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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018

Opinion No. 64/2018 concerning Francisca Linconao Huircapán (Chile)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 8 February 2018 the Working Group transmitted to the Government of Chile a communication concerning Francisca Linconao Huircapán, in which it requested the Government to provide the relevant information before 9 April 2018. On 19 March 2018, the Government requested an extension of the deadline for replying to the communication. The request was granted and the deadline extended until 9 May 2018. The Government failed to reply to the Working Group by the new deadline. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,



disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Ms. Linconao is a 61-year-old indigenous Chilean woman and traditional and spiritual authority (*machi*) of the Mapuche people who resides in Temuco. Ms. Linconao has diabetes. The source states that, in her role as a spiritual authority, Ms. Linconao has consistently championed the territorial and spiritual rights of the Mapuche people.

5. For context, the source highlights that, in September 2009, an appeals court ruled in favour of Ms. Linconao in a case involving the illegal felling of trees, native shrubs and medicinal plants by a forestry company. The court considered that the acts in question violated article 5 of the Forests Act and the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), since the logging was taking place on indigenous spiritual land of cultural importance to the Mapuche. The source indicates that this led to Ms. Linconao becoming a point of reference in the defence of Mapuche lands, environment and culture.

6. The source also believes that it is important to mention the events of the morning of 4 January 2013, when an unknown number of people attacked the home of the Luchsinger-Mackay couple on the Lumahue ranch in Vilcún, Araucanía. During the attack, firearms were used and a fire was started in the couple's home, causing them both to lose their lives. A few hours later, a member of the Mapuche people who had suffered a bullet wound was arrested less than 2 kilometres from the house. The individual was accused, tried, convicted and, in February 2014, sentenced to 18 years' imprisonment.

7. According to the source, on 4 January 2013 – the same day as the blaze – Ms. Linconao's home was violently broken into and searched during an operation for which the Carabineros (police) did not present a warrant. The source claims that some 30 officers from the Intelligence Directorate of the Carabineros took part in the operation and that they planted evidence and stripped Ms. Linconao of her traditional dress, which caused serious harm to her physical and spiritual health.

8. Ms. Linconao was arrested and taken to a police station, where she was held for around two hours. She was accused of unlawful possession of a prohibited firearm that had supposedly been found during the raid. Ms. Linconao was placed under house arrest and prohibited from leaving the region under the terms of a preventive measure imposed up to May 2013, when it was replaced with an order to sign in on a monthly basis. The case was heard by means of oral proceedings before Temuco Criminal Court, which absolved Ms. Linconao of the charge of unlawful possession of a prohibited firearm in a judgment dated 18 October 2013.

9. The source reports that, after this acquittal, on 10 April 2014, Ms. Linconao brought a civil claim against the State for moral damages and loss of profits as a result of the trial and the abuses suffered during the deprivation of her liberty. In October 2015, the claim was upheld by Temuco Civil Court No. 1, which ordered the State to pay Ms. Linconao 30 million Chilean pesos.

10. The source notes that, on the morning of 30 March 2016, Ms. Linconao's home was raided again and she was arrested without a warrant by the Intelligence Directorate of the Carabineros, even though she had been acquitted of the criminal charges against her and had won a civil claim against the State. It is alleged that this State action was taken under pressure from economic and political groups in the region and in the wake of a campaign of stigmatization and public condemnation directed at Ms. Linconao through the media.

11. That same day, Ms. Linconao was brought before the Guarantees Court and charged with arson resulting in death under the 1984 Counter-Terrorism Act in connection with the events that led to the deaths of Mr. Luchsinger and Ms. Mackay. The source argues that the Act made it possible to remand Ms. Linconao in custody on the grounds that she represented "a danger to society", with no option of imposing another, non-custodial

preventive measure, such as house arrest or release on bail, despite Ms. Linconao's age and the submission of medical reports certifying that she was in delicate health. She was placed in Temuco women's prison.

12. The charge was based on a statement made by a witness, who allegedly said that he had participated in the attack alongside other individuals, whom he identified. The witness subsequently asserted that his statement had not been voluntary, but made as a result of pressure, harassment and threats by the police.

13. On 25 May 2016, Temuco Guarantees Court decided to downgrade the preventive measure imposed on Ms. Linconao from pretrial detention to house arrest. On that occasion, the defence argued that there was insufficient information pointing to her participation in the offence. Nevertheless, on 3 June 2016, the Court of Appeal ruled that she should be placed back in pretrial detention. In its judgment, the Court concluded that leaving the accused at liberty would put the safety of the public at risk and that the circumstances that had been taken into consideration when imposing her pretrial detention had not changed.

14. The source states that, on four separate occasions, the Guarantees Court changed the preventive measure by substituting pretrial detention with house arrest. However, on four subsequent occasions, the decisions were revoked by the Court of Appeal in response to appeals lodged by the Attorney General's Office pursuant to the Counter-Terrorism Act. The source reports that the Act requires a unanimous decision of the three judges who sit on the bench and that, in this case, there was a dissenting judge, which impeded the substitution of preventive measures.

15. In December 2016, Ms. Linconao was being held in pretrial detention in Temuco women's prison. On 23 December 2016, she began a hunger strike to demand medical attention, in view of her failing health, and to protest against the substitution and subsequent reinstatement, on four occasions, of the decision to remand her in custody.

16. On 5 January 2017, after spending nine months in prison and submitting an application for *amparo*, Ms. Linconao was granted house arrest as a less onerous measure involving deprivation of liberty. The source alleges that, during her nine months of pretrial detention, Ms. Linconao was not permitted to perform her spiritual practices as a Mapuche leader, and the exercise of her faith was arbitrarily restricted.

17. On 4 October 2017, the Working Group on Arbitrary Detention, the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism sent a communication to the Government of Chile (UA CHL 3/2017) in which they expressed concern about alleged violations of due process in several court cases that form part of a broader context of stigmatization of the Mapuche people and defenders of indigenous peoples' rights, and about the application of the Counter-Terrorism Act to individuals belonging to the Mapuche people. One of the people involved in those legal proceedings was Ms. Linconao.

18. On 25 October 2017, Temuco Criminal Court acquitted Ms. Linconao and 10 other persons accused in the case concerning the fire at the Luchsinger-Mackay family ranch. The Court's decision was based on the lack of evidence that the accused had participated in the criminal acts that they had been charged with having committed. The only evidence submitted by the Attorney General's Office to support the charges was a witness statement that was legally flawed and contained gaps and contradictions.

19. Nevertheless, on 29 December 2017, Temuco Court of Appeal upheld a petition for annulment filed by the Attorney General's Office and the plaintiffs against Ms. Linconao's acquittal and ordered a retrial. The Court's rationale for doing so was to determine whether or not the witness's retraction was due to interference by a third party. As a result, the 11 persons accused in this case will have to face a retrial for offences of which they have already been acquitted. In view of these upcoming proceedings, Ms. Linconao is currently prohibited from leaving the country.

20. From 4 to 8 January 2018, Ms. Linconao went on a personal trip to the Plurinational State of Bolivia. The source asserts that this gave rise to much speculation and to

misinterpretations of the reason for the trip among the public, with statements made to the media by public prosecutors, plaintiffs, government representatives and even some members of parliament, despite the fact that there was no legal impediment to the trip and no definitive criminal conviction against Ms. Linconao. The Attorney General's Office requested a warrant for Ms. Linconao's arrest and called for the hearing on preventive measures to be brought forward.

21. At a hearing before Temuco Criminal Court on 15 January 2018, Ms. Linconao was placed under night-time house arrest and prohibited from leaving the country. However, on 19 January 2018, the Court of Appeal revoked the order for house arrest. Ms. Linconao is currently awaiting the criminal trial, which is expected to start on 26 February 2018.

22. A key aspect of the source's claim is that the Counter-Terrorism Act is being used as an instrument to give legal cover to human rights violations. The purpose of the Act is reportedly to criminalize conduct and provide for harsher punishments than those applicable to ordinary offences. The Act was adopted by the ruling military junta and promulgated by Augusto Pinochet on 16 May 1984. The source notes that it has been applied in numerous trials of Mapuche individuals. It grants broad powers to public prosecutors and allows, inter alia, the conduct of secret proceedings, the use of anonymous witnesses and extended periods of pretrial detention.

23. The source adds that the prosecutors from the Public Prosecution Service who are responsible for the criminal proceedings against Ms. Linconao were involved, in the past, in other trials of members of the Mapuche indigenous community in which they allegedly requested the application of the Counter-Terrorism Act. In this connection, it is reported that, owing to the actions of one of these prosecutors and the application of the Act, the Inter-American Court of Human Rights found Chile guilty of human rights violations.¹ The Court found that there had been violations of, inter alia, the principle of legality, the right to the presumption of innocence, the principle of equality and non-discrimination, the right to equal protection of the law and the right to personal liberty.

24. The source claims that the various periods when Ms. Linconao has been deprived of her liberty, either in prison or under house arrest, amount to arbitrary detention, in violation of the right to liberty of person, as provided for in article 9 of the Covenant.

25. With regard to category III, the source contends that there have been several violations of the fair trial and due process guarantees enshrined in article 14 of the Covenant. In this respect, it is asserted that the right to the presumption of innocence has been violated through the guilty treatment afforded to Ms. Linconao in the shape of her prolonged imprisonment, which has been ordered without justification and in the absence of a conviction. The source also alleges violations of the right to the presumption of innocence on account of the series of public statements made by agents of the State to the media in which they declared that Ms. Linconao is guilty. Moreover, the source indicates that the only evidence used to decide that Ms. Linconao should be deprived of her liberty was obtained by coercing an alleged witness, which renders it illegal and inadmissible at trial.

26. Concerning category V, the source argues that the detention of Ms. Linconao constitutes an act of discrimination, in violation of article 26 of the Covenant. It is indicated that the deprivation of her liberty was based on her status as a Mapuche spiritual leader and that she is involved in a historical conflict in which members of the Mapuche indigenous community have been systematically and arbitrarily deprived of their human rights. It is also argued that the application of the Counter-Terrorism Act against Mapuche individuals is further evidence of this discrimination.

Response from the Government

27. The Working Group transmitted the allegations set out in the preceding paragraphs to the Government on 8 February 2018. In accordance with paragraph 15 of its methods of work, the Working Group requested the Government to respond within 60 days from the

¹ Inter-American Court of Human Rights, *Norín Catrimán et al. v. Chile*, judgment of 29 May 2014, Series C, No. 279.

date of transmission of the communication. However, in accordance with paragraph 16, if the Government wishes an extension of the time limit, it may request a further period of a maximum of one month.

28. On 19 March 2018, the Working Group received a request from the Government for an extension of the time limit for submitting a response to the allegations transmitted.

29. The extension was granted, giving the Government until 9 May 2018 to respond.

30. The Government failed to respond by the new deadline.

Discussion

31. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Working Group had not received a timely response from the Government when the deadline expired, but, in accordance with paragraph 16 of its methods of work, it renders the present opinion on the basis of all the information available to it.

32. Since the Working Group was created, one of its core functions has been to investigate cases of detention imposed arbitrarily. Moreover, in accordance with its methods of work and the resolutions that established and have extended its mandate, the Working Group has the power to handle cases of alleged arbitrary detention by the authorities, including when such detention is based on a final and executory judgment pronounced by a domestic court, as can be seen from the Working Group's more than 27 years of international practice of processing individual cases. Consequently, the Working Group will analyse the information at its disposal to determine whether arbitrary detention has indeed occurred, in accordance with the applicable rules.

33. Based on the information provided, the Working Group notes that Ms. Linconao is a 61-year-old indigenous Chilean woman, a traditional and spiritual authority (*machi*) of the Mapuche people and a defender of their territorial and environmental rights.

34. In 2008, Ms. Linconao brought a constitutional action for protection in accordance with the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) in relation to the illegal felling of trees, native shrubs and medicinal plants by a forestry company. These legal proceedings resulted in the issuance of a ruling in favour of Ms. Linconao in September 2009.

35. The Working Group notes that, on the morning of 4 January 2013, several people carried out an attack on the residence located on the Lumahue ranch in Vilcún in which they used firearms and set fire to the residence, causing the deaths of the Luchsinger-Mackay couple. Consequently, a member of the Mapuche community was arrested, accused, tried and convicted of killing the Luchsinger-Mackay couple, and, in a judgment of February 2014, sentenced to 18 years' imprisonment.

36. Ms. Linconao was first arrested on 4 January 2013, during a raid conducted as part of the investigation into the fire that resulted in the deaths of the Luchsinger-Mackay couple. A large number of Carabineros participated in the operation, during which Ms. Linconao was arrested, before being taken to a police station and held there for approximately two hours. She was accused of unlawful possession of a prohibited firearm that had supposedly been found by the officers during the raid. Once steps had been taken to establish the legality of her detention, Ms. Linconao was granted conditional release because of a lack of information pointing to her participation in the offence. Nevertheless, she was placed under night-time house arrest for three months and prohibited from leaving the region and the country. In October 2013, after a trial, she was acquitted of all charges.

37. The Working Group received credible information to the effect that Ms. Linconao was arrested again during a raid on her home on the morning of 30 March 2016. She was brought before the Guarantees Court and charged with the crime of arson resulting in death

under the 1984 Counter-Terrorism Act in connection with the events that led to the deaths of Mr. Luchsinger and Ms. Mackay.

38. On 30 March 2016, the Guarantees Court remanded Ms. Linconao in custody, placing her in Temuco women's prison. The Working Group observes that, on several occasions since then, the Guarantees Court and an *amparo* court substituted the preventive measure of pretrial detention with house arrest in view of Ms. Linconao's state of health. These decisions were subsequently revoked by the Court of Appeal in response to appeals lodged by the Attorney General's Office pursuant to the Counter-Terrorism Act.

39. The Working Group notes that, on 14 November 2017, Temuco Criminal Court delivered a unanimous judgment acquitting the 11 Mapuche community members, including Ms. Linconao. The Court's decision was based on the lack of evidence that the accused had participated in the criminal acts that they had been charged with having committed. The only evidence submitted to support the charges was a witness statement that was legally flawed and contained gaps and contradictions.

40. The Working Group observes that the Court ruled definitively that Ms. Linconao is innocent of the murders of the Luchsinger-Mackay couple. Despite this, on 29 December 2017, Temuco Court of Appeal declared the decision null and void, and ordered a retrial of the 11 persons accused.

Category III

41. The Working Group must analyse, in accordance with its methods of work, whether there was a total or partial observance by the authorities of international norms relating to the right to a fair trial, such as those established in the Universal Declaration of Human Rights and the Covenant. If the non-observance of these norms was of sufficient gravity, it may be concluded that the detention was arbitrary under category III.

42. The Working Group concurs with the Human Rights Committee's analysis, in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, of the scope of the right of all persons to be presumed innocent, as set out in article 14 (2) of the Covenant. The Committee indicated that all persons accused of an offence should be treated as innocent until convicted beyond reasonable doubt. Like the Committee, the Working Group considers that:

It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. ... The media should avoid news coverage undermining the presumption of innocence.²

43. In the present case, the Working Group was persuaded that Ms. Linconao's right to be presumed innocent was not respected by the authorities. This is corroborated by the fact that she has repeatedly been targeted by the security forces, having been arrested on several occasions in a failed attempt to implicate her in the murders of the Luchsinger-Mackay couple. Ms. Linconao was deprived of her liberty for the first time following a raid carried out on the day of the victims' deaths in 2013, for a second time in 2016, in the wake of an operation conducted after economic and political groups had participated in a campaign of stigmatization and public condemnation directed at her, and for a third time when her acquittal was declared null and void and the judge ordered a retrial. All of this despite the lack of evidence pointing to her guilt.

44. The authorities' insistence on depriving Ms. Linconao of her liberty, in a subversion of the presumption of innocence, is also apparent from the many occasions on which she has been remanded in custody, only to then be released subject to various restrictive orders (house arrest, daytime and night-time curfews, prohibitions on leaving the region and the country). Moreover, on the two occasions when raids were conducted, large numbers of police and State security officers were deployed even though it was not a case of "hot

² General comment No. 32, para. 30.

pursuit”, Ms. Linconao did not have a criminal record or a history of resisting arrest, and she is over 60 years of age and a spiritual leader of the Mapuche people.

45. The Working Group was also persuaded that Ms. Linconao has been subjected to the application of a counter-terrorism law that has been flagged as incompatible with due process obligations by several human rights protection mechanisms. For example, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concluded that:

In cases where the Counter-Terrorism Law has been invoked, it is invariably used as an adjunct to a substantive criminal offence which can be prosecuted under ordinary criminal law. If that law is invoked, the accused is subjected to a number of significant procedural and substantive disadvantages.³

46. The Working Group was convinced that Chile failed to meet its obligations with regard to pretrial detention in the specific case of Ms. Linconao. The right to personal liberty may be restricted through the imposition of pretrial detention or custody, provided that this is done in accordance with applicable national and international standards. In this respect, the Working Group considers it appropriate to highlight that the Inter-American Court of Human Rights, in a case against Chile, indicated that, for pretrial detention to adhere to inter-American standards, it must satisfy certain requirements, namely that: (a) it is a precautionary measure that does not become a premature punishment; (b) the person is detained for the purposes of preventing him or her from obstructing investigations or evading justice; and (c) there is sufficient reasonable evidence that the person took part in the unlawful act. In the Court’s opinion, if there is not the slightest evidence linking the individual to the wrongful act investigated, there will be no need to safeguard the objectives of the proceedings.⁴ On the basis of the information received, including in relation to Ms. Linconao’s acquittal, the Working Group notes that, at the time when the first pretrial detention orders were issued, there was scant evidence, and this evidence was disregarded by the judiciary, in particular a key witness statement that was later found to have been made under duress. This implies that there was not sufficient or reasonable evidence that Ms. Linconao participated in the unlawful act or that she was capable of obstructing investigations or evading justice. Consequently, the Working Group considers that the standards established in articles 9 and 14 of the Covenant were not met, to the detriment of Ms. Linconao.

47. The Working Group also wishes to recall that article 14 (7) of the Covenant stipulates that “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”. Like the Human Rights Committee, the Working Group considers that this provision prohibits a country’s authorities from summoning or bringing a person who has been convicted or acquitted of an offence before a court (the same court or a different one) for the same offence.⁵ In the present case, Ms. Linconao had been tried, and the judgment against her had become final. Nevertheless, the most recent trial of Ms. Linconao is reportedly the third that she has had to face in relation to the deaths of the Luchsinger-Mackay couple, in contravention of the right not to be tried twice for the same offence. The Working Group considers that the violation of this right, which is enshrined in article 14 (7) of the Covenant, is of sufficient gravity to render Ms. Linconao’s detention arbitrary.⁶

48. In the light of the above, the Working Group considers that the authorities seriously violated the right to a fair trial under articles 9 and 14 of the Covenant, which renders the deprivation of liberty of Ms. Linconao arbitrary under category III.

³ A/HRC/25/59/Add.2, para. 55.

⁴ *Norín Catrimán et al. v. Chile*, para. 311.

⁵ General comment No. 32, para. 54.

⁶ For example, opinions Nos. 56/2015 and 25/2016.

Category V

49. As mentioned above, the Working Group found that Ms. Linconao was detained under the Counter-Terrorism Act. The Working Group wishes to recall that the implementation of the Act has been a matter of concern on the agenda of the international community for some time.

50. The Act, which was adopted by the ruling military junta and promulgated by Augusto Pinochet on 16 May 1984, has been applied specifically to the detriment of the Mapuche people. In the aforementioned case against Chile, the Inter-American Court of Human Rights indicated that “it is evident that members of the Mapuche indigenous people or activists linked to their cause have been prosecuted and, at times, convicted for actions that the law presumed to be terrorist acts”.⁷

51. Meanwhile, the Working Group on Arbitrary Detention, the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism sent a communication to the Government of Chile (UA CHL 3/2017) in which they expressed concern about alleged violations of due process in several court cases that form part of a broader context of stigmatization of the Mapuche people and defenders of indigenous peoples’ rights, and about the application of the Counter-Terrorism Act to individuals belonging to the Mapuche people.

52. In this regard, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recalled that:

The issue has been highlighted by a number of international and national bodies, including treaty bodies, special procedures, the Inter-American Commission on Human Rights and the Chilean National Human Rights Institution. Among others, the Special Rapporteur on the rights of indigenous peoples has expressed his concern at allegations of abuse and violence by police officers against members of the Mapuche people, in the context of police searches and other police operations (A/HRC/12/34/Add.6, para. 62). The issue was also recently highlighted by the Committee on the Elimination of Racial Discrimination, which observed that the enforcement of the Counter-Terrorism Act and the undue and excessive use of force against members of the Mapuche people, including children, women and older persons, could have negative and discriminatory impacts on indigenous peoples that go beyond their impacts on the individuals suspected of having committed an offence (CERD/C/CHL/CO/19-21, para. 14; see also CEDAW/C/CHL/CO/5-6, paras. 20 and 21).⁸

53. Furthermore, the Human Rights Committee has indicated that it is concerned by “reports that [the Counter-Terrorism Act] has been used to investigate and, in some cases, to prosecute members of Mapuche communities. The Committee repeats that [procedural guarantees] have been restricted by the application of this Act”.⁹ Similarly, the Committee against Torture has expressed concern that the Act limits fundamental due process safeguards and has stressed that it is “particularly concerned about the cases where the Act is inappropriately applied in order to bring proceedings for terrorism against Mapuche activists”.¹⁰

54. The Working Group is also conscious of the prominent role that Ms. Linconao has played within the Mapuche community as a spiritual and ancestral leader and of the activities that she has undertaken in this capacity, which include defending the lands and cultural and historical interests of her community by, for example, successfully taking legal action against economic projects to exploit natural resources.

⁷ *Norín Catrimán et al. v. Chile*, para. 215.

⁸ A/HRC/25/59/Add.2, para. 70.

⁹ CCPR/C/CHL/CO/6, para. 7.

¹⁰ CAT/C/CHL/CO/6, para. 18.

55. Taking into account the information presented, the Working Group was persuaded that Ms. Linconao, as an indigenous woman, defender of her people's right to environment and spiritual leader within her community, was detained and charged with offences under the Counter-Terrorism Act, which is applied disproportionately to the detriment of members of the Mapuche community. In the Working Group's view, Ms. Linconao's detention pursuant to the Act is based on discrimination on the grounds of ethnic origin and political opinion, because of her efforts to protect her culture and environment, which renders the detention arbitrary under category V.

56. Bearing in mind that Ms. Linconao was stripped entirely of her traditional dress, which caused serious physical and spiritual harm, and the allegations that have been received concerning her state of health, the Working Group refers the case to the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health for their consideration and possible action. In addition, taking into account the violations of due process guarantees and the application of the Counter-Terrorism Act, the Working Group has decided to refer the present case to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

Disposition

57. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Francisca Linconao Huircapán, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, is arbitrary and falls within categories III and V.

58. Under applicable international law, victims of arbitrary detention have the right to seek and obtain reparation from the State, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Working Group therefore requests the Government to make appropriate reparation to Ms. Linconao, including through the restitution of her right to personal liberty.

59. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Linconao and to take appropriate measures against those responsible for the violation of her rights.

60. The Working Group urges the Government to make efforts to reconcile Chilean legislation, in particular the Counter-Terrorism Act, with the State's international human rights obligations, in the light of the considerations set out in the present opinion and those of universal and regional human rights mechanisms.

61. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the rights of indigenous peoples, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the independence of judges and lawyers, and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism for appropriate action.

62. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

63. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Ms. Linconao's rights to personal liberty and freedom of movement have been guaranteed and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Linconao;

(c) Whether an investigation has been conducted into the violation of Ms. Linconao's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Chile with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

64. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

65. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

66. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.¹¹

[Adopted on 19 November 2018]

¹¹ Human Rights Council resolution 33/30, paras. 3 and 7.