigenous people, as well as a generalised representation of the claims of said indigenous people, without a distinction made between the context of social demands and protest, and the sporadic acts of violence that have arisen in that context' (D'Ávila Lopes and Pereira dos Santos 2018: 138; see also UN Human Rights Council 2009).

The Commission and the Court thereby build on earlier decisions that would actively engage with violations of the principle of legality in the context of securitization and targeted action against indigenous peoples and representatives, such as demonstrated by the 2006 *López-Álvarez vs. Honduras* Inter-American Court of Human Rights judgment and the *Chitay Nech et al. vs. Guatemala* Inter-American Court of Human Rights decision in 2010. In *López-Álvarez vs. Honduras*, the Court added yet another dimension to this context of legal loopholes by identifying what could be considered a separation of different due process and effective resource rights and their arbitrary effects on a member of the afrodescendent/indigenous Garifuna community who had assumed leadership in different indigenous organizations and was deprived of his personal liberty in the case. Similarly, the Court would pronounce itself in *Chitay Nech et al. vs. Guatemala*, the case of an indigenous Maya Kaqchikel chief who had forcibly disappeared during Guatemala's military regime, affecting him and his family. Most notably, the case enables us to appreciate the significance of systematized persecution of indigenous peoples under the guise of a pretentious security discourse. In fact, the dictatorial context in Guatemala would reveal strategies resembling the persistently upheld security paradigm adopted as early as under Pinochet: according to testimonies, the 'implementation of the doctrine of national security expressed itself very concretely by means of a policy of forced disappearance, that is (targeting) indigenous peoples' (Historical Clarification Commission 1999). A second common conclusion may be drawn or—more precisely—correlations can be found between the presence of indigenous organizations and leadership structures in a given place and enhanced levels of persecution in such regions (*Chitay Nech et al. vs. Guatemala*, Expert Witness Rosalina Tuyuc).

As discussed in the following, the decision *Norín Catrimán vs. Chile* reveals transformative potential in its ambition to enforce an integral understanding of due process rights, in its rigorous disclosing of discriminatory treatment and legal loopholes inherent to Chile's legislation on anti-terrorism and its critique of a somewhat deficiently practiced separation of powers doctrine affecting the Chilean judiciary in particular.

To start with, the Court essentially rediscovers the roots of procedural rights by conveying an integral understanding of basic habeas corpus and due process rights, hence demanding re-interpretation at a domestic level. The fact that the Inter-American decision addresses deficiencies in the domestic judicial process as regards penal matters, as opposed to decisions on criminal matters taken by the executive, deserves to be mentioned here (Ortega Jarpa 2019). Considerable power is exerted by means of the procedural toolbox of the judiciary in subverting its inner logics of safeguarding; the case at hand thus stands out by its institutionally enhanced arbitrariness. We need to keep in mind the classical function of the judiciary here as the most powerful instance of controlling the other branches while protecting the individual and groups. The Court essentially identifies due process violations, including the presumption of innocence, the right of the defence to examine witnesses, the right to appeal the judgement before a higher court and the related right to personal liberty in *Norín Catrimán et al. vs. Chile* (para. 478). Much may be attributed to an outdated penal code; the new Code of Penal Proceedings of Chile was eventually adopted in 2000 and entered into force in 2000 in the Araucanía region and 2005 in Santiago de Chile, respectively: the written and inquisitorial processes would be substituted by oral, public, contradictory trials (Human Rights Watch, Observatorio de Derechos de los Pueblos Indígenas 2004). Other violations of basic procedural guarantees included the fact that only one judge would be in charge of the investigation, defining the charges and

pronouncing the judgement, hence limiting possibilities for the defence. Preventive detention would be the norm rather than the exception, the majority of the judgements would be held in written form, investigations were carried out secretly, the press did not benefit from direct access to the proceedings and the accused did not count with de facto access to competent legal representation (Human Rights Watch, Observatorio de Derechos de los Pueblos Indígenas 2004). In fact, the Inter-American Court of Human Rights has come to assume a particularly active role in developing jurisprudence on the State's positive obligations as relating to procedural rights (Ruggeri 2017; García Ramírez 2011). Basing itself on Article 8 (American Convention), the Court has established far-reaching conditions to be met, including 'a serious, impartial and effective investigation using all available legal means . . . while observing 'the principle of effectiveness' that should permeate the development of such an investigation' as stated in the *González et al. ('Cotton Field') vs. Mexico* 2009 and the *García Prieto et al. vs. El Salvador* 2007 decisions.

The Court further pushes forward jurisprudential transformations as far as discriminatory treatment is concerned, notably by uncovering legal loopholes that lend themselves to unequal application at best and specific targeting at worst. Anti-terrorism legislation in Chile may be emblematic here. In the first years after entering into force, anti-terrorism laws would find exclusive application in processes litigated against the Mapuche, or as relating to such a group, social protests being emblematic of the fields of application, which would, in turn, be understood as clear evidence of racial discrimination by relevant human rights bodies (Millaleo 2012). Conversely, the Court maintained that criminal law, the codification of terrorist acts and its application to indigenous members would itself be tantamount to a 'selective application' of a discriminatory nature, disclosing patterns of such discrimination. The Court follows the positioning of the Commission carving out the details of such discriminatory treatment. Most notably, the Commission had ruled that those security forces that were called upon to protect peaceful demonstrators had to observe 'complete impartiality towards all . . . citizens, regardless of their political affiliation or the content of their demonstrations' (IACHR 2017). The Commission similarly coincided with the Court as to a State's 'differentiated treatment of participants in a social protest because of their membership in a particular group or because they have made critical claims against governments or dominant sectors of society' (IACHR and RFOE 2019), which shall fall under the prohibition of discrimination under the ACHR framework. In *Norín Catrimán vs. Chile*, the Court makes dedicate allusion to such prohibition in the operational paragraphs of the judgement, namely by identifying violations of the principle of equality and non-discrimination as well as equal protection of the law in such contexts (para. 478(2)). Further-reaching conclusions may be derived.

It may be argued that criminalizing the Mapuche movement(s) would render a construction of a political democratic culture impossible (Gutiérrez Chong and Gálvez González 2017). In fact, the Court itself places emphasis on the larger ramifications of such criminalization, that is the existence of stereotypes and the use of unfavourable concepts such as 'the Mapuche question', the 'Mapuche conflict' or the 'Mapuche problem', which would be employed to delegitimize indigenous territorial rights (para. 93), on the one hand, and legitimize the State's role in exacerbating and re-establishing both social control and punitive potential, on the other (Mella Seguel 2007). Other forms of discriminate treatment became apparent, for example, failing to distinguish 'between the legitimate claims and the acts of violent protest by certain minority groups in that context' (Akhtar 2013), reflecting an attitude of generalizing and labelling conduct as criminal under the presumably protective auspices of the State.

Finally, the Court calls into question what could be derived from the classical separation of powers doctrine. In fact, international legal developments have been criticized on grounds of their hesitant attitude in addressing political conflicts, possibly owing to the socio-political structure at domestic level, inherited from the dictatorial regime and being reproduced during its lengthy transition (Álvez Marín and Becker Lorca 2017). One main indicator may be found in the judiciary's lack of independence. While the Court itself has largely refrained from ruling on the right to an impartial judge or court, the Commission did find a violation of such right since the domestic courts had 'assessed and classified (the) acts based on pre-conceived ideas relating to the context in which they took place, and ... adopted their decision to convict the accused applying these prejudices' (*Norín Catrimán vs. Chile* before the Inter-American Court of Human Rights). The Court further makes explicit reference to the FIDH which had identified a 'subjective impartiality' in the judgements, disclosing bias or stereotyping which would show through statements such as 'notorious public fact' or 'it is public knowledge' as stated in *Norín Catrimán et al. vs. Chile*. Similar reasoning may be found in a Joint Dissenting Opinion of judges Ventura Robles and Ferrer Mac-Gregor in the same judgement dedicated to the specific violation of Article 8 (1), addressing the right to an impartial judge or court; they maintain that 'it is verified that these judgements contain expressions or reasoning based on negative ethnic stereotypes and prejudices and that this constitutes a violation of the guarantee of judicial impartiality' (para. 35). To be clear, the dissenting judges accuse the domestic court of having 'made a causal nexus between the ethnic origin of the Lonkos as Mapuche leaders and their participation in the offenses of which they were accused' (para. 37) which would eventually prove 'decisive in the establishment of their (the victims') criminal responsibility' (para. 42).

Others have denominated such systemic ills an attack on Chile's internal democratic system at large, being perpetuated by the monopoly held by State entities in penally prosecuting social protest (Becker Castellaro 2015). Notably, investigation on 'terrorist offences' has manifested itself in the unjustified deprivation of liberties or detention while violating the presumption of innocence (Becker Castellaro 2015). Much systemic arbitrariness hence lies in criminal legal language, entering the sophisticated amalgam of legislative action and biased judicial oversight. Recent developments around implementing the law however raise much hope as to the leverage of international law and its transformative potential: *Norín Catrimán et al. vs. Chile* has been met with an open attitude on the part of Supreme Court judges when annulling previous decisions (Ortega Jarpa 2019). In fact, the Chilean justice system has become known for its ambition in redressing the victims (of the Pinochet regime) and its effectiveness (Sandoval 2018). The Executive similarly gains considerable leverage as relating to the international legal framework, especially as far as obligations to implement Inter-American Court of Human Rights decisions are concerned. In the latter context, the Court has come to address local judgements, emphasizing the significance of local judges in implementing international standards, such as those relating to preventive prison sentences or in dealing with anonymous witnesses (Fernández et al., 2017). While the Legislative demonstrated a certain reluctance to adopting pro indigenous policies generally, the Executive demonstrably failed to employ its co-legislative powers to put forward draft acts or to spur the constitutional changes necessary for implementing Inter-American decisions (Schönsteiner and Couso 2015). It is argued that Chile's governments and the Piñera administration, in particular, as principally mandated to comply with the decision, are expected to assume main responsibility for the occurrences in the Araucanía region, for

officially neglecting dialogue and opting for repression (Fuentes 2019). This may also be attributed to the neo-liberal turn under Piñera, hence spurring confrontations on indigenous lands. While a certain willingness to implement decisions may be noted in the executive branch at specific points in time and with the exception of indigenous rights, resistance is maintained on the part of the judiciary and the Supreme Court which meets with a rather indifferent Legislative (Schönsteiner and Couso 2015). Questions on the importance of intra-State powers and its dynamics thus need to be extended and elevated to include those subjected to its rule, indigenous peoples, in particular, representing those traditionally excluded from the State's main decision-making functions.

In that sense, recourse to international law alongside 'national' mobilization for indigenous rights have proven quintessential in light of poor legislative records on indigenous rights (Doran 2017a). Regional law in particular has demonstrated considerable capacities in shaping the domestic legal sphere in the *Norín Catrimán et al. vs. Chile* decision (Céspedes 2017). In fact, the weak emancipatory substance of indigenous rights in Chile has been described as purely rhetorical or as reflecting a paradox, that is an 'authoritarianization' of rights in the context of the Chilean democratic framework (Céspedes 2017; see Haughney 2012 for a debate on 'authoritarianization'). Similarly to the Latin American system of supervision, international law has demonstrably exerted pressure for conformity on the Chilean State: most notably through UPR, the Chilean State (Piñera administration) has been called upon to recognize indigenous rights at constitutional levels, to impose limits on discrimination and xenophobia against indigenous peoples, to spur the struggle against impunity, prevent the use of anti-terrorism legislation, and to investigate acts committed by State agents against indigenous peoples (Tomaselli 2016). It has been argued elsewhere that such international attention as generated by the case had contributed to better social reception and more cultural sensitivity towards indigenous mobilization (Doran 2019): what is more, the cases brought to the Inter-American Court of Human Rights revealed yet another function of international law, that of legitimizing indigenous demands for human rights in the contentious Chilean context (Doran 2019; González-Parra and Simon 2014).

## 5. Concluding remarks

In the case *Norín Catrimán vs. Chile*, the Inter-American human rights system sheds light on the arbitrariness of Chilean criminalizing policies against the Mapuche people. The decision of the Inter-American Court of Human Rights dismantles the security discourse that overrides due process rights, but also unveils the discriminatory use of pieces of legislation by Chilean courts against certain groups, such as the Mapuche people. International law thus wields the function of channelling, translating, and legitimizing indigenous rights and develops a compelling capacity on domestic legislation and jurisprudence. We may feel inclined to term such capacity a 'counter-judicializing effect' or a judicialization strategy in its own accord, striving to develop transformative potential in the domestic realm while tipping the balance in favour of a functioning rule of law regime, institutional oversight, non-discriminatory application of penal standards and due consideration of the special situation the Mapuche are facing.

The criminalization of the Mapuche people's protest action may be understood either as part of a new age of suppression, of failing States, of authoritarianism-inspired harmonization, misusing the sophisticated power of the law in a considerable number of States against indigenous peoples and their legitimate demands for representation, autonomies, land

recognition, and self-governance or in the light of criminalizing measures against larger protest action, targeting human rights defenders and environmental activists amongst others. Indeed, indigenous peoples have come to be subjected to suppressive State action in the public sphere. Neighbouring Bolivia merits further examination in that regard, drawing on a recent experience of targeted action against the indigenous *Wiphala* (flag) movement under the interim Jeanine Añez government in late 2019, which eventually led to two massacres, affecting 'working-class and indigenous MAS supporters', who were portrayed as 'terrorists or drug traffickers', and reflecting 'strikingly different treatment by the police of mestizo middle-class versus indigenous working class-protesters graphically displaying how deep racism still runs in Bolivia' (Farthing 2020: 9–10). The same government would also overstep its powers when dealing with the Morales government: prosecutors and judges were subjected to considerable pressure, resulting in criminal investigations against Evo Morales, his government and supporters for sedition, terrorism or both (Human Rights Watch 2020). Relevant representatives of the judiciary were to be pursued by the interim Minister of the Interior where the accused were released (Human Rights Watch 2020).

indigenous concerns are also to be understood as finding articulation under the umbrella of civil society movements and general protest action (IACHR and RFOE 2019), yet remaining confined to the margins of the latter given the horizontality and equity-driven nature of the protests in the recent Chilean context (Espinoza 2020), hence disguising the demand for recognizing indigenous rights under the broad umbrella of revindications for social protection and the pension system (Barozet 2020). Comparative findings direct us to the importance of the historical-political context when making sense of criminalization practices relating to public expression of dissent. Two recent waves of mass mobilization in the region may be mentioned here, the electoral protests in Peru and the tax-related mobilizations in Colombia.

The recently elected president in Peru put an end to a long phase of public protest, demonstrating dividing, polarizing lines between rural-left forces and urban conservative elites (Burt 2021). indigenous movements would largely support Castillo's (rural-left) candidature counting on his support for territorial demands while assuming scrutinizing functions throughout the follow-up proceedings on the domestic elections: illegitimate action had been initiated by the opposition to disqualify regular votes in rural areas, including lands and livelihoods of indigenous peoples, causing indigenous organizations to mobilize representatives to demonstrate in the State's capital (Fowks 2021). While indigenous peoples are not subjected to targeted action as such, stereotyping, discrimination, and racist policies by Fujimorian forces persist against rural protestors, at times targeting indigenous peoples (Fowks 2021).

Similarly, indigenous demands have found accommodation under Colombia's social protest action, commencing in April 2021 under the umbrella of the so-called *Minga Indígena* (indigenous march). Apart from the historically disproportionate impact caused by violent action and the armed conflict, indigenous movements have come to face stigmatizing conduct on the part of authorities such as the Policía National as well as excessive repression during the protests (Amnistía Internacional 2021). indigenous representatives have further undergone attacks with gunfire as reported by Colombia's Ombudsman as well as other violent confrontations (BBC 2021). In that sense, any undermining measures as regards indigenous collective expression of dissent need to be understood as part of a discriminatory policy paradigm, operating in disrespect of indigenous peoples' dedicated human rights protection.

We may also approach the issue from the perspective of comparative experience and the virtuous realm of regional *Jus Commune*, exerting judicializing powers on its own terms. The Inter-American Commission maintains, 'the region, far from offering a picture of consensus regarding the protection of demonstrations and protests, has been—and continues to be—the scene of repression, dispersal, and limitation of the exercise of these rights in the public sphere, the product of a deep-rooted conception that considers citizen mobilisation to be a form of disruption of the public order or, even worse, a threat to the stability of democratic institutions' (IACHR and RFOE 2019: 1). In fact, the State's institutions continue to be at the forefront of analytical engagement with post-authoritarian, hence transitionary Latin American contexts, requiring the Latin American *Jus Commune* to be particularly responsive to structural deficiencies 'often attributable to weak institutions, which lead to (inter-alia) insecurity, impunity '; the *Jus Commune* notably embraces manifestations of transformative constitutionalism shining through the (renewed) constitutions in the region (Bogdandy et al., 2017: 6).

Others have referred to 'new types of violence-compatible democracies' or 'violent pluralism' that would show tolerant towards 'violence against opponents' in some Latin American contexts (Doran 2017b: 185; 200). Such 'hegemonic definition of democracy in the public space' would operate through the targeted action against human rights defenders (Doran 2017b: 200); the latter meriting attention on its own accord. As the Special Rapporteur on the rights of freedom of peaceful assembly and association holds, specific 'at-risk groups share the experience of discrimination, unequal treatment, and harassment, as well as a lack of visibility and systematic exclusion from public debate', among which indigenous peoples and human rights defenders find dedicated mention (IACHR and RFOE 2019: 22).

Eventually, a complex amalgam of co-existing legal orders, often contradicting positioning on human rights, deficient checks and balances, arbitrary security discourse and a somewhat ignorant equality paradigm, all contribute to the difficulties the Mapuche people have been facing in expressing dissent in public. It remains to be seen to what extent Chile's novel constitutional order may reinforce Latin American *Jus Commune*, or alternatively, how domestic constitutionalism will potentially develop a genuinely dialogical relationship with the Inter-American human rights system, exerting a shaping influence on the latter while strengthening its frontrunner position in promoting indigenous peoples' rights.

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