INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF THE MAYA KAQCHIKEL INDIGENOUS PEOPLES OF SUMPANGO ET AL. V. GUATEMALA

JUDGMENT OF OCTOBER 6, 2021

(Merits, Reparations and Costs)

In the case of the *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Elizabeth Odio Benito, President
L. Patricio Pazmiño Freire, Vice President
Eduardo Vio Grossi
Humberto Antonio Sierra Porto
Eduardo Ferrer Mac-Gregor Poisot
Eugenio Raúl Zaffaroni, and
Ricardo Pérez Manrique

also present,

Pablo Saavedra Alessandri, Registrar
Romina I. Sijniensky, Deputy Registrar

in accordance with Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and with Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules" or "Rules of the Court"), delivers this judgment, structured as follows:

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I
INTRODUCTION OF THE CASE AND CAUSE OF THE ACTION

1. *The case submitted to the Court*. On April 3, 2020, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the case of the *Maya Kaqchikel Indigenous Peoples of Sumpango and others regarding the Republic of Guatemala* (hereinafter "the State" or "the State of Guatemala", or "Guatemala"), pursuant to Articles 51 and 61 of the American Convention. According to the Commission, the dispute concerns four indigenous communities of Guatemala (Maya Kaqchikel of Sumpango, Maya Achí of San Miguel Chicaj, Maya Mam of Cajolá and Maya Mam of Todos Santos Cuchumatán) that were allegedly prevented from freely exercising their right to freedom of expression and their cultural rights through their community radios stations. This situation was the result of legal obstacles that prevented them from accessing radio frequencies, as well as an alleged policy of criminalization of community radio stations operated without authorization. The case also concerns the alleged lack of legal recognition of community media and the alleged discriminatory regulations that govern radio broadcasting. The Commission concluded that the domestic regulations and the failure to adopt affirmative measures for equal access to radio frequencies for the benefit of indigenous peoples, violated their rights to freedom of expression, equality before the law and cultural rights, recognized in Articles 13, 24 and 26 of the American Convention, in relation to Articles 1(1) and 2 thereof. The Commission also determined that the criminalization of the operation of two indigenous community radio stations (Radio Ixchel and "La Voz del Pueblo"), violated the right to freedom of expression, enshrined in Article 13 of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of the Maya Kaqchikel indigenous peoples of Sumpango and the Maya Achí of San Miguel Chicaj.

2. *The following proceedings took place before the Commission*:

   a. *Petition*. On September 28, 2012, *Asociación Sobrevivencia Cultural*, *Asociación Mujb'ab'l Yol Encuentro de Expresiones*, Cultural Survival Inc. and the Human Rights and Indigenous Peoples Clinic of Suffolk University Law School presented the initial petition on behalf of the four indigenous communities mentioned above.

   b. *Admissibility Report*. On May 5, 2018, the Commission adopted Admissibility Report No. 51/18 (hereinafter "Report of Admissibility" or "Report No. 51/18"), in which it concluded that the initial petition was admissible.

   c. *Report on the Merits*. On November 9, 2019, the Commission issued Merits Report No. 164/19 (hereinafter "Merits Report" or "Report No. 164/19"), pursuant to Article 50 of the Convention, in which it reached a series of conclusions[1] and made various recommendations to the State.

   d. *Notification to the State*. On January 3, 2020, the Commission notified the Merits Report to the State, granting it two months to report on its compliance with the recommendations. The State presented a brief indicating that it had forwarded the Merits Report to the relevant authorities; however, it did not express its willingness to comply with the Commission's recommendations, nor did it request an extension

[1] The Commission concluded that the State of Guatemala violated the rights recognized in Articles 13 (freedom of thought and expression); 24 (equality before the law) and 26 (cultural rights) of the American Convention, in relation to Articles 1(1) (obligation to respect rights) and 2 (duty to adopt provisions of domestic law) of the same instrument, to the detriment of the following indigenous peoples: Maya Kaqchikel of Sumpango, in Sacatepéquez; Achí of San Miguel Chicaj, in Baja Verapaz; Mam of Cajolá, in Quetzaltenango, and Mam of Todos Santos Cuchumatán, in Huehuetenango.

to suspend the deadline of Article 51 of the American Convention.

3. *Submission to the Court.* On April 3, 2020, the Commission submitted to the Inter-American Court all the facts and human rights violations described in Report No. 164/19, "given the need to obtain justice and reparation."[2] The Court notes that approximately seven years and six months have elapsed between the presentation of the initial petition before the Commission and the submission of the case before the Court.

4. *Requests of the Inter-American Commission*. Based on the foregoing, the Commission asked the Court to find and declare the State's international responsibility for the violations indicated in its Merits Report (*supra* para. 2(c)) and to order the State to implement the measures of reparation described and analyzed in Chapter VIII of this judgment.

II
PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and the representatives*. On August 5, 2020, the Court notified the State and the representatives of the alleged victims[3] (hereinafter "the representatives") of the submission of the case by the Commission.

6. *Brief with pleadings, motions and evidence.* On October 5, 2020, the Human Rights and Indigenous Peoples Clinic of Suffolk University Law School[4] submitted to the Court a brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief"), as legal representative of the aforementioned indigenous communities, pursuant to Articles 25 and 40 of the Court's Rules of Procedure. The representatives agreed substantially with the arguments of the Commission and asked the Court to declare the violation of Articles 1(1), 2, 13, 24 and 26 of the Convention. They also requested various measures of reparation and the reimbursement of costs and expenses.

7. *Answering brief*. On January 21, 2021, the State[5] presented before the Court its answering brief in response to the submission of the case and Merits Report of the Inter-American Commission and to the leadings and motions brief of the representatives (hereinafter "answer" or "answering brief"). In this brief, the State raised a preliminary objection and challenged the alleged violations and the requests for measures of reparation submitted by the Commission and the representatives.

8. *Observations on the preliminary objection*. On March 15, 2021, the representatives and

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[2] The Commission appointed Commissioner Esmeralda Arosemena de Troitiño, then Executive Secretary Paulo Abrão, and then Special Rapporteur for Freedom of Expression, Edison Lanza as its delegates. It also appointed Marisol Blanchard Vera, Assistant Executive Secretary, Jorge Humberto Meza Flores, lawyer of the Executive Secretariat of the Commission and Cecilia Maria La Hoz Barrera, lawyer of the Office of the Special Rapporteur for Freedom of Expression, as legal advisers.

[3] The representatives of the alleged victims are the Human Rights and Indigenous Peoples Clinic of Suffolk University Law School; Nicole Friederichs, attorney and director of said Clinic; Cultural Survival, Inc., *Sobrevivencia Cultural* ; the *Asociación Mujb'ab'l Yol;* and attorney Cristian Otzín Poyón, of the *Nim Ajpu* Association of Maya Attorneys and Notaries of Guatemala.

[4] The Inter-American Commission appointed Nicole Friederichs, an attorney and Director of the Human Rights and Indigenous Peoples Clinic of the Suffolk University Law School, as representative of the alleged victims (the four indigenous communities mentioned previously). Ms. Friederichs, along with Ms. Amy Van Zyl-Chavarro and law students Rebecca Brouillette, Suna Garcia Guzman, Michaela Hinckley-Gordon Shushrusha Lamsal and Joshua Lutts, as members of the Clinic, signed the pleadings and motions brief.

[5] On September 4, 2020, the State accredited Mr. Jorge Luis Donado Vivar, Attorney General of the Nation, as its agent before the Court, and Ana Luisa Gatica Palacios, Director of the International Affairs Unit of the Attorney General's Office, and Lilian Elizabeth Nájera Reyes, of the International Affairs Unit of the Attorney General's Office, as alternate agents.

the Commission presented, respectively, their observations on the preliminary objection presented by the State.

9. *Public Hearing*. In an order dated April 28, 2021,[6] the President of the Court called the State, the representatives and the Inter-American Commission to a public hearing to receive their final oral arguments and observations, respectively, on the preliminary objection and possible merits, reparations and costs, and to receive the statements of three alleged victims, an expert witness proposed by the representatives and an expert witness proposed by the Commission. The public hearing was held on June 9 and 10, 2021, during the 142nd regular session of the Court, which took place via a videoconferencing platform.[7]

10. *Amici curiae.* The Court received six *amicus curiae* briefs presented by: 1) researchers of the International Human Rights Practicum of Boston College Law School[8]; 2) the *Observatorio Latinoamericano de Regulación de Medios y Convergencia* (Latin American Observatory of Media Regulation and Convergence) and the World Association of Community Radio Broadcasters;[9] 3) *Asociación Latinoamericana de Investigadores de la Comunicación* (Latin American Association of Communication Researchers);[10] 4) José Ignacio Hernández G;[11] 5) the Human Rights Group of the Externado University of Colombia,[12] and 6) *Bufete para Pueblos Indígenas* (Indigenous Peoples' Law Firm).[13]

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6 *Cf. Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala. Call to a Public Hearing.* Order of the President of the Inter-American Court of Human Rights of April 28, 2021. Available at: http://www.corteidh.or.cr/docs/asuntos/pueblos_indigenas_maya_kaqchikel_de_sumpango_y_otros_28_04_21.pdf.

7 The following appeared at the hearing: a) for the Inter-American Commission: Esmeralda Arosemena de Troitiño, Commissioner; Pedro José Vaca Villarreal, Special Rapporteur for Freedom of Expression; Marisol Blanchard, Assistant Executive Secretary of the Commission; Erick Acuña and Cecilia La Hoz, advisers of the Commission; b) for the representatives: Nicole Friederichs, Amy Van Zyl-Chavarro, Cristian Oztín and Julian Bal, and c) for the State: Jorge Luis Donado Vivar, Attorney General of the Nation, Head of Delegation; Diego Montenegro, Undersecretary General of the Presidency, Secretary General of the Presidency of the Republic; Ana Isabel Carrillo Fabián, Director General of International Multilateral and Economic Affairs, Head of Delegation; Sandra Noriega, Ambassador of Guatemala in Costa Rica; Lilian Elizabeth Nájera Reyes, alternate agent of the State, Attorney General's Office; María Gabriela Hernández Siguantay, alternate agent of the State, Attorney General's Office; Maria José del Águila Castillo, Director of Human Rights, Ministry of Foreign Relations; Walter Estuardo Beltrán Sandoval, Director of Human Rights Monitoring and Promotion, Presidential Commission for Peace and Human Rights; Verónica Elizabeth Jiménez Tovar, Deputy Director of Human Rights, Ministry of Foreign Relations; Yessenia Yasmín González Gudiel, Attorney General's Office, and María Denise Ralda Quinto, First Secretary of the Human Rights Unit, Ministry of Foreign Relations.

8 The brief was signed by Daniela Urosa, Olivia Bender, Laura Noerdlinger and Sarah McWhirter and describes the alleged discrimination suffered by indigenous communities; freedom of expression as a collective right, and the alleged indirect discrimination caused by the lack of legislation to regulate community radio stations.

9 The brief was signed by Gustavo Gómez, Mónica Valdez, Javier García, Oscar Pérez and Damián Miguel Loreti, and discusses applicable legal standards related to freedom of expression and broadcasting, as well as regulations related to community radio stations.

10 The brief was signed by Tanius Karam and Gabriel Kaplún, and contains a factual and legal analysis of the alleged violations committed by the State of Guatemala against the Maya Kaqchikel indigenous peoples of Sumpango; Achí of San Miguel Chicaj; Mam of Cajolá, and Mam of Todos Santos Cuchumatán. It also describes the structural context of community radio stations in Guatemala.

11 The brief was signed by José Ignacio Hernández G., and describes the economic basis and legal principles that regulate the intervention administrative on the radio spectrum and how the legal-administrative system of the radio spectrum should be adapted to the general principles of the inter-American *corpus iuris*.

12 The brief was signed by María Daniela Díaz Villamil, Marianna Peña Rozo, Natalia Andrea Cañaveral Pedraza, Thalía Romero Pinilla and Luisa Fernanda Ballesteros Guerrero, and refers to the right of indigenous communities to have access to the electromagnetic and radio spectrum without discrimination, and the legislation and praxis of other States in the region.

13 The brief was signed by Juan Castro. It contains data and arguments concerning the alleged context of marginalization, discrimination and exclusion of indigenous peoples in Guatemala; the role of community radio stations and the need to recognize them; the Agreement on Identity and Rights of Indigenous Peoples; an outline of the problem; the auction as an unfair mechanism; implications of the lack of regulation and the Constitutional Court's exhortation to the Guatemalan Congress; and proposed legislation presented before Congress and applicable international standards.

11. *Final written arguments and observations.* On July 12, 2021, the representatives and the State forwarded their final written arguments, with various attached documents, and the Commission presented its final written observations.

12. *Observations of the parties and the Commission*. On July 26, 2021, the representatives presented their observations on the annexes to the final written arguments forwarded by the State. On August 6, 2021, the State presented its observations on the annexes to the final arguments of the representatives, and the Commission, submitted its observations regarding the annexes to the final arguments of the State and indicated that it had no observations to make on the annexes of the representatives.

13. *Deliberation of the case*. The Court deliberated this judgment in a virtual session held on October 4, 5 and 6, 2021.[14]

III
JURISDICTION

14. The Inter-American Court has jurisdiction to hear this case, pursuant to Article 62(3) of the American Convention, given that Guatemala has been a State Party to this instrument since May 25, 1978, and accepted the Court's contentious jurisdiction on March 9, 1987.

IV
PRIOR CONSIDERATION

15. In the case *sub judice* the State presented as a preliminary objection the "identification of the alleged victims." The Court notes that, pursuant to its constant case law, this argument does not constitute a preliminary objection, since its analysis cannot result in the inadmissibility of the case or in the Court's lack of jurisdiction to hear it. Therefore, the Court will examine this issue as a prior consideration.[15]

A. Arguments of the parties and of the Commission

16. The ***State*** argued that although the Commission had named four indigenous communities as victims, the representatives, in their pleadings and motions brief, had identified eight community radios and one indigenous community without a radio station. Thus, the State asserted that, since they were legal entities, their admission as alleged victims would not be possible under Article 1 of the American Convention. It also argued that "the radio [stations] specified [in the aforementioned brief of the representatives] were not part of the initial petition, and that the Commission did not make any pronouncement with respect to them in the Merits Report."

17. The ***Commission*** considered that Guatemala's arguments correspond to the analysis of the merits of the case and, therefore, should be dismissed as a preliminary objection. It added that, in its Merits Report, it did not identify legal entities as victims in the case, but rather four indigenous communities located in four different regions of Guatemala, who operated four

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[14] This judgment was deliberated and approved during the Court's 144th regular session which, owing to the exceptional circumstances created by the COVID-19 pandemic, was held virtually in accordance with the provisions of the Court's Rules of Procedure.

[15] *Cf. Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 18, and *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 16.

different community radio stations. It also pointed out that, since the alleged victims in this case correspond to the aforementioned indigenous peoples, "the reference to other community radio stations operated by these peoples, insofar as they are related to the facts of the case, does not constitute an inclusion of new victims […], as indicated by the State."

18. The ***representatives*** stated that, since the petition was submitted to the Inter-American Commission, the alleged victims have been identified as indigenous communities and reference has been made to their radio stations. They also indicated that, between 2012 and 2019, they updated the Commission on new facts, especially those related to the raids on indigenous community radio stations carried out by state authorities. They emphasized that, when the case was submitted to the Court, due to the nature of the relationship between the indigenous communities and their radio stations,[16] they deemed it necessary to obtain powers of attorney from the ancestral authorities of the indigenous communities, as well as from their respective community radio stations. However, they pointed out that, due to: i) only two of the four indigenous communities originally named as alleged victims still having functioning community radio stations, and ii) difficulties in obtaining power of attorney letters from those communities, the representatives "decided to include other indigenous communities as [alleged] named victims." They argued that the communities included "had previously contributed to the case while it was before the Commission and are well known to the representatives […]." They indicated that the addition of these indigenous communities was aimed at ensuring that "the extent and impact of human rights violations in Guatemala could presented to the Court."

B. Considerations of the Court

19. The Court confirms that, in Merits Report No. 164/19, the Commission considered the following indigenous communities as victims: the Maya Kaqchikel of Sumpango, in Sacatepéquez; the Maya Achí of San Miguel Chicaj, in Baja Verapaz; the Maya Mam of Cajolá, in Quetzaltenango; and the Maya Mam of Todos Santos Cuchumatán, in Huehuetenango.

20. For their part, in their pleadings and motions brief, the representatives added six different indigenous communities, in addition to the ones originally indicated, namely: (1) the Maya Q'eqchi' of El Estor, Izabal (Radio Xyaab' Tzultaq'a); (2) the Maya Q'eqchi,' of Arroyo de Leche, Cobán (Radio Nimlajacoc); (3) the Maya Mam, of San Idelfonso, Ixtahuacán (Radio Nan Pix); (4) Los Encuentros, Sololá (Radio Juventud); (5) the Maya Q'anjob'al, of Santa Eulalia, Huehuetenango (Radio Jolón Konob), and (6) the Maya K'iche', of Totonicapán, Totonicapán (Radio La Nina).

21. In view of the foregoing, the Court considers that the alleged victims in this case are the indigenous communities that operated or operate community radio stations – not the radio stations themselves, as alleged by the State - and that these communities are the holders of the rights that are alleged to have been violated in the instant case.[17]

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[16] The representatives emphasized that the "fundamental characteristic [of community radio] is the participation of the community in ownership as well as programming, management, operation, financing and evaluation […] and [they] exist to satisfy the communication needs of their communities' members and to enable them to exercise their rights of access to information and freedom of expression." World Association of Community Radio Broadcasters (AMARC). *Principles for a Democratic Legislation on Community Broadcasting*, principles 3 and 4. Available at: https://www.amarcmexico.org/pdf/international/01-Principles.pdf.

[17] The Court recalls that, according to its case law, indigenous communities are holders of collective rights protected by the American Convention, "[given that] indigenous and tribal peoples and communities, unified by their particular way of life and identity, exercise some of the rights recognized in the Convention collectively" *Cf*. *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 And 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) And (B) of the Protocol of San Salvador). Advisory Opinion* OC-22/16

22. Furthermore, Article 35(1) of the Court's Rules of Procedure establishes that alleged victims must be identified in the Merits Report, pursuant to Article 50 of the American Convention. It is therefore incumbent upon the Commission to identify precisely, and at the proper procedural opportunity, the alleged victims in a case before the Court, except in the exceptional circumstances set forth in Article 35(2) of the Court's Rules of Procedure, namely, when it has not been possible to identify one or more alleged victims in cases of massive or collective violations, the Court will decide in due course whether to consider them victims in accordance with the nature of the violation.[18] This means that Article 35(2) conditions the possibility of identifying new alleged victims in a contentious case, in addition to those already named by the Inter-American Commission, to i) the presence of mass or collective violations; ii) and that, for this reason, it has not been possible to identify one or more alleged victims of the facts of the case, and iii) that such failure to identify them is justifiable.

23. In the case under analysis, this Court finds that the six indigenous communities included in the aforementioned pleadings and motions brief (*supra* para. 20) were not identified as alleged victims in the Merits Report. On the contrary, the Commission expressly excluded the facts related to the community radio stations operated by the aforementioned six indigenous communities. Indeed, footnote 20 of the Commission's Merits Report stated:

> In their brief of observations to the merits, dated December 20, 2018, the petitioners included a list of community radio stations that were allegedly raided, many of which are not part of the present case. The following are examples of raids carried out on community radio stations in Guatemala: 1) July 7, 2006, raid at Radio Ixchel, operated by the Maya Kaqchikel people of Sumpango, in Sacatepéquez; 2) 2008 raid on Radio San Pedro, of San Pedro in Sololá; 3) December 8, 2009 raid at Radio San Juan de Comalapa in Chimaltenango; 4) May 8, 2012, raid at Radio Uqul Tinamit de San Miguel Chicaj in Baja Verapaz; 5) October 11, 2012, raid at Radio Doble Vía, San Mateo de Quetzaltenango; 6) November 15, 2012, and November 21, 2013 raids at Radio Damasco de San Pablo, in San Marcos; 7) February, 27, 2014, raid at Radio San José de San Pedro, in San Marcos; 8) December 9, 2014, at Radio Juventud, in Patzicia, Chimaltenango; 9) January 20, 2015, raid at Radio Snuq'Jolom Konob, Santa Eulalia, in Huehuetenango; 10) February 25, 2015, raid at Radio Ixmukane, in Santa Cruz del Quiché, in Quiche; 11) February 25, 2015, raid at Radio Swan Tinamit, in Chichicastenango, and 12) September 16, 2015, raid at Radio Restauración, in Chimaltenango. At least six of these community radio stations do not currently broadcast their programs and six suspended their transmissions for a certain period of time and later returned to the air. In each of the 12 raids, the authorities seized broadcasting equipment and in at least four cases, some of the volunteers and/or employees were arrested. The petitioners requested precautionary measures for eight of these radio stations, which are not part of this case (Underlining added).

24. As stated in the above note, the Commission did not identify as alleged victims the indigenous communities that the representatives included in their pleadings and motions brief, nor did it include the facts concerning the alleged raids on their community radio stations in the Merits Report. Therefore, the Court considers that said communities are not alleged victims in this case, since none of the exceptions set forth in Article 35(2) of the Rules of the Court are present or were alleged.

25. At the same time, and taking into account that the State raised no objection in this regard, the Court deems it pertinent to point out that the representatives have not submitted

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of February 26, 2016. Series A No. 22, para. 75, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs*. Judgment of February 6, 2020. Series C No. 400, para. 154.

[18] *Cf. Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012. Series C No. 250, para. 48; *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs*. Judgment of February 6, 2020. Series C No. 400, para. 31, and *Case of Ríos Avalos et al. v. Paraguay. Merits, reparations and costs*. Judgment of August 19, 2021. Series C No. 429, para. 15.

to this Court power of attorney letters granted by the Maya Mam indigenous people of Cajolá on the grounds that they have not been able to establish contact with that community, mainly due to the situation caused by the COVID-19 pandemic. The lack of power of attorney mentioned refers to the legal representation of an indigenous community identified by the Commission in its Merits Report, so that it is not an issue related to the very nature of the indigenous people as alleged victims.[19] Furthermore, there was clearly continuity in the representatives' actions since the processing of the case before the Commission, given that most of the representatives have acted as petitioners before the Commission, and there is no record that, in all the years that the process lasted, the Mam community of Cajolá has expressed any disagreement with such actions.[20] Accordingly, and without prejudice to the fundamental importance of the duty of prior consultation with indigenous peoples on any matter that may affect them, the Court considers that the Maya Mam indigenous community of Cajolá is one of the alleged victims in this case.

26. Consequently, the Court will consider as alleged victims in the case under analysis only those indigenous communities identified by the Inter-American Commission in the Merits Report, namely: Maya Kaqchikel of Sumpango; Maya Achí of San Miguel Chicaj; Maya Mam of Cajolá, and Maya Mam of Todos Santos Cuchumatán.

V
EVIDENCE

A. Admissibility of the documentary evidence

27. The Court received various documents submitted as evidence by the Commission, the representatives and the State, attached to their main briefs (*supra* paras. 3, 6 and 7). As in other cases, the Court admits those documents submitted in a timely manner (Article 57 of the Rules)[21] by the parties and the Commission, whose admissibility was not disputed or challenged, and whose authenticity was not questioned.[22]

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[19] *Cf. Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 282, para. 88.

[20] *Cf. Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs, supra*, para. 88.

[21] In general, and in accordance with Article 57(2) of the Rules, documentary evidence may be presented together with the briefs submitting the case, of pleadings and motions or answering briefs, as appropriate. Evidence submitted outside of those procedural opportunities is not admissible, except in the exceptions established in Article 57(2) of the Rules of Procedure (*force majeure* or serious impediment) or if it concerns a supervening fact, that is, one that occurred after the aforementioned procedural opportunities.

[22] *Cf.* Article 57 of the Rules; see also *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Garzón Guzmán et al. v. Ecuador. Merits, reparations and costs*. Judgment of September 1, 2021. Series C No. 434, para. 33.

28. In addition, the Court received documents attached to the final written arguments submitted by the State[23] and the representatives[24] (*supra* para. 11). On July 26 and August 6, 2021, the representatives and the State, as well as the Commission, respectively, submitted observations to these documents. In this regard, the ***Commission*** only referred to the content of the State's annexes and indicated that it had no observations to make regarding the annexes to the arguments of the representatives.

29. For their part, the ***representatives*** pointed out that six pages of Annex "AE-03", attached to the State's final arguments, appears to be identical to a part of Annex "AE-09" of the State's answering brief, but that another six pages of Annex "AE-03" had not been previously submitted to the Court, despite the fact that they came from the same criminal case file to which Annex "AE-03"refers. The ***Court*** recalls that evidence submitted outside the proper procedural opportunities is not admissible, except in the exceptions established in Article 57(2) of the Rules of Procedure, namely, *force majeure*, serious impediment, or if it refers to an event that occurred after the aforementioned procedural moments.[25] In this regard, the Court notes that Annex "AE-03" to the State's final arguments refers to the criminal file related to the accusation against Anselmo Xunic, which was already at the disposal of the State at the time it submitted its answer. Consequently, and since none of the exceptions specified in the Rules for the admission of evidence presented out of time are present, the annex in question will not be admitted.

30. The ***State***, in turn, argued that Annex 1 to the representatives' final written arguments should not be admitted, since it concerns a request for precautionary measures filed by the representatives before the Commission and concluded in May 2019. It also pointed out that some of the receipts submitted by the representatives as "Annex 2" refer to expenses incurred prior to the submission of the pleadings and motions brief, and therefore its submission at this point would be time-barred. The ***Court*** finds that Annex 1 and pages 1 to 4 and 9 to 11 of Annex 2 to the final written arguments of the representatives were not offered at the proper procedural opportunity, and that none of the exceptions provided in the Rules of Procedure for the untimely admission of evidence are present. For this reason, they will not be admitted.

31. The Court admits the other documents attached to the final arguments of the parties, insofar as they refer to aspects discussed at the public hearing in the case, to questions asked by the judges during that hearing or to proof of expenses incurred by the representatives in the litigation of this case.

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[23] The State of Guatemala attached 12 annexes to its final written arguments: (i) AE-01 – Decision SIT-296-2004 of the Superintendency of Telecommunications, of August 2, 2004; (ii) AE-02 – Conviction No. 14003-2014-00280/UA/AM. Trial court for drug trafficking and environmental crimes of the department of Quiché, Santa Cruz del Quiché, September 1, 2016; (iii) AE-03 - Documents from File 653-2006. Trial court for criminal matters, drug-trafficking and environmental crimes of the department of Sacatepéquez, La Antigua Guatemala; (iv) AE-04 – Decision on files 1446-2015 and 1449-2015. Constitutional Court, of July 8, 2015; (v) AE-04A - Official letter 601-2021-AAP/DDHH/GM/AH. Ministry of Public Health and Social Assistance. Dated June 21, 2021; (vi) AE-05 - Official letter DL-MAAA-pv-839-2021 of the Congress of the Republic, of June 4, 2021; (vii) AE-06 - Initiative No. 4087, approval of the Community Media Law; (viii) AE-07 - Initiative No. 4479, proposed reforms to the Criminal Code, Decree No. 17-73 of the Congress of the Republic; (ix) AE-08 - Initiative No. 3142, proposed reforms to the General Telecommunications Law, Decree 94-96 of the Congress of the Republic; (x) AE-09 - Initiative No. 3151, proposed reforms to the General Telecommunications Law, Decree 94-96 of the Congress of the Republic; (xi) AE-10 - Initiative Reg. No. 2621, approval of the law on community broadcasters, and (xii) AE-11 – Framework Law of the Peace Accords, Decree No. 52-2005 of the Congress of the Republic.

[24] The representatives of the alleged victims attached two documents to their final written arguments: (i) an email and documents sent by the representatives to the Commission on November 30, 2015; (ii) receipts and invoices from January 2018 to July 2021.

[25] *Cf. Case of Barbani Duarte et al. v. Uruguay*. *Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 22, and *Case of Garzón Guzmán et al. v. Ecuador. Merits, reparations and costs*, *supra,* footnote 16.

32. Finally, the Court notes that both the State and the representatives submitted some considerations on the annexes to the other party's final written arguments that do not refer to their admissibility, but rather to their probative value. The Court will take these considerations into account in its assessment of the evidence.

B. Admissibility of the testimonial and expert evidence

33. This Court deems it pertinent to admit the statements made by affidavit[26] and at the public hearing[27] insofar as they are in keeping with the purpose defined by the President in the order that required them and with the purpose of this case.

VI
FACTS

34. In this chapter, the Court will establish the facts of the case based on the factual framework contained in the Merits Report of the Inter-American Commission, the arguments presented by the parties and the body of evidence, as follows: A) the situation of the indigenous communities in Guatemala and the media system; B) the relevant regulatory framework; and C) the raids carried out at Radio Ixchel and Uqul Tinamit "La Voz del Pueblo".

A. The situation of the indigenous communities in Guatemala and the media system

35. Guatemala is a country in which a variety of peoples coexist, including the Maya indigenous people, the Xinka indigenous people and the Garífuna indigenous people. According to the 2018 population census, 43.6% of Guatemala's population self-identifies as indigenous.[28] However, according to estimates provided by the Maya, Garífuna and Xinka communities themselves, indigenous peoples represent 65% of the population.[29]

36. In addition, approximately 80% of Guatemala's indigenous population is considered poor, and the rate of extreme poverty among the indigenous population is three times higher than that of the non-indigenous population.[30] Approximately 70% of the indigenous population

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[26] The Court received the statements, rendered by affidavit, of the following persons: Ana Margarita Chen Xol, affidavit rendered on May 17, 2021 (evidence file, folios 1508 to 1512); Antonio Pérez Felipe, affidavit rendered on May 14, 2021(evidence file, folios 1513 to 1517); Olga Mercedes Ajcalon, affidavit rendered on May 20, 2021 (evidence file, folios 1518 to 1525); Raúl Tacaj Xol, affidavit rendered on May 15, 2021 (evidence file, folios 1526 to 1532); Alfredo Rax Coc, affidavit rendered on May 28, 2021 (evidence file, folios 1552 to 1559); Robin Macloni Sicajan, affidavit rendered on May 28, 2021 (evidence file, folios 1533 to 1538); Rosa Conception Ajanel Ajpacajá, affidavit rendered on May 25, 2021 (evidence file, folios 1539 to 1544); Alfredo Baltazar Pedro, affidavit rendered on May 14, 2021(evidence file, folios 1501 to 1507); Irma Alicia Velásquez Nimatuj, affidavit rendered on May 20, 2021 (evidence file, folios 1560 to 1571); Víctor Manuel Ángel Vásquez, affidavit rendered on May 20, 2021 (evidence file, folios 1545 to 1551); Lorie Graham, expert opinion rendered by affidavit on May 27, 2021 (evidence file, folios 1441 to 1484), and Rudy Estuardo Santos, statement requested by the Court as *ex officio* evidentiary procedures, rendered by affidavit on May 31, 2021 (evidence file, folios 1485 to 1500).

[27] The Court received the statements provided during the public hearing held in this case by Anselmo Xunic, María Pedro of Pedro, Rosendo Pablo, José Francisco Calí Tzay and Adriana Sofía Labardini Inzunza.

[28] *Cf.* National Institute of Statistics of Guatemala. XII National Population Census and VII Housing Census of 2018. Available at: https://www.ine.gob.gt/ine/poblacion-menu/.

[29] *Cf.* Written version of the expert opinion presented before the Court by Adriana Sofía Labardini Inzunza of June 3, 2021 (evidence file, folio 1578).

[30] *Cf.* National Institute of Statistics of Guatemala. National Survey of Living Conditions (ENCOVI). 2014. Available at: https://www.ine.gob.gt/sistema/uploads/2015/12/11/vjnvdb4izswoj0ztuivpicaaxet8lzqz.pdf; OAS, Inter-American Commission of Human Rights. *Report on the situation of the Human Rights in Guatemala.* OAS/Ser.L/V/II. Doc. 208/17, December 31, 2017, para. 4. Available at: http://www.oas.org/eng/iachr /reports/pdfs/Guatemala2017-eng.pdf; written version of the expert opinion submitted to the Court by Adriana Sofía Labardini Inzunza (merits file, folios 1578 and 1579), *supra*; amicus curiae brief presented by researchers of the International Human Rights

work in the informal sector, and only 10% of those with social security are indigenous people.[31] Indigenous people also have a high rate of illiteracy,[32] since 50% of indigenous children do not attend school. Indigenous girls who receive education usually attend school for approximately two years, compared to six years for non-indigenous girls.[33] Moreover, "the majority of the indigenous population does not have access to primary health care" due to "lack of infrastructure, personnel and medicines."[34]

37. Moreover, as the Court has indicated in its judgments in previous cases concerning Guatemala,[35] the internal armed conflict had a significant cultural impact on the country's indigenous communities. In this regard, the Court noted that the "human rights violations that occurred during the internal armed conflict in Guatemala also meant the loss of cultural and religious values and practices of the Maya peoples, as well as their social, economic and political institutions."[36] The Court has likewise acknowledged the existence of racial and ethnic discrimination, the presence of racial and ethnic stereotypes, and violence against indigenous peoples.[37]

38. Historical discrimination against indigenous peoples was recognized in 1995 by the State of Guatemala in the Agreement on Identity and Rights of Indigenous Peoples[38] (hereinafter "AIDPI"),[39] which forms part of the Peace Accords signed to put an end to the internal armed conflict. The persistence of such discrimination was also recognized at the international level in 2018, when the then Special Rapporteur on the Rights of Indigenous Peoples noted, after her visit to Guatemala, that "the main structural problem affecting the

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Practicum of Boston College Law School (merits file, folio 763), and amicus curiae brief presented by the *Bufete Para Pueblos Indígenas* (merits file, folio 946).

31 *Cf.* UN, Human Rights Council. *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Guatemala*. Doc. A/HRC/39/17/Add.3, 10 August 2018, para. 87.

32 *Cf.* Written version of the expert report submitted to the Court by José Francisco Calí Tzay on May 24, 2021 (evidence file, folio 1415).

33 *Cf.* UN, Human Rights Council. *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Guatemala*, *supra*, para. 92.

34 UN, Human Rights Council. *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Guatemala, supra*, para. 89.

35 *Cf. Case of the Plan de Sánchez Massacre v. Guatemala. Merits*. Judgment of April 29, 2004. Series C No. 105, and *Members* of *Chichupac Village and Neighboring Communities of the Municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 328.

36 *Cf. Case of the Plan de Sánchez Massacre v. Guatemala*. *Merits, supra,* para. 42.7 and *Members* of *Chichupac Village and Neighboring Communities of the Municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs, supra,* para. 80.

37 *Cf. Members* of *Chichupac Village and Neighboring Communities of the Municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs, supra*, paras. 318 to 320.

38 The Agreement on the Identity and Rights of Indigenous Peoples states that "to overcome the age-old discrimination against indigenous peoples, the assistance of all citizens will be needed in the effort to change thinking, attitudes and behaviour. This change must begin with a clear recognition by all Guatemalans of the reality of racial discrimination and of the compelling need to overcome it and achieve true peaceful coexistence *Cf.* Agreement on Identity and Rights of Indigenous Peoples (enacted on March 31, 1995, signed in Mexico City by the Government of the Republic of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca*, as part of the Agreement on a Firm and Lasting Peace, sponsored by the United Nations), chapter II, section A (1). Available at: http://www.lacult.unesco.org/docc/oralidad_08_70-79-anales.pdf.

39 The Agreement on Identity and Rights of Indigenous Peoples is one of the Peace Accords signed by the Government of Guatemala and the *Unidad Revolucionaria National Guatemalteca* (URNG) "to achieve peaceful solutions to the main problems that caused the armed conflict of more than 36 years." Available at: http://www.muniguate.com/images/2011/user01/fuentes_monumentos/manitas_paz/acuerdosdepazenguatemala.pdfThe Framework Law for the Peace Agreements, Decree 52-2005, characterizes the Peace Accords as "State commitments." *Cf.* Congress Decree 52-2005, of August 3, 2005, Article 3 (evidence file, folio 1827). See also: Agreement on Identity and Rights of Indigenous Peoples, *supra*, and written version of the expert opinion submitted to the Court by José Francisco Calí Tzay, *supra* (evidence file, folio 1412).

Maya, Xinka and Garífuna peoples of Guatemala is the all-pervasive racism and discrimination, which amount to *de facto* racial segregation and impinge on all areas of life."[40]

39. For his part, the current Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay, noted that the United Nations Committee on the Elimination of Racial Discrimination (hereinafter "CERD") expressed concern about "[…the continuing effects of structural discrimination faced by indigenous peoples in Guatemala, reflected in high rates of poverty, social exclusion and obstacles to the full enjoyment of economic, social and cultural rights" and in the "persistent manifestations of racial discrimination in the media," along with the recommendations of the UN Member States during the Universal Periodic Review (UPR) of Guatemala, which urged the State to "reform the legislation regarding indigenous peoples' access to radio frequencies."[41]

40. The Rapporteur also pointed out that, prior to colonization, Guatemala's indigenous peoples had a written system of cultural transmission. However, at present, oral communication is the main means used to preserve their knowledge and culture.[42]

41. In 1995, the AIDPI recognized the need to "encourage the widest possible access to the media by Maya communities and institutions and those of other indigenous peoples, as well as the widest possible dissemination in indigenous languages of the indigenous cultural heritage."[43] In particular, this agreement recognized that "the Maya, Garífuna and Xinca peoples are the authors of their cultural development,"[44] and that "the communications media play a paramount role in the defense, development and transmission of cultural values and knowledge."[45] The AIDPI pointed out that the State has a duty to "create opportunities in the official media for the dissemination of expressions of indigenous culture and to promote a similar opening in the private media."[46] Moreover, under that agreement, Guatemala made a commitment to:

> Promote, in the Guatemalan Congress, the reforms of the existing Act on radio communications that are required in order to make frequencies available for indigenous projects and to ensure respect for the principle of non-discrimination in the use of the communications media. Furthermore, promote the abolition of any provision in the national legislation that is an obstacle to the right of indigenous peoples to have their own communications media for the development of their identity […].[47]

42. Similarly, the Constitutional Court of Guatemala urged the Congress of the Republic to issue "the corresponding legislation to regulate opportunities and access for indigenous peoples

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[40] UN, Human Rights Council. *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Guatemala*, *supra*, para. 7. In 2003, the then Special Rapporteur on the rights of the indigenous peoples identified four types of interrelated discrimination suffered by indigenous peoples in Guatemala: legal, interpersonal, institutional and structural. *Cf.* UN. Human Rights Commission. *Report of the Special Rapporteur on the situation of Human Rights and fundamental freedoms of indigenous peoples*. Doc. E/CN.4/2003/90/Add.2, February 10, 2003, para. 16.

[41] Written version of the expert opinion submitted to the Court by José Francisco Calí Tzay, *supra* (evidence file, folio 1414). See also: written version of the expert opinion submitted to the Inter-American Court by Adriana Labardini, *supra* (evidence file, folios 1600 to 1603), and expert opinion rendered by affidavit by Lorie Graham on May 27, 2021 (evidence file, folios 1441 to 1484).

[42] *Cf.* Written version of the expert opinion submitted to the Inter-American Court by José Francisco Calí Tzay, *supra* (evidence file, folio 1418).

[43] *Cf.* Agreement on Identity and Rights of Indigenous Peoples, *supra*, Chapter III: Cultural Rights, section H (2).

[44] Agreement on Identity and Rights of Indigenous Peoples, *supra*, Chapter III: Cultural Rights, para. 3.

[45] Agreement on Identity and Rights of Indigenous Peoples, *supra,* Chapter III: Cultural Rights, section H: Mass Media, para. 1.

[46] Agreement on Identity and Rights of Indigenous Peoples*, supra,* Chapter III: Cultural Rights, section H: Mass Media, para. 2, item l.

[47] Agreement on Identity and Rights of Indigenous Peoples, *supra,* Chapter III: Cultural Rights, section H (2)(b).

[so that they] can obtain and exploit frequency bands of the radio spectrum, to promote the defense, development and dissemination of their languages, traditions, spirituality and other cultural expressions."[48]

43. There are approximately 424 licensed FM radio stations in Guatemala and 90 on AM frequency,[49] of which one is an indigenous community radio station, Radio Qawinaqel.[50]

44. There are also several community radio stations operated by indigenous peoples that do not have a state license to operate,[51] such as the stations belonging to the alleged victims, namely the Maya Kaqchikel of Sumpango, Maya Achí of San Miguel Chicaj, Maya Mam of Cajolá and Maya Mam of Todos Santos Cuchumatán. The indigenous community radio stations are supported operationally and financially by members of the communities they serve through contributions and voluntary work.[52]

B. The relevant regulatory framework

B.1 Regulation of broadcasting

45. The General Telecommunications Law (hereinafter "LGT") establishes the legal framework for radio broadcasting activities in Guatemala. It also establishes the forms of use and exploitation of the radio spectrum[53], as well as the procedure allocating radio frequencies in the country.[54] Article 61 of the law establishes public bidding as the sole mechanism for the adjudication of frequencies.[55]

46. This provision also describes the procedure to be followed in the event of any disagreement over the granting of an usufruct title, stating that "those individuals or legal entities that have a well-founded and legitimate interest, and who may be harmed if a title is granted, may present their objection."[56]

47. Article 62 of the LGT, in turn, refers to the public auction as a mechanism to obtain the usufruct title for frequency bands, indicating that "[t]he frequency band shall always be

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[48] *Cf.* Decision of the Constitutional Court. File No. 4238-2011, of March 14, 2012 (evidence file folio 1021 to 1022), and statement rendered by Anselmo Xunic at the public hearing held on June 9, 2021, before the Court.

[49] *Cf.* Written version of the expert opinion submitted to the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folio 1595); Superintendency of Telecommunications, Radio Broadcasting. Rights granted in the radio broadcasting service. Available at https://sit.gob.gt/gerencia-de-frecuencias/espectro-radio-electrico/radiodifusion/, and Annex 5*:* List of radio broadcasting rights granted (evidence file, folio 1262).

[50] Radio Qawinaqel has a website that can be accesses at: http://www.radioqawinaqel.com/qawinaqel/.

[51] According to information provided by the representatives, in Guatemala there are at least 58 indigenous community radio stations. *Cf.* List of radio stations of indigenous communities in Guatemala, dated October 2020, compiled by the *Asociación Sobrevivencia Cultural* (evidence file, folio 1109). In his statement at the hearing held on June 9 and 10, 2021, Anselmo Xunic also stated that there are between 50 and 60 indigenous community radio stations in Guatemala. The Court does not have sufficient evidence to confirm these numbers, but finds it plausible that other indigenous communities in Guatemala operated or continue to operate community radio stations.

[52] Cf. Statement rendered by Anselmo Xunic, *supra*, and statement rendered by María Pedro de Pedro at the public hearing held on June 9, 2021.

[53] *Cf.* Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, reformed by Decree 115-97 of the Congress of the Republic of Guatemala, enacted on October 17, 1996, Article 1 (evidence file, folios 904 to 926).

[54] *Cf.* Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra*, Article 61 and 62 (evidence file, folios 904 to 926).

[55] Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra*, Article 61 (evidence file, folios 904 to 926).

[56] Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra*, Article 61 (evidence file, folios 904 to 926).

awarded to the person who offers the highest price."[57] It also establishes that "[t]here shall be no administrative or judicial appeal against the adjudication, other than those based on the fact that the auctioned frequency was not awarded to the highest bidder […]."[58]

48. Article 97 of the LGT states: "[…] the Executive Branch shall submit to Congress [...] a bill to adapt the Radiocommunications Law, Decree Law 433 of 1966, to the present law."[59] It is not known whether such an initiative has been presented and, although the Radiocommunications Law[60] is still in force, some of its provisions, such as one that provides for a different procedure for allocating radio frequencies,[61] are not being applied.

49. Under the LGT, the radio spectrum is divided into smaller frequency ranges known as frequency bands. In that regard, the LGT regulates three types of bands: reserved frequency bands, for the exclusive use of government institutions and entities; frequency bands for amateur radio (radio hams), used exclusively by radio enthusiasts; and regulated frequency bands that can only be used through the prior acquisition of usufruct rights.[62]

50. On November 17, 2011, one of the representatives of the alleged victims, the *Asociación Sobrevivencia Cultural* (hereinafter "the Association"), through an action of unconstitutionality

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[57] Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra*, Article 62 (evidence file, folios 904 to 926).

[58] Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra*, Article 61 (evidence file, folios 904 to 926).

[59] Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra*, Article 97 (evidence file, folios 904 to 926).

[60] According to this law, to obtain a concession it is not necessary to participate in a public auction. However, an application for a concession must be submitted to the General Directorate of Broadcasting, which approves or rejects it. *Cf.* Decree Law No. 433 of the Council of Ministers: Radio Communications Law, enacted on March 10, 1966, Articles 18-20. Available at http://radiotgw.gob.gt/lai/2018/DECRETOLEY433.pdf.

[61] *Cf.* Decree law No. 433 of the Council of Ministers: Radiocommunications Law, *supra,* Article 18.

[62] *Cf.* Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra,* Article 51 (evidence file, folios 904 to 926).

filed before the Constitutional Court, challenged Articles 1,[63] 2,[64] 61,[65] and 62[66] of the said law, on the grounds that these provisions would not allow indigenous peoples in Guatemala real access to the radioelectric spectrum, since they would not take into account the situation of poverty that affects those communities.[67] On March 14, 2012, the Constitutional Court ruled that the challenged provisions were constitutional.[68] Nevertheless, it urged the Guatemalan

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63 "Article 1. Scope of application. The purpose of this law is to establish a legal framework for the development of telecommunications activities and to regulate the use and exploitation of the radioelectric spectrum, in order to support and promote the efficient development of telecommunications; stimulate investment in the sector; promote competition among different telecommunications service providers; protect the rights of users and providers of telecommunications services; and support the rational and efficient use of the radioelectric spectrum." Decree No. 94-96 of the Congress of the Republic of Guatemala: General Law of Telecommunications, *supra.*

64 "Article 2. Subjects. This law is applicable to all users and usufructuaries of the radioelectric spectrum, and to all those who operate and/or commercialize telecommunications services in the national territory, whether they are individuals or legal entities, national or foreign, with private, mixed or governmental participation, regardless of their degree of autonomy or their regime of incorporation." Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra.*

65 "Article 61. Public tender. For the adjudication of frequency usufruct titles, any interested party, whether they are individuals or legal entities, national or foreign, or a State entity, shall submit to the Superintendency an application specifying the frequency bands and the characteristics indicated in subparagraph a) of Article 57. The Superintendency shall issue a decision admitting or not admitting the application for processing. Said decision shall be issued and notified within three (3) days from the date on which the application was received. In the event of a favorable decision, the Superintendency shall publish the application. The Superintendency may only refuse to process applications for frequency bands which, in accordance with current technological advances, are impossible to define under the conditions proposed by the applicant, those that would breach international agreements, treaties and conventions on the subject ratified by the Government of Guatemala, or those pertaining to frequency bands that have been previously allocated to others, reserved frequency bands or frequency bands for radio amateurs. Individuals or legal entities who have a well-founded and legitimate interest, and who may be harmed if an award is made, may oppose the granting of the usufruct title over the frequency bands requested. Likewise, other persons may express their interest in acquiring, partially or totally, the same frequency band or bands requested. Any objection or interest of third parties shall be submitted to the Superintendency within five (5) days after the expiration of the period for publications pursuant to Article 21. If there is no objection and there are no interested third parties, the Superintendency shall directly grant the right of usufruct of the requested frequency band, ordering its registration in the Telecommunications Registry. If there is an objection, the Superintendency shall have ten (10) days to resolve it. If the objection is declared admissible, the public tender process shall be concluded. On the contrary, if the objection is dismissed and there are no other interested parties the right of usufruct over the requested band shall be granted to the interested party without further procedures. If there are other interested parties, after fifteen (15) days from the date of expiration of the period for raising an objection or having the objection rejected, the Superintendency shall invite the interested parties to participate in a public auction of the requested frequency band, and may split the band, provided it considers that this is necessary to promote competition in the telecommunications market. The auction shall be held within twenty (20) days from the date on which the invitation to participate therein was issued, in accordance with the preceding paragraph, except when the requested band has been split, in which case the term may be extended for up to twenty (20) days. Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra.*

66 "Article 62. Public auction. The Superintendency shall determine the manner in which each public auction shall be conducted. All offers shall be submitted in a sealed envelope, including a performance bond equivalent to the amount offered or any other form of guarantee that the Superintendency may determine. The auctions may have one or several rounds, depending on the modality used by the Superintendency. If the Superintendency has decided to split a band, the auction of the fractions shall take place simultaneously with multiple rounds, clearly specifying the minimum acceptable increments, as well as the manner of ending the auction. The auction's bidding and adjudication procedures will be supervised by a reputable firm of external auditors. The frequency band shall always be awarded to the highest bidder. No administrative or legal appeals shall be allowed against the adjudication, other than those based on the fact that the auctioned frequency was not awarded to the highest bidder, in which case such appeals shall be addressed and settled in accordance with the provisions of this law. Once the adjudication has been made, and upon payment of the price offered at the auction, the Superintendency shall immediately order its registration in the Telecommunications Registry. Payment must be made within five (5) days from the date of adjudication. The Superintendency shall issue and deliver to the successful bidder the title representing the right of usufruct of the frequencies within the non-extendable term of ten (10) days following the date of adjudication. Holders of usufructuary rights shall register these in the Telecommunications Registry before starting to operate." Decree No. 94-96 of the Congress of the Republic of Guatemala: General Telecommunications Law, *supra.*

67 *Cf.* Decision of the Constitutional Court. File No. 4238-2011, of March 14, 2012 (evidence file folio 997 to 1022), and Statement rendered by Anselmo Xunic at the public hearing held on June 9, 2021 before the Court.

68 *Cf.* Decision of the Constitutional Court, *supra* (evidence file, folios 1013 to 1022).

Congress to introduce the corresponding legislation to regulate access by indigenous peoples to mechanisms to obtain and exploit frequency bands of the radio spectrum.[69]

51. Since 2002, several bills have been presented to reform the regulatory framework related to radio broadcasting in Guatemala. In 2002, the Community Radio Broadcasting Bill (No. 2621) was presented, which sought to recognize community radio stations and guarantee indigenous peoples the use of radio frequencies on equal terms.[70] In 2004, Initiative No. 3142 called for the incorporation of community radio stations into the legal framework of Guatemala, in order to provide them with certain frequencies. In 2005, Initiative No. 3151 sought the formal recognition of community radio stations and the continuation of their services through a usufruct concession duly granted by the Superintendency of Telecommunications.[71] These three initiatives were sent to the Commission of Communications, Transportation, Public Works and Housing of the Congress of the Republic, for the corresponding analysis and opinion, which has not yet taken place.[72] In 2009, Initiative No. 4087 was presented for the purpose of approving the "Community Media Law." This law established a special procedure for granting licenses, aimed at ensuring the reservation of the radio spectrum for use by community radio broadcasters.[73] In January 2010, the Indigenous Peoples' Commission of the Congress issued a favorable opinion on said initiative, which is currently pending discussion in first and second debate, and discussion and approval in third debate, as well as approval of its articles and final wording.[74]

52. Furthermore, in September of 2002, Guatemala signed Governmental Agreement 316-2002, which recognizes the existence of multiple forms of social organization: community associations and committees; non-profit civil, peasant, women's, trade union and academic organizations, and those of various indigenous communities.[75] This agreement instructed the Ministry of Culture and Sports and the Ministry of Communications, Infrastructure and Housing, to:

> […][C]ede the use of radio frequencies[,] of which are they are usufructuaries [,] to associations or entities with legal personality that promote constitutional values, intercultural development, especially to indigenous communities and institutions, intellectuals, universities, academic centers, non-profit civil associations, women's groups, professional associations, journalists and communicators' associations without access to or ownership of the established media.[76]

53. The frequencies authorized to be transferred were 640, 660, 810, 840, 860, 1000, 1290 and 1440 MHz, all with national coverage in the amplitude modulation band (AM). Although initially, the allocation of FM frequencies was authorized, two subsequent Government Decrees, in 2002, excluded these frequencies.[77]

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69 *Cf.* Decision of the Constitutional Court, *supra* (evidence file, folios 1021 to 1022).

70 *Cf.* Initiative No. 2621, discussed by the Plenary of the Congress of the Republic on February 7, 2002 (evidence file, folios 940 to 953).

71 *Cf.* Initiative No. 3142, debated by the Plenary of the Guatemalan Congress on February 1, 2005 (evidence file, folios 955 to 967), and Initiative Nº 3151, debated by the Plenary of the Guatemalan Congress on February 9, 2005 (evidence file, folios 969 to 975).

72 *Cf.* Official letter DL-MAAA-0012-2021 of the Congress of the Republic of Guatemala of January 14, 2021 (evidence file, folios 1347 to 1348), and Official letter DL-MAAA-pv-839-2021 of the Congress of the Republic of Guatemala of 4 June 2021 (evidence file, folio 1716).

73 *Cf.* Initiative No. 4087, debated by the Plenary of the Guatemalan Congress on August 20, 2009 (evidence file, folios 977 to 990).

74 *Cf.* Official letter DL-MAAA-0012-2021, *supra* (evidence file, folio 1348), and Official letter DL-MAAA-pv-839-2021, *supra* (evidence file, folio 1716).

75 *Cf.* Government Agreement 316-2002 of the President of the Republic of Guatemala of September 10, 2002 (evidence file, folios 1271 to 1272).

76 *Cf.* Government Agreement 316-2002, *supra*, Article 1 (evidence file, folio 1271).

77 Namely, 107.3000 MHz, with coverage of the departments of Guatemala, Sacatepéquez, Petén and Huehuetenango, and 107.5000 MHz, with coverage in the departments of Alta Verapaz, Baja Verapaz, Chimaltenango,

B.2 The Criminal Code

54. Article 246 of Guatemala's Criminal Code has been used to criminally prosecute persons who operate radio stations without a license.[78] This provision establishes that, "whoever takes, without due authorization, a movable item, totally or partially belonging to another" commits the crime of theft, and is subject to a prison term of 1 to 6 years.[79] The State classifies radio frequencies as "movable items" based on Article 451 of the Civil Code, which provides that the radio spectrum is a movable good and a natural force subject to appropriation.[80] In turn, Article 121(h) of the Guatemalan Constitution states that the radio spectrum is property that belongs to the State.[81]

55. The Prosecutor's Office for Crimes related to the Illegal Use of Radio Frequencies, created in November 2010, is the unit of the Public Prosecutor's Office in charge of criminal prosecution for the illegal use and exploitation of radio frequencies. This unit has used the above regulatory provisions to classify the conduct of persons operating radio stations without a license as "theft".[82]

56. In this regard, Initiative No. 4479, discussed by the plenary of the Guatemalan Congress in July 2012, proposes the addition of article "219 *bis*" to the Criminal Code,[83] in order to "punish individuals or legal entities that use the radio spectrum without the corresponding state license."[84] On November 20, 2012, the Congressional Committee on Legislation and Constitutional Points issued a favorable opinion[85] regarding this initiative, which is now pending discussion in first and second debate, and discussion and approval in third debate, as well as approval of each article and final wording.[86]

C. Raids carried out at Radio Ixchel and Uqul Tinamit "La Voz del Pueblo"

57. Article 246 of the Guatemalan Criminal Code, which defines the criminal offense of theft, has been used to criminally prosecute persons who operate radio stations without a license[87] (*supra* paras. 54 to 56), including members of indigenous communities. Between November 2010 and May 2021, 206 raids involving a search, inspection and seizure of evidence were carried out at radio stations operating without a license, including some indigenous community radio stations.[88] During the same period, 90 people were convicted of the crime of "theft" in

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Chiquimula, El Progreso, Escuintla, Izabal, Jalapa, Jutiapa, Quetzaltenango, Quiché, Retalhuleu, San Marcos, Santa Rosa, Sololá, Suchitepéquez, Totonicapán and Zacapa. *Cf.* Statement of Rudy Estuardo Santos rendered by affidavit on May 3, 2021 (evidence file, folio 1497). See also Governmental Agreement 316-2002, *supra*, Article 2 (evidence file, folio 1271).

78 *Cf.* Brief of observations of the State of July 25, 2017 (evidence file, folio 641).

79 *Cf.* Brief of observations of the State of July 25, 2017 (evidence file, folio 645).

80 *Cf.* Affidavit rendered by Rudy Estuardo Santos, *supra* (evidence file, folio 1489).

81 *Cf.* Affidavit rendered by Rudy Estuardo Santos, *supra* (evidence file, folio 1489).

82 *Cf.* Affidavit rendered by Rudy Estuardo Santos, *supra* (evidence file, folios 1487 to 1491).

83 "Article 219 *bis*. Illegal Broadcasts. Any individual or legal entity that uses the radioelectric spectrum belonging to the State of Guatemala, without the usufruct title or the corresponding license issued by the Superintendency of Telecommunications, for the transmission of sound waves, audiovisual content, or any other form of communication, shall be punished with prison terms of six to ten years and the confiscation and loss of his broadcasting equipment." Initiative No 4479, discussed by the Plenary on July 10, 2012, (evidence file, folio 995).

84 Initiative No. 4479, *supra* (evidence file, folios 992 to 995).

85 Official letter DL-MAAA-0012-2021, *supra* (evidence file, folio 1348).

86 Official letter DL-MAAA-0012-2021*, supra* (evidence file, folio 1348) and Official letter DL-MAAA-pv-839-2021, *supra* (evidence file, folio 1717).

87 *Cf.* Brief of observations of the State of July 25, 2017 (evidence file, folio 641).

88 *Cf.* Affidavit rendered by Víctor Manuel Ángel Vázquez on May 20, 2021 (evidence file, folios 1547 to 1548); affidavit rendered by Olga Mercedes Alcajon on May 20, 2021 (evidence file, folio 1522); affidavit rendered by Rosa Concepción Ajanel on May 25, 2021 (evidence file, folio 1541); affidavit rendered by Ana Margarita Chen Xol on May

relation to the use of the radio spectrum without a license.[89]

58. In this regard, on June 28, 2006, the Public Prosecutor's Office asked the trial judge of first instance for criminal matters, drug trafficking and environmental crimes of the department of Sacatepéquez, to authorize a raid, inspection, search and seizure of evidence at Radio Ixchel, operated by the Maya Kaqchikel indigenous people of Sumpango.[90]

59. Once again, on July 7, 2006, Radio Ixchel was raided by the Prosecutor for Crimes against Trade Unionists and Journalists, a unit of the Public Prosecutor's Office. During the raid, which involved a search and inspection of the premises, the station's broadcasting equipment was seized, despite the fact that the search warrant did not authorize the confiscation of property.[91] As a result, legal proceedings were initiated against Anselmo Xunic Cabrera, a member of the Kaqchikel community who at that time was the voluntary coordinator of the radio station. He appeared before the trial court for criminal matters, drug-trafficking and environmental crimes of the department of Sacatepéquez, for the alleged crime of theft, by virtue of the unlicensed operation of a community radio station. In August 2007, the judge of first instance determined "a lack of merit against the accused, given the absence of rational elements linking [him] to the process."[92]

60. As a result of the raid, Radio Ixchel suspended its broadcasts for seven months and the community had to raise funds to purchase new equipment so that it could broadcast again. In addition, community members were reluctant to participate in the radio for fear of being arrested.[93]

61. On May 8, 2012, the National Police and the Public Prosecutor's Office carried out a raid on Uqul Tinamit "La Voz del Pueblo," a community radio station operated by the Maya Achí indigenous people, in the municipality of San Miguel Chicaj, in Baja Verapaz. This action resulted in the confiscation of the transmitter, a computer and the sound editor. During the raid, one of Uqul Tinamit's volunteer workers, Bryan Cristofer Espinoza Ixpata, was arrested.[94] On January 15, 2013, he was convicted and declared "responsible for the crime of theft, for the illegal use of the 106.3 MHz radio frequency in the municipality of San Miguel Chicaj, department of Baja Verapaz, by Radio La Voz del Pueblo."[95] Subsequently, on April 20, 2016,

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17, 2021 (evidence file, folio 1511); Committee to Protect Journalists. "Police raid Aya Xyaab' Tzuultaq'a radio station in eastern Guatemala", September 30, 2019. Available at: https://cpj.org/x/7f57; affidavit rendered by Raúl Tacaj Xol on May 1, 2021 (evidence file, folio 1530); search warrant issued by the trial judge for criminal matters, drug trafficking and crimes against the environment. Criminal Case No. 653-2006 of July 6, 2006 (evidence file, folio 928); OAS, Inter-American Commission on Human Rights. *Report on the situation of Human Rights in Guatemala*. OAS/Ser.L/V/II. Doc. 43/15, December 31, 2015, paras. 302 ff. Available at: http://www.oas.org/eng/iachr/reports/pdfs/Guatemala2016.eng.pdf; OAS, Inter-American Commission of Human Rights. *Report on the situation of Human Rights in Guatemala*". OAS/Ser.L/V/II. Doc. 208/17, *supra*, paras. 293 ff. Available at: http://www.oas.org/eng/iachr/reports/pdfs/Guatemala2017-eng.pdf, and affidavit rendered by Rudy Estuardo Santos, *supra* (evidence file, folio 1493).

89 *Cf.* Affidavit rendered by Rudy Estuardo Santos, *supra* (evidence file, folio 1493).

90 *Cf.* Memo of the Office of the Human Rights Prosecutor, AGE3, Journalists and Trade Unionists Unit of the Public Prosecutor's Office, file MP-001-2006-45814, of June 28, 2006 (evidence file, folios 1293 to 1299).

91 *Cf.* Search warrant issued by the trial judge for criminal matters, drug-trafficking and environmental crimes, criminal case No. 653-2006, of July 6, 2006 (evidence file, folios 928 to 932).

92 *Cf.* Ruling by the trial judge for criminal matters, drug-trafficking and environmental crimes declaring a lack of merit against Anselmo Xunic Cabrera, criminal case 653-2007, of August 20, 2007 (evidence file, folios 934 to 938).

93 *Cf.* Statement rendered by Anselmo Xunic, *supra.*

94 *Cf.* Official letter of the Office of the Prosecutor for Crimes Involving the Unlawful Use of Radio Frequencies of the Public Prosecution Service of February 14, 2020 (evidence file, folio 1337); Cultural Survival. "Uqual Tinamit community radio station raided by the Guatemalan police." May 8, 2012. Available at http://www.culturalsurvival.org/news/uqul-tinamit-community-radio-station-raided-guatemalan-police.

95 *Cf.* Official letter of the Office of the Prosecutor for Crimes Involving the Unlawful Use of Radio Frequencies of the Public Prosecutor's Office of February 14, 2020, (evidence file, folio 1337).

the Uqul Tinamit "La Voz del Pueblo" community radio station was raided for a second time by the National Civil Police. During the raid, they confiscated broadcasting equipment, including a transmitter, a console, a computer and microphones. The radio station ceased its broadcasts after this second raid.[96]

VII
MERITS

62. The instant case concerns the alleged existence of legal obstacles that prevent Guatemala's indigenous peoples, particularly the Maya Kaqchikel indigenous peoples in the municipality of Sumpango, in Sacatepéquez; the Maya Mam of Todos Santos Cuchumatán, in Huehuetenango; the Maya Achí, in the Municipality of San Miguel Chicaj, in Baja Verapaz, and the Maya Mam of Cajolá, in Quetzaltenango, from having access to radio frequencies. The case also concerns the alleged absence of affirmative actions by the State aimed at ensuring such access, and an alleged policy of criminalization of community radio stations operated without a license in Guatemala, which has resulted in the criminal prosecution of members of indigenous communities and raids on their community radio stations.

63. Based on the arguments of the Commission, the representatives and the State, and in light of the indivisible nature of the violations alleged in this case, the Court will proceed to examine the merits of this case in a single chapter.

VII-1
RIGHTS TO FREEDOM OF THOUGHT AND EXPRESSION,[97] TO EQUALITY BEFORE THE LAW[98] AND TO PARTICIPATE IN CULTURAL LIFE,[99] IN RELATION TO THE OBLIGATIONS TO RESPECT AND GUARANTEE RIGHTS WITHOUT DISCRIMINATION[100] AND THE DUTY TO ADOPT PROVISIONS OF DOMESTIC LAW[101]

A. Arguments of the parties and of the Commission

64. The ***Commission*** argued that Article 13 of the American Convention protects the right of indigenous peoples to establish community broadcasting media and to enjoy and exercise their right to freedom of expression through such media, by means of access to a radio frequency. It further argued that although the wording of Guatemala's General Telecommunications Law is, at first glance, neutral, it indirectly discriminates by establishing the highest financial offer as the sole criterion for allocating frequencies. It explained that this criterion is applied to allocate all frequencies in Guatemala, without taking into account that a large segment of the country's indigenous population suffers from structural poverty, discrimination and social exclusion. In this sense, it considered that the LGT "has a mainly commercial outlook that does not take into account the conditions affecting the four indigenous communities in this case." Thus, it alleged that the LGT "violates the rights of members of those communities to establish communication media and to express themselves through a useful means to express information, ideas and their cultural worldview."

65. The Commission added that the State has the duty to adopt and implement affirmative measures in order to revert or change the situation of disadvantage affecting indigenous

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96 *Cf.* Statement rendered by Anselmo Xunic, *supra*, and Cultural Survival. "Uqual Tinamit community radio station is raided by the Guatemalan police," *supra*

97 Article 13 of the American Convention.

98 Article 24 of the American Convention.

99 Article 26 of the American Convention.

100 Article 11 of the American Convention.

101 Article 2 of the American Convention.

peoples, in order to grant them access the radio spectrum on equal terms. However, according to the Commission, Guatemala's domestic legislation has not recognized community broadcasters, despite the importance of this sector and considering that approximately half the population belongs to indigenous communities. It added that the State has failed to take steps to remove the barriers or obstacles that, in practice, prevent the alleged victims from having access to radio frequencies in order to exercise their right to freedom of expression.

66. In addition, the Commission held that the *de facto* impediment created by the LGT with regard to the use of radio frequencies, by restricting the access of indigenous communities to diverse information - especially of public interest - as well as to the exchange of ideas and opinions of all kinds, particularly those pertaining to their history, traditions, culture and identity, in their own language, also restricted their cultural rights.

67. The Commission further argued that the criminalization of conduct involving the violation of broadcasting regulations is extremely serious for freedom of expression. It added that the use of the criminal definition of theft to punish the use of the radio spectrum by two of the indigenous communities in this case, would be contrary to the requirements established in Article 13(2) of the Convention on subsequent liability. In this regard, it argued that since "there is no real possibility in practice for indigenous peoples' radio stations to operate with licenses within the existing regulatory framework, a situation that must be remedied by the State, […] the raids and seizure of broadcasting equipment at the aforementioned radio stations, although carried out with a court order, resulted from criminal proceedings that impose restrictions on the right to freedom of expression, which do not comply with the Convention." It considered that the search and seizure orders were in breach of Article 13(2) of the Convention "because the measure restricting the right to freedom of expression (confiscation) of the Maya Kaqchikel (Radio Ixchel) and Maya Achí (Uqul Tinami[t] "La Voz del Pueblo") peoples was neither necessary nor proportional, as it absolutely prevented the communities from exercising their right to freedom of expression by making it impossible to broadcast because they did not have the equipment to do so." Accordingly, the Commission concluded that such search and seizure orders constitute a form of censorship and a disproportionate violation of the indigenous peoples' freedom of expression.

68. The ***representatives*** agreed with the Commission and affirmed that Guatemala's regulation of radio frequencies perpetuates a practice of exclusion of indigenous communities and promotes a system based on economic and political power, reflected in the alleged media monopolies. They argued that the fact that indigenous communities cannot legally access radio frequencies, since the LGT allows access to radio frequencies only through a public auction in which the winner is the highest bidder, together with the government raids carried out against indigenous community radio stations, result in the radical suppression of freedom of expression of these communities. Thus, they considered that the impact and effects of Guatemala's broadcasting system discriminate against indigenous communities that seek to operate a community radio station. They pointed out that this alleged *de facto* ban on community radio also has an impact on other communities in Guatemala. However, the impact on indigenous peoples is substantial given that not enough has been done to address the disadvantages faced by indigenous peoples as a result of a long history of discrimination, assimilation and exclusion, and so the LGT perpetuates discrimination against these communities.

69. They also indicated that the alleged *de facto* prohibition imposed by the State on community radio stations violates the individual and social dimensions of the right to freedom of expression, as it restricts the expression of volunteer workers in community radio stations - many of them social communicators - and prevents them from sharing information, history, and traditions in their own indigenous language as part of their efforts to promote and preserve their cultural identity. They emphasized that sharing stories and experiences allows indigenous

communities to transmit their culture to future generations. They also pointed out that community radio stations enable indigenous peoples to preserve their cultural heritage, using their native languages, sharing their worldview, transmitting historical events and their music, so that they are a vehicle for the practice, preservation and transmission of culture.

70. The representatives emphasized that, by allowing indigenous peoples to receive, in their own indigenous languages, diverse information and opinions on economic, social and political topics, community radio provides the most effective and economical means for community members to keep themselves informed, "considering their modest incomes and limited access to other media and technologies," and to receive information in cases of emergency such as natural disasters.

71. The ***State*** argued that it is not responsible for the alleged violations, since it has acted in accordance with its domestic legal framework and has respected the rights enshrined in the American Convention as well as its international commitments. It asserted that the freedoms of expression, thought, opinion and information are fully guaranteed in Guatemala by different domestic laws, which are in line with the provisions of Article 13 of the Convention.

72. It also explained that the regulation of radio frequencies is carried out exclusively by the State, which not only allows it to determine the manner in which licenses for the use of radio frequencies are granted, but also to plan and implement public policies on this activity. It indicated that the criterion for granting usufruct of the broadcasting network cannot be construed as a restriction to freedom of expression, since it is embodied in a law that was established prior to the facts and which is clear and precise. The State explained that the regulation of broadcasting in Guatemala is intended to ensure predictability and legal certainty for users and usufructuaries of the radio spectrum, so as to guarantee the full exercise of their rights to freedom of expression in a safe and objective manner. It added that the LGT complies with the standards established by the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission, insofar as it is clear and precise; it contemplates transparent procedures that respect due process; it grants licenses to use frequencies for sufficient time to develop the communications project or to recover the investment and achieve profitability; it ensures that while the frequency is being used, no requirements other than those established by law are demanded; and it does not allow decisions to be made that affect the exercise of freedom of expression due to editorial or informative policies.

73. In addition, the State emphasized that there is no monopoly of radio frequencies in Guatemala, a situation reflected in the 514 usufruct titles for radio frequencies related to radio broadcasting legally granted to different individuals and legal entities.

74. The State argued that, in order to guarantee legal certainty and security to those who own or acquire the usufruct of a radio frequency through due process, in compliance with pre-established requisites and criteria, it is necessary that the body responsible for ensuring compliance with the law and for prosecuting offenses make every possible effort to prevent the illegal use of broadcasting media. It considered that, if such criminal prosecution were not carried out, it would lead to a "situation of mistrust, lack of legal certainty and impunity." Thus, it mentioned that the Public Prosecutor's Office "does not make any distinction as to the criteria of the group or social sector to which the persons belong, since it is not concerned with the offender but rather with the criminal act. Nor is its action influenced by the content of the programs broadcast. It indicated that the reported raids on the radio stations are within the law and in strict compliance with national regulations and the observance of the judicial guarantees of the defendants. It explained that the legislation specifies the crimes and the penalties to be imposed for the illegal use of radio frequencies and the respective criminal proceeding is independent of any decision taken by the corresponding administrative authority.

It affirmed that the raids and the seizure of assets belonging to the radio stations in this case were never intended to exercise censorship or to undermine the right to free expression, since the only reason for this action by the State was the illegal use of frequencies, which translates into the crime of theft or the interruption or obstruction of legally established communications.

75. As for the alleged violation of the right to equality before the law, Guatemala asserted that the criterion for allocating radio frequencies established by the LGT does not seek to discriminate or exclude indigenous peoples, but rather "responds to technical and objective criteria which the State, in its sovereign exercise of regulating the radio frequencies, decided was the most suitable for awarding them." It argued that the use of a financial criterion in the public auction does not lead to any discrimination, since "the fact that some have more or less possibilities of entering a contest is a circumstantial or unforeseeable matter, which does not discriminate, since the opportunity to compete is available to all those with an interest. The contest is to compete and fight for the adjudication of the frequency." It added that economic exploitation of a radio frequency is necessary for it to be sustainable and that awarding frequencies based on other interests could prejudice its sustainability and the interests of all the population.

76. Finally, the State argued that it cannot be held responsible for the violation of the cultural rights of the alleged victims, because the State's actions to protect and improve radio broadcasting - a public good, which is considered to be a limited natural resource – cannot be construed as some type of censorship, deprivation or limitation of the right to promote culture in the country. It also affirmed that it recognizes the right to culture and is committed to promoting it in a comprehensive manner.

B. Considerations of the Court

77. In view of the arguments presented by the parties and the Commission, as well as the facts of this case and the evidence in the case file, the Court considers it appropriate to divide the analysis of the alleged violations as follows: first, it will examine the impact of the regulation of broadcasting in Guatemala on the rights to freedom of expression, equality before the law and to participate in cultural life (1), and second, the alleged violation of Article 13(2) of the American Convention, in connection with the raids on the Ixchel and Uqul Tinamit "La Voz del Pueblo" community radio stations and the criminal prosecution of their operators (2).

B.1 The regulation of broadcasting in Guatemala and the rights of indigenous peoples to freedom of expression, equality before the law and to participate in cultural life

78. The Court will now proceed to: a) establish the content and scope of the right to freedom of expression and its relationship with the community media of indigenous peoples; b) specify the content and scope of the rights related to the regulation of radio broadcasting; c) establish the content and scope of the right of indigenous peoples to participate in cultural life and its relationship with radio broadcasting, and d) analyze whether the regulation of broadcasting in Guatemala resulted in a violation of the rights of the alleged victims to freedom of expression, equality before the law and to participate in cultural life.

a) The right to freedom of expression and the community media of indigenous peoples

79. Since Advisory Opinion OC-5/85, the Court has recognized freedom of expression as a cornerstone of the very existence of a democratic society, since it is "indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political

parties, trade unions, scientific and cultural societies and, in general, for those who wish to influence the public."[102] Similarly, the Inter-American Democratic Charter, which is an authentic interpretation of both the Charter of the Organization of American States (hereinafter "OAS Charter" or "the Charter") and the Convention, that is, by the States parties themselves, characterizes freedom of expression and of the press as one of the "fundamental components of the exercise of democracy."[103]

80. The Court has reiterated that the right to freedom of thought and expression has an individual dimension, interpreted as the right to seek, receive and impart ideas and information of all kinds, as well as a social dimension, which refers to the right to receive and have access to information and ideas expressed by others.[104]

81. In this regard, the Court has indicated that the individual dimension "is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons."[105] Thus, the expression and dissemination of information and ideas are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression.[106]

82. Regarding the social dimension of this right, the Court has established that freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try to communicate one's point of view to others, but it also implies everyone's right to know opinions, reports and news. For the ordinary citizen, the knowledge of other people's opinions and information is as important as the right to impart their own.[107]

83. The Court has reaffirmed the importance of pluralism in the context of the exercise of the right to freedom of expression and has indicated that this implies tolerance and a spirit of openness, without which no democratic society can exist.[108] The importance of pluralism has also been emphasized by the OAS General Assembly in several resolutions, in which it has reaffirmed that "free and independent media are fundamental for democracy, for the promotion of pluralism, tolerance and freedom of thought and expression, and for the facilitation of free and open dialogue and debate in all sectors of society, without discrimination of any kind."[109]

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[102] *Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 70. See also, *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of July 2, 2004. Series C No. 107, para. 112; *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 82, and *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs*. Judgment of September 19, 2006. Series C No. 151, para. 85.

[103] Article 4 of the Inter-American Democratic Charter, adopted on September 11, 2001.

[104] *Cf. Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008, Series C, No. 177, para. 53, and *Case of Grijalva Bueno v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of June 3, 2021. Series C No. 426, para. 152.

[105] *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs*. Judgment of February 5, 2001. Series C No. 73, para. 65, and *Case of Bedoya Lima et al. v. Colombia. Merits, reparations and costs.* Judgment of August 26, 2021. Series C No. 431, para. 109.

[106] *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs*, *supra,* para. 65, and *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of August 27, 2020. Series C No. 409, para. 78.

[107] *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs*, *supra,* para. 65, and *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs*, *supra*, para. 79.

[108] *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, para. 69, and *Case of Perozo et al. v. Venezuela Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 195, para. 116.

[109] UN, General Assembly. Resolution on the right to freedom of thought and expression and the importance of the media. AG/RES. 2679 (XLI-O/11), June 7, 2011, para. 5. Available at:

84. In this regard, a Joint Declaration was published in 2001 on the challenges to freedom of expression, prepared by the Special Rapporteurs on Freedom of Opinion and Expression of the UN, the OSCE and the OAS. The experts stated that, "[p]romoting diversity should be a primary goal of broadcast regulation; diversity implies gender equity within broadcasting, as well as equal opportunity for all sections of society to access the airwaves."[110]

85. In 2007, the United National Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the Special Rapporteur of the African Commission on Human and Peoples' Rights on Freedom of Expression and Access to Information, recognized the varied contributions that different types of broadcasters - commercial, public service and community, as well as broadcasters of different reach – local, national, regional and international - make to diversity in freedom of expression.[111] They also noted that undue concentration of media ownership, among other factors, poses "a threat to media diversity."[112]

86. In this regard, the Court has reiterated that freedom of expression may be affected by the existence of monopolies or oligopolies in ownership of the media,[113] situations in which the

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https://www.acnur.org/fileadmin/Documents/BDL/2012/8376.pdf; UN, General Assembly. Resolution on the right to freedom of thought and expression and the importance of the media. AG/RES. 2523 (XXXIX-O/09), 4 June 2009, para. 5. Available at: https://www.oas.org/dil/esp/AG-RES_2523-2009.doc; UN, General Assembly. Resolution on the right to freedom of thought and expression and the importance of the media. AG/RES. 2434 (XXXVIII-O/08), 3 June 2008, para. 5. Available at: https://www.oas.org/dil/esp/AGRES_2434.doc; UN, General Assembly. Resolution on the right to freedom of thought and expression and the importance of the media. AG/RES. 2287 (XXXVII-O/07), 5 June 2007, para. 5. Available at: https://www.oas.org/dil/esp/AG-RES_2287_XXXVII-O07.doc; UN, General Assembly. Resolution on the right to freedom of thought and expression and the importance of the media. AG/RES. 2237 (XXXVI-O/06), 6 June 2006, para. 5. Available at: https://www.acnur.org/fileadmin/Documents/BDL/2007/4892.pdf?view=1. *Cf.* UN, General Assembly. Resolution on the right to freedom of thought and expression and the importance of the media. AG/RES. 2149 (XXXV-O/05), 7 June 2005, para. 4. Available at: http://www.oas.org/xxxvga/docs/SPA/2149.doc, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of June 22, 2015. Series C No. 293, para. 141.

110 Joint Declaration: Challenges to Freedom of Expression in the New Century, adopted on November 20, 2001. Available at: http://oas.org/eng/iachr/expression/showarticle.asp?artID=48&lID=2. Also, "[d] types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms. Specific measures to promote diversity may include reservation of adequate frequencies for different types of broadcasters, must-carry rules, a requirement that both distribution and reception technologies are complementary and/or interoperable, including across national frontiers, and non-discriminatory access to support services, such as electronic programme guides." Joint Declaration on Diversity in Broadcasting, adopted on December 12, 2007. Available at: http://www.oas.org/eng/iachr/expression/showarticle.asp?artID=719&lID=2.

111 *Cf.* Joint Declaration on Diversity in Broadcasting, *supra.*

112 *Cf.* Joint Declaration on Diversity in Broadcasting, *supra.*

113 *Cf.* Advisory Opinion OC-5/85, *supra*, para. 56, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs,* supra, para. 143. See also, OAS, IACHR. *Freedom of Expression Standards for free and Inclusive Broadcasting.* OAS Ser.L/V/II. CIDH/RELE/INF. 3/09, December 30, 2009, paras. 116 and 117. On this point, principle 12 of the Declaration of Principles on Freedom of Expression states that "Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals." *Cf.* Declaration of Principles on Freedom of Expression, principle 12. The Declaration of Principles on Freedom of Expression was adopted by the Inter-American Commission on Human Rights, in support of the Office of the Special Rapporteur for Freedom of Expression, during its 108th regular session in October 2000. Similarly, in General Comment No. 34, the Human Rights Committee reiterated its observation in general comment No. 10 that "because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.' The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views." OAS, Human Rights Committee. *General Comment No. 34: Freedom of opinion and freedom of expression*, CCPR/C/GC/34, September 12, 2011, para. 40.

State must act to prevent concentration and promote pluralism of voices, opinions and views. To this extent, the State must democratize access to the different media, ensure diversity and pluralism, and promote the existence of commercial, public and community communication services. It is the duty of the State not only to implement appropriate measures to prevent or limit the existence and formation of monopolies and oligopolies, but also to establish adequate mechanisms for their control.

87. The Court has recognized the importance of the media for the exercise of the right to freedom of expression, thought and information. Indeed, the Court has characterized the media as true instruments of freedom of expression,[114] and has further stated that "it is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, the barring of all monopolies thereof, in whatever form […]."[115]

88. Indeed, the Court has considered that pluralism in the media and news[116] provides an effective guarantee of freedom of expression,[117] and that the State has a duty to protect and ensure this under Article 1(1) of the Convention by minimizing restrictions on the dissemination of information, encouraging balanced participation,[118] and allowing the media to be open to all without discrimination, so that "no individuals or groups are excluded *a priori*."[119] Therefore, the State has the duty to adopt the measures necessary so that all segments of the population can access the media.

89. To achieve this objective, the State must democratize access in such a way that it recognizes, promotes or encourages diverse forms and applications that each sector can use to access and operate media and, consequently, create spaces for differentiated forms of media and the corresponding legal instruments to provide them with legal certainty. In fact, in the "Joint Declaration on Diversity in Broadcasting" of 2007, the Rapporteurs for Freedom of Expression of the UN, the OSCE, the OAS and the African Commission stated that "community broadcasting should be explicitly recognized in law as a distinct form of broadcasting."[120]

90. Similarly, in 2018, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information recognized the positive obligation of States to "ensure that community media have space to operate on all distribution platforms and adequate resources."[121]

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114 *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 149, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs*, *supra*, para. 148.

115 *Advisory Opinion OC-5/85*, *supra*, para. 34.

116 *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 34, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs, supra*, para. 142.

117 *Cf. Case of Herrera Ulloa v. Costa Rica*. *Preliminary objections, merits, reparations and costs, supra,* para. 116, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs, supra*, para. 142.

118 *Cf. Case of Kimel v. Argentina*, para. 57, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of June 22, 2015. Series C No. 293, para. 142*.

119 Advisory Opinion OC-5/85, *supra*, para. 34, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs, supra*, para. 142.

120 Joint Declaration on Diversity in Broadcasting, *supra.*

121 *Cf.* Joint Declaration on Media Independence and Diversity in the Digital Age, adopted on May 2, 2018. Available at: http://www.oas.org/eng/iachr/expression/showarticle.asp?artID=1100&lID=2.

91. In view of the importance of media pluralism for the effective guarantee of the right to freedom of expression, and taking into account the provisions of Article 2 of the Convention, the Court considers that States are internationally obliged to establish laws and public policies that democratize access to the media and guarantee media pluralism in the different areas of communication, such as, for example, the press, radio and television.[122] This obligation includes the duty of the State to establish adequate measures to prevent or limit the existence and formation of monopolies and oligopolies. However, the Court warns that it is not appropriate to condition, directly or indirectly, respect for the right to freedom of expression and thought to the observance of the right of ownership or property rights over the media. These are two different conceptual approaches, as reflected in the Inter-American Democratic Charter, which does not contemplate the second of the aforementioned rights. On the contrary, the Court considers that it is precisely the analytical and regulatory separation of both rights - although they are certainly linked - that makes it possible to better enforce or democratize freedom of thought and expression.

92. The aforementioned State obligation necessarily implies the right of indigenous peoples to be represented in the different media, especially by virtue of their distinctive ways of life, their community relations and the importance of the media for these communities (*infra* paras. 108 to 110), without forgetting that, in the instant case, the majority of Guatemala's inhabitants identify themselves as part of their country's native peoples.

93. The right to freedom of expression through indigenous media is exercised individually by each person who issues an opinion or transmits information; but it is also, and most especially, manifested collectively, due to the particular form of organization of indigenous communities. Indeed, for indigenous peoples, the collective dimension of freedom of expression is fundamental for the realization of other collective rights. In this sense, the expert witness Francisco Calí Tzay explained that:

> For indigenous peoples, freedom of expression has an essential collective dimension, decisive for the full enjoyment of other collective rights, such as the right to autonomy and the right to culture. For example, radio has been used develop indigenous life plans. The right to disseminate and receive information is an essential, basic and fundamental human right, directly associated with the right to freedom of expression. It has been recognized in human rights instruments as a right that States must guarantee without discrimination. Freedom of expression has been defined to encompass not only freedom of information, but also the right to communicate in response to the growing influence of print, radio and television media and the emergence and proliferation of information and communication technologies, such as the internet and social media.[123]

94. In this regard, the Court recalls that in the case *of the Xákmok Kásek Indigenous Community v. Paraguay*, it recognized native peoples as subjects of international law.[124] The Court also emphasized that "international law related to indigenous or tribal peoples and communities recognizes their rights as collective subjects of international law and not only to their members[;] […] indigenous or tribal peoples, united by their particular ways of life and

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[122] *Cf. Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs. supra*, para. 145. Similarly, in the case of *Centro Europa 7 s.r.l. and Di Stefano v. Italy, the* European Court indicated that in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism. The Court referred to Recommendation CM/Rec(2007)2 of the Committee of Ministers on media pluralism and diversity of media content, reaffirming that: "in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member States should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed. ECHR, *Case of Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GS], No.38433/09. Judgment of June 7, 2012, paras. 129 to 134.

[123] *Cf.* Written version of the expert opinion submitted to the Court by José Francisco Calí Tzay (evidence file, folio 1420).

[124] *Cf. Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, paras. 85, 86 and 87. See also: *Advisory Opinion OC-22/16*, *supra,* para. 75.

identity, exercise certain rights recognized by the Convention from a collective dimension," among them the right to land ownership,[125] but also the right to freedom of expression, as mentioned above. The Indigenous and Tribal Peoples Convention of the International Labour Organization (hereinafter "Convention 169" or "ILO Convention 169")[126] and the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter "UNDRIP")[127] recognize indigenous people as holders of human rights. The American Declaration on the Rights of Indigenous Peoples (hereinafter "ADRIP"),[128] in Articles VI and IX, respectively, establishes the State's duty to recognize "the right of indigenous peoples to act collectively," and "the juridical personality of indigenous peoples, respecting indigenous forms of organization and promoting the full exercise of the rights recognized in this Declaration."[129]

95. From the above perspective, the Court considers that indigenous peoples have the right to establish and use their own media, based on the content and scope of the right to freedom of expression previously mentioned, but also taking into account the rights of indigenous peoples to non-discrimination, self-determination and to their cultural rights.

96. In this regard, Convention 169 states the following:

> 1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.
> 2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.[130]

97. In turn, UNDRIP establishes that:

> 1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination;
> 2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.[131]

98. Similarly, according to the ADRIP:

> 1. Indigenous peoples have the right to preserve, use, develop, revitalize, and transmit to future generations their own histories, languages, oral traditions, philosophies, systems of knowledge, writing, and literature, and to designate and retain their own names for their communities, individuals, and places.
> 2. States shall adopt adequate and effective measures to protect the exercise of this right with the full and effective participation of indigenous peoples.
> 3. Indigenous peoples have the right to promote and develop all their systems and means of communication, including their own radio and television programs, and to have equal access to all other means of communication and information. States shall take measures to promote the broadcast of radio and television programs in indigenous languages, particularly in areas with an indigenous presence. States shall support and facilitate the creation of indigenous radio and television stations, as well as other means of information and communication.

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125 *Cf. Case of the Mayagna* (*Sumo*) *Awas Tingni* Community *v*. *Nicaragua*. *Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79*,* para. 149; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, paras. 145 and 231, and Advisory Opinion OC-22/16, *supra*, para. 75.

126 Guatemala ratified ILO Convention 169 on June 5, 1996.

127 United Nations Declaration on the Rights of Indigenous Peoples, adopted on June 26, 2006. Available at: https://www.un.org/development/desa/indigenouspeoples/wpcontent/uploads/sites/19/2018/11/UNDRIPS_web.pdf

128 *Cf.* American Declaration on the Rights of Indigenous Peoples, adopted on June 14, 2016.

129 *Cf. Case of the Indigenous Communities* of the *Lhaka Honhat* (*Our Land) Association v*. *Argentina. Merits, reparations and costs*, *supra*, para. 154.

130 *Cf.* Article 30 of ILO Convention 169.

131 Article 16 of the United Nations Declaration on the Rights of Indigenous Peoples.

> 4. States, in conjunction with indigenous peoples, shall make efforts to ensure that those peoples can understand and be understood in their own languages in administrative, political, and judicial proceedings, if necessary through the provision of interpretation or by other effective means.[132]

99. At the national level, the AIDPI (*supra* paras. 38 and 41) requires Guatemala to:

> [P]romote the broadest possible access to the communications media by the Maya communities and institutions and those of other indigenous peoples, and the widest possible dissemination in indigenous languages of the indigenous, and especially Mayan, cultural heritage, as well as of the universal cultural heritage.[133]

100. To achieve broad access to the media, the AIDPI requires the State to take specific steps to promote legislative reforms in order to "make frequencies available for indigenous projects and ensure respect for the principle of non-discrimination in the use of the media."[134]

101. It should be emphasized that the expert opinions provided during the proceedings highlighted the importance of indigenous peoples' right to media access. In this regard, Mr. Calí Tzay referred to the relationship between the right of indigenous peoples to the media and freedom of expression. Ms. Labardini stressed the importance of access to and ownership of the media for indigenous peoples and alluded to the right to access means of communication, linking it to the ideals of pluralism and equality.

102. The Court notes that the present case refers exclusively to community media related to sound broadcasting, that is, to "community radio stations." Therefore, the Court will henceforth refer only to them.

103. The Court observes that there are different definitions of community radio. However, in general, community radios stations are non-profit, are managed by the community and serve the interests of the community. According to the World Association of Community Radio Broadcasters (hereinafter "AMARC"), the fundamental characteristic of community radio stations "is the participation of the community in ownership as well as programming, management, operation, financing and evaluation*."*[135] Moreover*,* "they are independent and non-governmental media that do not depend on or form part of political parties or private firms*"*[136] and do not engage in religious proselytism. Their *raison d' être* is to facilitate the exercise of the right to information and freedom of expression of members of their communities.[137] It should be noted that, as indicated previously (*supra* footnote 16), the representatives agreed with this definition provided by AMARC.

104. Similarly, a 2003 study by the United Nations Organization for Education, Science and Culture (hereinafter "UNESCO") stated that the essential features of community radio can be summarized by the phrase "a radio service for the people, close to the people and for the people."[138] According to UNESCO, community radio is "a medium that gives a voice to the

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132 Article XIV of the American Declaration on the Rights of Indigenous Peoples.

133 *Cf.* Agreement on the Identity and Rights of Indigenous Peoples, *supra*. Section III: Cultural Rights, point H: Mass media, para. 2.

134 *Cf.* Agreement on Identity and Rights of Indigenous Peoples*, supra.* Section III: Cultural Rights, point H: Mass media, para. 2.

135 World Association of Community Radio Broadcasters (AMARC). *Principles for a Democratic Legislation on Community Broadcasting*, *supra,* principle 3.

136 World Association of Community Radio Broadcasters (AMARC). *Principles for a Democratic Legislation on Community Broadcasting*, *supra,* principle 3.

137 *Cf.* World Association of Community Radio Broadcasters (AMARC). *Principles for a Democratic Legislation on Community Broadcasting*, *supra,* principle 4.

138 UNESCO. Legislation on community radio broadcasting: comparative study of the legislation of 13 countries. CI-2003/WS/1. 2003, p. 6. Available at: http://unesdoc.unesco.org/images/0013/001309/130970s.pdf.

voiceless."[139] It "consist[s] of members of the community and its programming is based on community access and participation. It reflects the special interests and needs of its listeners whose first duty it is to serve."[140]

105. In Guatemala, radio is the most widely used means of communication in rural and remote areas of the country, where most of the indigenous communities are concentrated, and sometimes it is the only medium available. This is due to several factors such as the absence of electricity supply, the lack of internet service,[141] high rates of illiteracy, monolingualism and the long distances that limit access to other services.[142]

106. According to the expert Lorie Graham, indigenous peoples also encounter a digital divide because "access to telephone services, broadcasting frequencies[143] and internet connectivity is non-existent, unreliable, insufficient or prohibitively expensive."[144] Furthermore, impediments to receiving information that would allow them to access and produce mass media,[145] the lack of physical infrastructure[146] and "insufficient access to financial support to build that infrastructure,"[147] are some of the structural barriers faced by indigenous peoples in Guatemala.

107. The United Nations Special Rapporteur for Indigenous Peoples had already noted in 1983, "the important role that radio could play […], given the impossibility of accessing other means of communication in remote areas, especially when programming is offered in 'indigenous languages' and within the corresponding 'cultural framework'."[148] In this regard, the expert witness Lorie Graham emphasized that radio has been a vital of part of the lives of indigenous communities since the 1960s, and continues to be the only means of communication in many remote areas.[149] Citing a UNESCO study, Ms. Graham explained that indigenous peoples regard the transmission of information via the radio as the most similar to their oral traditions and as a means of sharing information and transmitting ideas and cultural practices.[150]

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139 The then United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, stated that "the concept of community radio […] is a recommendation of the United Nations that arises from the principle of media diversity and pluralism of ideas."[139] Cited by the study on "Community radio stations in Guatemala. Situation of the Mam Peoples of Quetzaltenango, Huehuetenango and San Marcos". Guatemala. 2017. Available at: https://mujbablyol.files.wordpress.com/2017/03/las-radios-comunitarias-en-guatemala1.pdf.

140 UN, UNESCO. Legislation on community radio broadcasting: comparative study of the legislation of 13 countries, *supra*, p. 6.

141 According to the Population Census of 2018, approximately 4,422,483 indigenous people (around 68% of the population that self-identify as indigenous) do not have internet access at home. *Cf.* Directorate of Human Rights Research of the Ombudsman's Office for Indigenous Peoples. *Nota conceptual sobre las radios comunitarias, una aproximación al contexto de Guatemala*. 2020, p. 16. Available at: https://www.pdh.org.gt/documentos/seccion-de-investigacion/notas-conceptuales/2020-11/6256-nota-conceptual-radios-comunitarias/file.html. *Cf.* Amicus curiae brief presented by the Latin American Association of Communication Researchers- ALAIC (merits file, folio 852).

142 *Cf.* Directorate of Human Rights Research of the Ombudsman's Office for Indigenous Peoples. *Nota conceptual sobre las radios comunitarias, una aproximación al contexto de Guatemala*. 2020, *supra*, p. 14.

143 Article 1.38, of the International Telecommunication Union ITU Radio Regulations, 2020 edition, defines "broadcasting service" as "a radio communication service in which transmissions are intended for direct reception by the general public. This service may include sound transmissions, television transmissions or other types of transmission." Available at: https://www.itu.int/pub/R-REG-RR-2020/eng.

144 Expert opinion rendered by affidavit by Lorie Graham (evidence file, folio 1467).

145 *Cf.* Expert opinion rendered by affidavit by Lorie Graham, *supra* (evidence file, folio 1466).

146 *Cf.* Expert opinion rendered by affidavit by Lorie Graham, *supra* (evidence file, folios 1466 to 1467).

147 Expert opinion rendered by affidavit by Lorie Graham, *supra* (evidence file, folios 1466 to 1467).

148 Expert opinion rendered by affidavit by Lorie Graham, *supra* (evidence file, folio 1464).

149 *Cf.* Expert opinion rendered by affidavit by Lorie Graham, *supra* (evidence file, folio 1468).

150 *Cf.* Expert opinion rendered by affidavit by Lorie Graham, *supra* (evidence file, folios 1470 to 1471).

108. In Guatemala, indigenous community radio stations, in addition to being the main source of information for the communities from which they broadcast, promote and protect indigenous languages and cultures, and local consumption. Their relevance is reflected in the different ways in which members of indigenous communities support their radio stations: they contribute financially to cover operating costs and donate their time, among other efforts.[151]

109. According to the statements provided by members of the indigenous communities considered as alleged victims and the expert opinions offered in this case, beyond enabling indigenous peoples to participate more fully in the public discourse, community radio stations are essential tools for the preservation,[152] transmission and continued development of indigenous cultures and languages.[153]

110. Furthermore, as the expert witness Calí Tzay pointed out, indigenous community radio stations have also served as vehicles for the enjoyment of other rights, as illustrated by the essential role they have played in disseminating "culturally appropriate information in the indigenous languages" during the COVID-19 pandemic.[154] This was corroborated by both the State and the witnesses who testified at the hearing, who explained that State agencies, especially those working on health issues, use indigenous community radio stations to disseminate relevant information.[155] This is a strong indication and recognition of the presence and reach of these radio broadcasters and their importance to indigenous peoples. The expert also stressed the dependence of indigenous peoples on the oral dissemination of knowledge and information, especially given the high rates of illiteracy among many of their members.[156]

111. For example, Radio Ixchel, operated by the Maya Kaqchikel people of Sumpango, was founded in 2003 and broadcasts discussion programs as well as programs on children, music and health.[157] Radio Xob'il Yol Qman Txun, operated by the Maya Mam people of Todos Santos Cuchumatán and founded in June 2000,[158] seeks to "contribute to the construction and consolidation of a society integrated with the world without losing its past, based on its own

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151 *Cf.* Statement rendered by Anselmo Xunic, *supra*; statement rendered by María Pedro de Pedro, *supra*, and statement rendered by Rosendo Pablo at the public hearing held on June 9, 2021 before the Court.

152 The expert witness José Francisco Calí Tzay explained that: "[o]riginally, the indigenous peoples of Guatemala had a highly developed written system of cultural transmission that was nearly eradicated by colonization. Consequently, we indigenous peoples were forced to adapt by switching to oral transmission of culture in order to preserve our knowledge and our languages. Now indigenous knowledge is transmitted mainly through tradition and oral communication, so radio plays a vital role in maintaining culture and providing education and information to indigenous communities in indigenous languages." Written version of the expert report submitted by José Francisco Calí Tzay, *supra* (evidence file, folio 1418).

153 The expert witness Graham explained that: "[m]any indigenous peoples live with the awareness that the language they speak could disappear during their lifetime and that this loss, in turn, threatens their very survival as distinct cultures. In response to the threat of linguistic extinction and cultural erosion, many indigenous communities are now looking to one of the sources of such threats – the media, and particularly community radio as a mechanism of cultural and linguistic renewal and protection. […]Moreover, as the Expert Mechanism on the Rights of Indigenous Peoples has explained, "[t]he use of indigenous languages in the media increases the visibility of these languages, illustrates and promotes their relevance in contemporary life, saves them from marginalization, and improves Indigenous Peoples' access to their languages." *Cf.* Expert opinion rendered by affidavit by Lorie Graham, *supra* (evidence file, folio 1478).

154 *Cf.* Written version of the expert opinion presented by José Francisco Calí Tzay, *supra* (evidence file, folio 1415).

155 *Cf.* Statement rendered by Anselmo Xunic, *supra,* and statement rendered by Rosendo Pablo, *supra.* According to the Office of the Guatemalan Human Rights Ombudsman, "the program slots on community radio stations are locally oriented, and present programs on agricultural, educational, medical and social assistance topics." *Cf.* Directorate of Human Rights Research of the Ombudsman's Office for Indigenous Peoples. *Nota conceptual sobre las radios comunitarias, una aproximación al contexto de Guatemala*, supra, p. 41.

156 *Cf.* Written version of the expert opinion presented by José Francisco Calí Tzay, *supra* (evidence file, folio 1415).

157 *Cf.* Statement rendered by Anselmo Xunic, *supra*.

158 *Cf.* Statement rendered by Rosendo Pablo, *supra*.

values, resources and potential for development and human progress."[159] Its programming, 90% of which is in the Mam language, includes community news and traditional music, among other topics.[160]

b) Broadcasting regulation

112. This Court has recognized the States' authority and the need to regulate broadcasting activities,[161] which is also recognized by the International Telecommunication Union.[162] In light of the foregoing considerations, the Court agrees with the Commission that such regulation should be aimed at ensuring pluralistic, diverse, inclusive[163] and independent broadcasting.[164] Furthermore, in order to ensure the enjoyment of the right to freedom of expression to a larger number of persons or social sectors and, consequently, a greater circulation of opinions and information, the regulation must be clear, transparent and democratic.

113. In the case of *Granier et al. v. Venezuela*, the Court established that, since the radioelectric spectrum is a limited resource with a specific number of frequencies, this restricts the number of media that have access to it so that it is necessary to ensure that this media represents a diversity of news and opinions, viewpoints or positions. The Court emphasized that "pluralism of ideas in the media cannot be measured based on the number of media [outlets]; rather the ideas and information broadcast must truly be diverse and approached from different perspectives, without just one viewpoint or position existing. This should be taken into account in the procedures for the granting and renewal of broadcasting concessions or licenses. The Court considers that any limits or restrictions arising from broadcasting laws and regulations should take into account the need to ensure pluralism in the media, given its importance for the functioning of a democratic society."[165]

114. At the same time, the regulation of radio broadcasting, as well as the effective allocation of radio or television licenses, have a decisive impact on the right to freedom of expression, both of the individuals and groups who express themselves through the allocated frequencies, and of society as a whole, which will have access to certain authorized voices and opinions. Therefore, in the allocation and use of radio frequencies, the State must act within the framework of the broadest recognition of freedom of expression without discrimination of any kind.

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159 *Cf.* Statement of Juan Jerónimo (evidence file, folios 1113 to 1114).

160 *Cf.* Statement of Rosendo Pablo, *supra*.

161 *Cf. Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs,* supra, para. 165.

162 The International Telecommunication Union (ITU) is the specialized agency of the United Nations for information and communication technologies. The State of Guatemala, through Decree 88-98 of the Congress of the Republic, approved the Constitution and Convention of the International Telecommunication Union, signed in the city of Kyoto, Japan, on October 14, 1994 (evidence file, folio 1269).

163 In her expert opinion, the expert witness Adriana Labardini stated that the regulation of the radio spectrum should be consistent with "democratic criteria that ensure equal opportunities and access for all individuals." Written version of the expert opinion presented before the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folios 1572 to 1612). Similarly, the amicus curiae brief presented by the International Human Rights Practicum of Boston College Law School, and the amicus curiae brief presented by OBSERVACOM (*Observatorio Latinoamericano de Regulación de Medios y Convergencia)* and the World Association of Community Broadcasters.

164 *Cf.* OAS, IACHR*. Freedom of Expression Standards for Free and Inclusive Broadcasting, supra*, para. 8.

165 *Cf. Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs, supra*, para. 170. In this regard, the European Court in the *Case of United Christian Broadcasters Ltd v. United Kingdom - in which a broadcasting license was refused because the company only had religious programming – established that the aim of protecting the rights of others was associated with the protection of diversity and pluralism, because the State sought to "ensure that the limited spectrum available for national radio broadcasting [was] distributed in such a way as to satisfy as may radio listeners as possible [and] ensure that any one [religious] viewpoint is not allowed to dominate to the disadvantage of others*." On that occasion, the European Court stressed that this argument was applicable both to religious organizations and to organizations of a political nature. ECHR, Case of United Christian Broadcasters Ltd v. United Kingdom, No. 44802/98. Decision of November 7, 2000.

115. Various States Parties to the Convention recognize community radio stations in their legal systems and reserve radio frequencies for them. Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Honduras, Mexico, Paraguay, Peru and Uruguay have legally recognized the existence of community media.[166] At least six countries have reserved frequencies for community media: Uruguay,[167] with at least one third for AM, FM and television; Mexico,[168] with 10% in AM and FM bands; Chile,[169] with 5% in FM radio; and Bolivia,[170] with 17% for community media and 17% for indigenous peoples, intercultural and Afro-Bolivian communities, both in radio (FM and AM) and in analog television.[171] In addition, expert witness Labardini mentioned Ecuador,[172] which "reserves 34% for community media, subject to supply and demand." Of these countries, Mexico, Bolivia and Ecuador include a specific category for use of the spectrum and licenses for indigenous community radio stations.

116. In her expert opinion, Ms. Labardini indicated that various countries such as Mexico, Argentina, Bolivia, Colombia and Uruguay have assigned radio and television frequencies to certain communities free of charge, as "affirmative measures towards substantive equality." She also explained that they have been granted "[…] spectrum and licenses to operate their own indigenous telecommunications networks," as well as "universal service funds, funds for creators and communicators, content repositories and technical training," among other measures.[173]

117. Therefore, the Court considers that, in order to guarantee the right to freedom of expression, States are obliged to adopt measures that allow access to the radio spectrum to different social sectors, reflecting the pluralism existing in society. In the area of radio broadcasting, this State obligation is realized through the adoption of measures that ensure access to the radio spectrum for community radio stations - especially those of indigenous communities - given their importance for the dissemination and preservation of their culture and taking into account that they are ethnically distinct groups in a situation of marginalization and social exclusion resulting from poverty and discrimination.

c) The right of indigenous peoples to participate in cultural life and its connection with broadcasting

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166 *Cf.* Written version of the expert opinion presented before the Court by Adriana Sofía Labardini Inzunza, *supra*, (evidence file, folio 1580 to 1594). See also: OBSERVACOM *(Observatorio Latinoamericano de Regulación de Medios y Convergencia) Libertad a Medias. La regulación de los medios comunitarios en América Latina y su compatibilidad con los estándares interamericanos de libertad de expresión*. 2019. Available at: https://www.observacom.org/libertad-a-medias-2019/.

167 Article 5 of Law No. 20.433 establishes that "at least one-third of the radio spectrum for each locality in all frequency bands for analog and digital use and for all types of broadcasts."

168 According to Article 90 of the law Federal Telecommunications and Broadcasting Law "[t]he Institute shall reserve for community and indigenous FM radio stations ten percent of the FM sound broadcasting band, which ranges from 88 to 108 MHz […] The Institute may grant concessions for AM, community, and indigenous radio stations in the extended radio spectrum band segment, which ranges from 1605 to 1705 KHz."

169 Article 3 of Law 20.433 indicates that, "[c]oncessions for services shall be granted within a special segment of the radio spectrum in the modulated frequency band, both for analog and digital operations."

170 Article 10 of the General Telecommunications Law establishes 17% for "social-community" media and 17% for indigenous peoples, intercultural and Afro-Bolivian communities, in radio (FM and AM) and analog television.

171 *Cf.* Written version of the expert opinion presented before the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folios 1593 to 1594).

172 Article 106 of the Organic Communication Law (amendment of 2019) states: Reservation of the radio spectrum- The telecommunications authority will plan the use of the radio spectrum for open signal broadcasts for public, private and community media. Up to 34% of the radio spectrum will be reserved for the community sector based on demand and availability, a maximum percentage to be reached progressively. The remaining 66% of the spectrum will be allocated to the public and private sectors based on demand. The allocation of frequencies to the sector public will not exceed 10% of the spectrum.

173 *Cf.* Written version of the expert opinion presented before the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folios 1576 to 1577).

118. In the instant case, as in the case of *Lhaka Honhat v. Argentina,*[174] the Court will examine the right of indigenous communities to participate in cultural life[175] from the perspective of the alleged violation of Article 26 of the Convention, and taking into account the intersection of this right with the right to freedom of expression and the role of community radio as an instrument for the realization of these rights.

119. The Court has reiterated its authority to determine violations of Article 26 of the American Convention, and has pointed out that it protects the economic, social, cultural and environmental rights (ESCER) derived from the OAS Charter, and that the rules of interpretation established in Article 29 of the Convention are relevant for its understanding.[176]

120. As it indicated in the case of *Lhaka Honhat v. Argentina,* the Court considers that the right to participate in cultural life includes the right to cultural identity. The OAS Charter establishes, in Articles 30, 45(f), 47 and 48, the commitment of the States to ensure a) "integral development for their peoples [, which] encompasses [the] cultural […] field […]"; b) [t]he incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in […] cultural life […], in order to achieve the full integration of the national community"; c) "encourage […] culture" and d) "preserve and enrich the cultural heritage of the American peoples."[177]

121. Furthermore, Article XIII of the American Declaration on the Rights and Duties of Man (hereinafter "American Declaration") indicates, where pertinent, that "[e]veryone has the right to participate in the cultural life of the community." Similarly, Article 14(1)(a) of the Protocol of San Salvador recognizes "the right of everyone to […] participate in cultural life."[178] For its part, the United Nations Committee on Economic, Social and Cultural Rights (hereinafter "CESCR") has established that "taking part in cultural life" implies participation in, access to and contribution to cultural life, either individually or as a community, in the case of indigenous peoples.[179]

122. In turn, the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR"), establishes "the right of everyone to […] participate in cultural life."[180] Similarly,

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174 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs*, *supra*.

175 This Court emphasizes that cultural rights are not limited to the right to participate in cultural life. In fact, Article XIII of the American Declaration includes the right to "enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries [,] as well as the protection of moral and material interests" related to "inventions or any literary, scientific or artistic works." Similarly, in paragraph 2 of General Comment No. 21, the CESCR clearly mentions the right to "participate in cultural life" and, in addition "other cultural rights" *Cf.* UN, CESCR. *General Comment No. 21: Right of everyone to take part in cultural life,* Doc. E/C.12/GC/21/Rev.1, May 17, 2010.

176 *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, paras. 142 and 143, and *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras.* Judgment of August 31, 2021. Series C No. 432. paras. 62 to 65.

177 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs, supra*, para. 231.

178 In the universal sphere, the Universal Declaration of Human Rights, in Article 27(1), states that: "[e]veryone has the right freely to participate in the cultural life of the community." The International Covenant on Economic, Social and Cultural Rights (ICESCR) in Article 15(1)(a) establishes "the right of everyone to […p]articipate in cultural life." Moreover, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides that "[i] n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

179 *Cf.* UN, CESCR*. General Comment No. 21,* supra, para. 15.

180 *Cf.* Article 15 of the ICESCR.

ILO Convention No. 169 establishes the right to culture and identifies its importance for indigenous peoples, including the protection of indigenous languages.[181]

123. The CESCR, for its part, has pointed out that the right to take part in cultural life entails an obligation on the part of States to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of said right", as well as to take steps to prevent third parties from interfering in that right.[182] Likewise, it has stressed that "[t]he protection of cultural diversity is an ethical imperative inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, and requires the full implementation of cultural rights, including the right to take part in cultural life."[183]

124. In addition, this Committee has indicated that in order to understand the content and scope of the term "participate" it is necessary to consider, *inter alia*, the component of "access to cultural life." The Committee considers that "access [to cultural life] covers in particular the right of everyone – individually, in association with others or as a community - to know and understand his or her own culture and that of others through education and information […] Everyone also has the right to learn about forms of expression and dissemination through any technical medium of information and communication […]."[184]

125. This Court has pointed out that cultural identity is a "basic human right, and one of a collective nature in indigenous communities,[185] which must be respected in a multicultural, pluralist and democratic society."[186] The Court understands that the right to cultural identity "protects the freedom of individuals, including when they are acting together or as a community, to identify with one or several societies, communities or social groups, to follow a way of life connected to the culture to which they belong and to take part in its development. Thus, this right protects the distinctive features that characterize a social group without denying the historical, dynamic and evolving nature of culture."[187]

126. As part of the "right to culture", both the ADRIP and the UNDRIP identify the right to "practice," the right to "disseminate," and the obligation to ensure that indigenous peoples can have access to and participate in cultural life. Both instruments also protect the right to preserve and revitalize culture and languages. In this regard, the ADRIP establishes that "States shall take measures to promote the broadcasting of radio and television programs in indigenous languages, particularly in areas with an indigenous presence" and "shall support and facilitate the creation of indigenous radio and television stations […]."[188]

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181 *Cf.* Article 28(3) of ILO Convention 169.

182 *Cf.* UN, CESCR. *General Comment No. 21*, *supra,* paras. 48, 55 and 63.

183 *Cf.* UN, CESCR. *General Comment No. 21*, *supra,* para. 40.

184 *Cf.* UN, CESCR. *General Comment No. 21: Right of everyone to take part in cultural life*, *supra,* paras. 14 and 15.b.

185 "The right to cultural identity is relevant to indigenous peoples, but not only to them: it is closely related to the right of every person to "participate in cultural life" and to the right of members of groups considered "minorities" to "have their own cultural life." *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs*, *supra*, para. 231 and footnote 233.

186 *Cf. Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity - interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights).* Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 113. *Mutatis mutandi*, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, supra, para. 217, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012. Series C No. 250, para. 160.

187 *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs, supra,* para. 240.

188 Article XIV of the American Declaration on the Rights of Indigenous Peoples.

127. An intrinsic element of participation in cultural life is access to the means of communication and the possibility of establishing independent media, through which indigenous peoples can not only participate in, but also learn about and contribute to their own cultures, in their own language. In this sense, the Court has recognized that "language is one of the most important elements of a people's identity, precisely because it guarantees the expression, dissemination and transmission of their culture."[189]

128. The Court has also referred to the instrumental nature of certain rights, such as freedom of expression, to realize other rights such as the right to take part in cultural life.[190] From this perspective, indigenous people's access to their own community radio stations, as vehicles of freedom of expression, is an indispensable element to promote the identity, language, culture, self-representation and the collective and human rights of indigenous peoples.[191] Thus, in the present case, the right to freedom of expression and the right to participate in cultural life are intimately connected, since the guarantee of the right to establish and use their own radio stations as part of the indigenous peoples' right to freedom of expression, is essential for the realization of their right to participate in cultural life through the aforementioned means of communication.

129. According to the AIDPI, "the identity of peoples is a set of elements which define them and, in turn, ensure their self-recognition." This agreement also mentions two of the fundamental elements of the Maya peoples' identity, namely the "languages derived from a common Mayan root" and "a worldview based on the harmonious relationship of all elements of the universe […]." The AIDPI recognizes the oral tradition as a mechanism for transmitting this worldview from generation to generation[192] and states that "the communications media play a paramount role in the defense, development and transmission of cultural values and knowledge."[193]

130. The Court considers that the nature and scope of the obligations stemming from the protection of indigenous peoples' participation in cultural life include aspects that are immediately enforceable, as well as aspects of a progressive nature.[194] Regarding the first (obligations of an immediate nature), the Court recalls that States must ensure that this right is exercised without discrimination, and adopt effective measures for its full realization.[195] With regard to the second (obligations of a progressive nature), progressive realization means that States Parties have the specific and constant obligation to move as expeditiously and efficiently

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189 *Cf. Case of López Álvarez v. Honduras*. *Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 171.

190 *Mutatis mutandi*, Advisory Opinion OC-23/17, *supra,* para. 211, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 160.

191 In similar vein, Article 6 of the Universal Declaration on Cultural Diversity, of UNESCO, establishes that "[w]hile ensuring the free flow of ideas by word and image, care should be exercised so that all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity." United Nations Educational, Scientific and Cultural Organization (UNESCO). Universal Declaration on Cultural Diversity, adopted on November 2, 2001. See also: UN, Economic and Social Council. *Report on the course for indigenous journalists*, Doc. E/CN.4/Sub.2/AC.4/1998/6, May 18, 1998, para. 20, and IACHR. *Justice and social inclusion: the challenges of democracy in Guatemala,* OAS/Ser.L/V/II.118, December 29, 2003, para. 414.

192 *Cf.* Agreement on Identity and Rights of Indigenous Peoples, *supra*. Section I: Identity of the Indigenous Peoples, para. 2.iii.

193 *Cf.* Agreement on Identity and Rights of Indigenous Peoples*, supra.* Section III: Cultural rights, point H: Mass media, para. 1.

194 *Cf. Mutatis mutandi, Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs, supra, para. 104, and Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra,* para. 66.

195 *Cf. UN, CESCR. General Comment No. 3: The Nature of States Parties' Obligations (para. 1 of Article 2 of the Pact), Doc. E/1991/23, December 14, 1990, para. 3, and UN, CESCR. General Comment No. 19: Right to social security (Article 9), a Doc. E/C.12/GC/19, February 4, 2008, para. 40.*

as possible toward the full realization of this right,[196] subject to available resources, by legislation or other appropriate means. Likewise, the obligation of *non-retrogression* is imposed with respect to the realization of the rights achieved.[197] Consequently, the obligations to respect and guarantee rights established in the Convention, as well as the adoption of provisions of domestic law (Articles 1(1) and 2), are essential to achieve their effectiveness.[198]

131. In this regard, the Court notes that the instant case refers to obligations of an immediately enforceable nature derived from Article of 26 of the Convention with respect to the failure to guarantee the right of indigenous peoples to participate in cultural life without discrimination, because of their lack of access to the means of communication necessary to do so. Without prejudice to the foregoing, the Court may in the future consider, if the necessary elements are present, the obligations of a progressive nature in relation to the right under analysis.

d) Alleged violations of the rights to freedom of expression, to equality before the law and to participate in cultural life of the Maya Kaqchikel indigenous peoples of Sumpango, Achí of San Miguel Chicaj, Mam of Cajolá and Mam of Todos Santos Cuchumatán

132. The Court has reiterated that States must refrain from carrying out actions that in any way are aimed, directly or indirectly, at creating situations of discrimination *de jure or de facto.*[199] Thus, it has established that Article 1(1) of the Convention contains a general obligation that extends to all the provisions of this treaty and establishes the obligation of States Parties to respect and ensure the free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatever the origin or the form it takes, any treatment that may be considered discriminatory with regard to the exercise of any of the rights guaranteed in the Convention is, *per se*, incompatible with this general obligation.[200] If a State fails to comply with the general obligation to respect and guarantee human rights by applying any form of differentiated treatment that may have discriminatory effects – in other words, that does not have a legitimate purpose, or is unnecessary and/or disproportionate – this will result in the State's international responsibility. Consequently, there is an inseparable link between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination.[201]

133. In this regard, while the general obligation under Article 1(1) refers to the State's obligation to respect and ensure the rights contained in the American Convention "without any discrimination," Article 24 protects the "right to equal protection of the law."[202] In other words, Article 1(1) ensures that all treaty rights are guaranteed without discrimination, while Article 24 mandates that no unequal treatment be accorded in the domestic laws of each State or in

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196 *Cf.* UN, *CESCR. General Comment No. 3, supra,* para. 9, and UN, CESCR*. General Comment No. 19, supra, paras. 40 and 41*.

197 *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 190, *and Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra,* para. 66.

198 *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs, supra,* para. 190*,* and *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra,* para. 66.

199 *Cf. Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 103, and *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra,* para. 98.

200 *Cf. Proposed amendments to the naturalization provision of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 53, and *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil. Preliminary objections, merits, reparations and costs, supra*, para. 182.

201 *Cf. Advisory Opinion OC-18/03, supra,* para. 85, and *Case of Vicky Hernández et al. v. Honduras. Merits, reparations and costs.* Judgment of March 26, 2021. Series C No. 422, para. 64.

202 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Vicky Hernández et al. v. Honduras, supra*, para. 65.

their application. Thus, if a State discriminates with regard to respecting and guaranteeing a conventional right, it would be in breach of the obligation established in Article 1(1) and the substantive right in question. On the other hand, if the discrimination refers to unequal protection under domestic law or its application, the fact must be analyzed in the light of Article 24 of the American Convention, in relation to the categories protected by Article 1(1) of the same instrument.[203] In this regard, and taking into account the situation of poverty that affects a large part of the indigenous population in Guatemala (*supra* para. 36), the Court will examine the alleged violation of Article 24 of the Convention in relation to the category of "economic status." In this sense, the Court has already established that poverty is a category protected under the Convention,[204] since "poverty may well be understood to fall within the category of "economic status" to which the said article expressly refers, or in relation to other categories of protection such as "social origin" or "any other social condition," in view of its multidimensional nature."[205]

134. Based on the foregoing considerations, the Court has previously indicated that "States have the obligation not to introduce discriminatory regulations into their legal system, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of everyone."[206]

135. According to the case law of this Court, Article 24 of the Convention also establishes an obligation to ensure material equality. The right to equality guaranteed by Article 24 of the Convention has two dimensions. The first is a formal dimension that establishes equality before the law; the second is a material or substantial dimension that requires the adoption of affirmative measures in favor of groups that have historically been discriminated against or marginalized due to the factors mentioned in Article 1(1) of the American Convention. Thus, the Court considers that the right to equality before the law also entails the obligation to adopt measures to ensure that the equality is real and effective; in other words "to correct existing inequalities, to promote the inclusion and participation of historically marginalized groups, and to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving material equality. To this end, States must actively combat situations of exclusion and marginalization."[207]

136. The Court has likewise pointed out that international human rights law not only prohibits laws, policies and practices that are deliberately discriminatory, but also those whose impact could be discriminatory with regard to certain categories of individuals, even when it is not possible to prove a discriminatory intention.[208] Thus, "a violation of the right to equality and

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[203] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Vicky Hernández et al. v. Honduras. Merits, reparations and costs.* Judgment of March 26, 2021. Series C No. 422, para. 65.

[204] *Cf. Case of the Workers of Hacienda Brasil Verde v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318, para. 341, and *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*. *Preliminary objections, merits, reparations and costs*, *supra,* para. 185.

[205] *Cf. Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil. Preliminary objections, merits, reparations and costs*, *supra,* para. 185, and *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra,* para. 102.

[206] *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 350, para. 289, and *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil. Preliminary objections, merits, reparations and costs*, *supra*, para. 183.

[207] *Cf. Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*. *Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, para. 199, and *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra,* para. 108.

[208] *Cf. Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs.* Judgment of October 24, 2012. Series C No. 251, para. 234, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs, supra*, para. 263. See also, UN, CESCR. *General Comment No. 20: Non-discrimination and Economic, Social and Cultural Rights (Article 2, para. 2 of the International Covenant on*

non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when they are or appear to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups."[209]

137. Since this case concerns the rights of indigenous communities, it is worth recalling that the constant jurisprudence of this Court, since the case of *Yakye Axa v. Paraguay,* has established that States must take into account the characteristics that differentiate the members of indigenous communities from the general population and that make up their cultural identity, when interpreting and applying their domestic laws and regulations. Similarly, the Court applies the aforementioned reasoning to assess the scope and content of the articles of the American Convention.[210]

138. The Court has also reiterated that "it is indispensable that States grant effective protection to indigenous peoples, taking into account their specific characteristics, their economic and social conditions, as well as their situation of special vulnerability, their customary law, values, traditions and customs."[211]

139. In this case, the historical discrimination to which indigenous peoples in Guatemala have been subjected was demonstrated. Indeed, the persistence, over the years, of high rates of poverty and extreme poverty in these communities, their limited access to the formal labor markets and social security, the high illiteracy rates among their members, their precarious access to health care, telephone and electricity services, as well as the constant manifestations of discrimination against indigenous peoples in the mass media, indicate that indigenous peoples are still subjected to a situation of structural discrimination.[212]

140. In view of the foregoing, the State had the obligation to "correct existing inequalities" and "promote the inclusion and participation" of these peoples. In light of this obligation and of the right of indigenous peoples to establish and use their own means of communication, the State should have taken all necessary measures to ensure their access to radio frequencies, in order to guarantee their material equality *vis à vis* other social groups with the financial resources to compete in auctions for the acquisition of radio frequencies.

141. Thus, the State's regulatory power must be exercised within the framework of its obligations to respect, protect and guarantee the right to freedom of expression, in conditions of equality and without discrimination of any kind. The State must act in such a way as to

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Economic, Social and Cultural Rights), E/C.12/GC/20, July 2, 2009, para. 10, subparagraph b).

209 *Cf. Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs. supra*, para. 235, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs, supra*, para. 263. The concept of indirect discrimination has also been recognized, *inter alia*, by the European Court of Human Rights, which has established that where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group. *Cf.* ECHR, Case of *Hoogendijk v. Netherlands, No. 58641/00*. Judgment of January 6, 2005, p. 18.

210 *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 51; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. *Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, paras. 59 and 60, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* supra, para. 162.

211 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs, supra,* para. 63, and *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of October 14, 2014, para. 167.

212 Systemic discrimination refers to behavior and attitudes deeply entrenched in society, often involving unchallenged or indirect discrimination against certain groups, which manifests in practices that create relative disadvantages for some groups, and privileges for other groups. These practices may appear neutral, but have a disproportionate impact on the groups who suffer discrimination. *Cf.* UN, CESCR. *General Comment No. 20, supra,* para. 12.

facilitate the broadest exercise of freedom of expression, avoiding any type of decision that could be considered as a form of exclusion.

142. However, as noted the previous sections, the regulation of radio broadcasting in Guatemala is fundamentally determined by the LGT. This law establishes the public auction as the only mechanism for accessing a radio frequency, with the highest bid being the sole criterion for adjudication. The Court finds that this criterion, despite appearing neutral, severely restricts opportunities for access to the spectrum. Thus, instead of promoting a plurality of voices through mechanisms that ensure diversity in the media, the LGT ends up creating, indirectly, space for only one type of radio: commercial, for-profit radio.

143. Moreover, Governmental Agreement 316, signed by the then President of Guatemala in 2002, with the aim of facilitating access to the spectrum for some organizations that otherwise would not have it, did not prove to be an adequate instrument to ensure access to radio frequencies for indigenous communities. In this regard, the agreement only granted a limited number of frequencies and did so through a mechanism that appears to lack sufficient legal certainty, as would be the case of a law. Additionally, one of the declarants in the public hearing stated that "nobody wanted" those frequencies, that "they are not useful," and that there is broadcasting equipment that can no longer be connected to those frequencies. He also indicated that few people listen to the frequencies granted, their quality is poor and their operating cost is very high.[213] Thus, the Court considers that Governmental Agreement 316-2002 cannot be considered as a legitimate or adequate instrument to promote a plural, diverse and inclusive regulation of broadcasting.

144. The Court agrees with the Commission's statement that there are strong indications of the existence, for many years, of an oligopoly in the ownership and operation of the media in Guatemala, and that there have been no "significant advances in relation to the excessive levels of concentration in the ownership and control of audiovisual media […]."[214] In fact, a small group of communication companies appears to control the audiovisual media.[215] As for the "radio spectrum, [it is] dominated by six corporations: *Emisoras Unidas de Guatemala*, *Central de Radios*, *Grupo Radial El Tajín*, *Grupo Radio Rumbos*, *Radio Grupo Alius* and *Radio Corporación Nacional.*"[216]

145. On this matter, the Office of the Human Rights Ombudsman of Guatemala stated that the market for open radio and television frequencies is "largely dominated by an oligopoly."[217] According to the Latin American Association of Communication Researchers (*Asociación Latinoamericana de Investigadores de la Comunicación* - ALAIC)

> Guatemala is characterized by a market of open radio and television frequencies, with an extreme media concentration, dominated by large business groups that own extensive radio networks, affiliated with the Guatemalan Chamber of Radio Broadcasting, […] thus, broadcasting, especially

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213 *Cf.* Statement rendered by Anselmo Xunic, *supra*.

214 IACHR. *Report on the Situation of Human Rights in Guatemala,* OAS/Ser.L/V/II. Doc. 208/17, December 31, 2017, para. 301. Available at: http://www.oas.org/eng/iachr/reports/pdfs/Guatemala2017-eng.pdf.

215 *Cf.* International Commission Against Impunity in Guatemala. Political Financing in Guatemala, July 16, 2015, p. 35. Available at: http://www.cicig.org/uploads/documents/2015/informe_financiamiento_politicagt.pdf. Expert opinion rendered by affidavit by Lorie Graham*, supra* (evidence file, folio 1472), and OAS, IACHR. *Report on the Situation of Human Rights in Guatemala*, *supra*, para. 301.

216 International Commission Against Impunity in Guatemala. Political Financing in Guatemala, *supra*, p. 35.

217 Human Rights Research Unit, Office of the Ombudsman for Indigenous Peoples. *Nota conceptual sobre las radios comunitarias, una aproximación al contexto de Guatemala.* 2020, *supra*, p. 12. According to the Ombudsman's Office, "[n]umerous studies have noted the high concentration of media ownership in Guatemala, particularly the radio and broadcast television oligopolies. The report of the Inter-American Press Association (IAPA), on the "González case," presented at the hearing "Diversity, pluralism and concentration in the media in the Americas," during the 154th regular session of the IACHR, states that this media oligopoly "affects the quality and quantity of information on matters of public interest received by Guatemalan citizens."

community broadcasting, has been weakened due to the domination of these large corporations in the use of radio frequencies.[218]

146. The State argued that the broad wording of the LGT "grants the right to any person to participate in public auctions, promoting free competition."[219] However, the Court points out that although free competition appears to have a neutral character, it often generates a *de facto* discrimination because it ignores the diverse vulnerabilities that exist in a given society.

147. The Court emphasizes that this is precisely the subject matter of this case. As was demonstrated, most of Guatemala's indigenous communities, due to their situation of poverty, social exclusion and discrimination, do not have the financial[220] and technical means to compete on an equal footing with applicants from commercial radio stations, who are indirectly favored by the LGT. Therefore, Guatemala should have adopted all the necessary measures to remedy the various disadvantages faced by indigenous peoples in order to allow them *de facto* access to the radio spectrum. This also meant adopting affirmative actions to reverse or change existing discriminatory situations.

148. In this regard, the Court finds that the State has not taken the aforementioned affirmative actions, since, as can be inferred from the facts described above, Guatemala's legal system does not make provision for community radio stations, nor does it provide mechanisms for the reservation of radio frequencies for indigenous peoples,[221] for example. This, despite (i) the international and domestic commitments assumed by the State when it signed the AIDPI, 26 years ago, to promote the necessary legislative reforms to allow access to the radio spectrum to indigenous peoples; (ii) the exhortation of the Constitutional Court of Guatemala to the Congress of the Republic to issue legislation to regulate access by indigenous peoples to obtain and exploit frequency bands of the radio spectrum,[222] and (iii) the continuous efforts made by indigenous communities and civil society organizations, for decades, to promote the legal recognition of community radio stations.[223]

149. Bearing in mind that most indigenous people live in a structural situation of poverty and that the vast majority do not have the financial means to cover the costs of legally acquiring the usufruct of a radio frequency, the Court finds that the regulation of radio broadcasting in Guatemala promotes, in practice, indirect discrimination and a *de facto* impediment to the exercise of freedom of expression by indigenous peoples, by establishing the highest price as the sole criterion for awarding radio frequencies and by not adopting any measure, such as the reservation of frequency bands, to enable indigenous peoples to actually establish and operate

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218 Amicus curiae brief presented by the *Asociación Latinoamericana de Investigadores de la Comunicación* (merits file, folio 851).

219 Answering brief presented by Guatemala on January 21, 2021 (merits file, folio 350).

220 This is also reflected in the statements of the alleged victims during the public hearing, who stated that it was impossible to cover the amounts normally offered to obtain licenses (sometimes more than $100,000).

221 *Cf.* Written version of the expert opinion presented to the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folio 1584); statement rendered by Anselmo Xunic, *supra*; *Cultural Survival. A Question of Frequency: Community Radio in Guatemala.* June 2020. Available at: https://www.culturalsurvival.org/publications/cultural-survival-quarterly/question-frequency-community-radio-guatemala*;* OAS, IACHR*. Justice and social inclusion: the challenges of democracy in Guatemala, supra*, paras. 412 ff.*;* OAS, IACHR. *Report on the situation of the Human Rights in Guatemala,* supra, December 31, 2015, paras. 302 ff.*; Report on the situation of the Human Rights in Guatemala,* supra, December 31, 2017, paras. 293 ff.

222 *Cf.* Resolution of the Constitutional Court, *supra* (evidence file folio 1021-1022); statement rendered by Anselmo Xunic, *supra.*

223 *Cf.* Amicus curiae brief presented by the *Asociación Latinoamericana de Investigadores de la Comunicación* (evidence file, folios 853 to 855); Human Rights Research Unit of the Ombudsman for Indigenous Peoples. *Nota conceptual sobre las radios comunitarias, una aproximación al contexto de Guatemala*, *supra, and* OAS, IACHR. Report no. 164/19. Case 13.608 (merits file, folio 12 to 13). See also: Initiative No. 2621, *supra* (evidence file, folios 940 to 953); Initiative No. 3142, *supra* (evidence file, folios 955 to 967); Initiative No. 3151, *supra* (evidence file, folios 969 to 975), and Initiative No. 4087, *supra* (evidence file, folios 977 to 990).

their own media.

150. In this case, it has been demonstrated that the Maya Kaqchikel indigenous peoples of Sumpango, the Achí of San Miguel Chicaj, the Mam of Cajolá, and the Mam of Todos Santos Cuchumatán have made significant efforts to try to operate community radio stations in Guatemala, even under fear of criminal prosecution and despite the difficulties of raising funds to purchase the necessary equipment, finding volunteers to work in the radio stations, etc. Likewise, it has been proven that community radio stations are of great importance for indigenous communities, since they are represented in the topics addressed, the music they share, the people who operate these radio stations and the languages used for communication. Both the operation of the radios and their access by members of the indigenous communities that listen to them, enable these people, individually and collectively, not only to disseminate and receive information and diverse opinions, but also to express themselves in their own languages, listen to and broadcast their music, and discuss and participate in the debate on possible issues or problems that specifically affect them.

151. As noted by the expert witness Lorie Graham, the mainstream media have broadcast predominantly in non-indigenous languages, "from a non-indigenous worldview and, […] have tended to focus primarily on non-indigenous issues."[224] Likewise, the media have promoted the assimilation and use of negative stereotypes and stigmatizing portrayals of indigenous peoples.[225] The Court finds that the absence of indigenous voices in the media not only affects indigenous peoples' right to freedom of expression, but also prevents citizens from having access to different narratives, especially on the opinions, worldview and music of these peoples, which is crucial given the negative effects that the mainstream media often have on the representation of indigenous peoples.[226] This is even more relevant in Guatemala, where approximately half (or more) of the population is indigenous.

152. This Court considers that the Maya Kaqchikel indigenous peoples of Sumpango, the Achí of San Miguel Chicaj, the Mam of Cajolá, and the Mam of Todos Santos Cuchumatán have not had institutional channels through which to exercise, in a meaningful and permanent manner, their right to publicly express their ideas and opinions or to receive information on matters that interest and affect them. This prevents the full participation of these indigenous communities in a democratic society and perpetuates their exclusion. At the same time, the marginalization of these communities by the media has deprived Guatemalan society of the opportunity to know their interests, opinions and needs.

153. Consequently, the manner in which broadcasting is regulated in Guatemala amounts to a *de facto*, almost absolute prohibition of the exercise of the right to freedom of expression of indigenous peoples with respect to establishing and using media to disseminate information, ideas and opinions that affect them and to generate discussions of interest to them. Thus, this

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224 Expert opinion rendered by affidavit by Lorie Graham*, supra* (evidence file, folio 1466).

225 *Cf.* Expert opinion rendered by affidavit by Lorie Graham, *supra* (evidence file, folio 1466). When community radio stations discuss topics such as "corruption, defense of the water, the land and forests," they are faced with smear campaigns and are described as "pirate radio stations." *Cf.* Sworn statement made by Alfredo Baltazar Pedro on May 14, 2021, (evidence file, folio 1504).

226 *Cf.* Expert opinion rendered by affidavit by the expert witness Lorie Graham, *supra* (evidence file, folio 1464). According to Graham, "this absence of indigenous voices and of indigenous means of communication was, and continues to be, more insidious than mere disinformation; threat to the very existence of indigenous peoples by undermining indigenous languages, customary practices and cultural traditions." She also noted that "the mainstream media have predominantly presented [information] in non-indigenous languages, from a non-indigenous worldview and, in the best of cases, have tended to focus primarily on non-indigenous issues. In the worst of cases, the media have been used to promote assimilation and promulgate negative stereotypes and stigmatizing portrayals of indigenous peoples. The problem is that when these are the only narratives heard in the media, they become widely accepted as a reflection of reality and a justification for continued discrimination against stigmatized populations whose voices are not heard."

Court considers that the regulation of broadcasting in Guatemala, represented especially by the LGT, produces an unjustified restriction of indigenous people's right to freedom of expression, and in particular, of the rights of the alleged victims of this case.

154. In addition, it should be recalled that the importance of community radios for indigenous peoples means that the operation and management of their own community radio stations, decisions on programming and active participation in the broadcasts is, *par excellence,* a form of cultural participation for these communities. Furthermore, the Court finds that the operation of community radio stations by indigenous peoples is an essential vehicle for their cultural survival. Therefore, considering that broadcasting regulations in Guatemala do not, in practice, allow indigenous peoples to establish and use their own means of communication, this means they are prevented from exercising their right to participate in cultural life through their community radio stations.

155. Furthermore, while it is true that the internet has improved access to information and freedom of expression, the digital divide means that social groups who endure poverty and discrimination are unable to access this resource. Hence, traditional forms of oral communication, such as radio, are essential to ensure communication and information, the transfer of traditions and the preservation of indigenous languages.

156. Therefore, the Court considers that, by virtue of the regulatory framework concerning radio broadcasting in Guatemala, especially the LGT, the State is responsible for the violation of the rights to freedom of expression, to equality before the law and to participate in cultural life, established in Articles 13, 24 and 26 of the American Convention, in relation to the obligations to respect and guarantee rights without discrimination and the duty to adopt provisions of domestic law, contained in Articles 1(1) and 2 of the same instrument, to the detriment of the Maya Kaqchikel indigenous peoples of Sumpango, the Achí of San Miguel Chicaj, the Mam of Cajolá, and the Mam of Todos Santos Cuchumatán.

B.2 The alleged violation of Article 13(2) of the Convention in relation to the raids on the Radio Ixchel and Uqul Tinamit "La Voz del Pueblo" community radio stations and the criminal prosecution of their operators

157. The Court has repeatedly stated that, in a democratic society, the restriction of freedom of expression must be proportionate and appropriate for the achievement of legitimate objectives.[227]

158. As is clear from the American Convention itself, and as this Court has affirmed, freedom of expression is not an absolute right. Indeed, Article 13(2) of the Convention, which prohibits prior censorship, also provides for the possibility of subsequent liability for the abusive exercise of this right. However, such restrictions must be exceptional and may not limit, beyond what is strictly necessary, the full exercise of freedom of expression or become a direct or indirect mechanism of prior censorship.[228]

159. According to the facts proven in the instant case, two community radio stations –Radio Ixchel and "La Voz del Pueblo" - operated without a license by the Maya Kaqchikel indigenous people of Sumpango and the Maya Achí of San Miguel Chicaj, were raided by state authorities as a result of court orders issued in the context of criminal proceedings. Their broadcasting

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[227] Advisory Opinion OC-5/85, *supra,* para. 46, and Case of Herrera Ulloa v. Costa Rica*. Preliminary objections, merits, reparations and costs*, *supra*, paras. 120 to 123.

[228] *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs, supra*, para. 120, and *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs*, *supra*, para. 81.

equipment was seized and some members of these indigenous communities were criminally prosecuted. Considering that the raids on the radio stations and the criminal prosecution of their workers constituted a restriction of the indigenous peoples' right to freedom of expression, this Court will now analyze whether said restriction was legitimate, in light of Article 13(2) of the American Convention.

160. The Court has reiterated in its case law that Article 13(2) of the American Convention stipulates that subsequent liability for the exercise of freedom of expression must meet the following requirements concurrently: (i) be previously established by law, in the formal and material sense;[229] (ii) pursue an objective permitted by the American Convention ("respect for the rights or reputations of others" or "the protection of national security, public order, public health or public morals"), and (iii) be necessary in a democratic society (for which they must meet the requirements of legality, necessity and proportionality).[230]

161. With respect to the first requirement, strict legality, the Court has stated that restrictions must be previously established by law in order to ensure that these are not left to the discretion of the public authorities. Thus, the criminal definition of a given conduct must be clear and precise,[231] particularly when it concerns matters of criminal law and not of civil law.[232]

162. Regarding the proportionality and necessity of the measure, the Court has understood that any restriction imposed on the right to freedom of expression must be proportionate to the legitimate interest that justifies it, and closely tailored to the accomplishment of the legitimate objective, interfering as little as possible with effective exercise of that right.[233] In that sense, it is not sufficient to have a legitimate purpose; the measure in question must also respect the principles of proportionality and necessity in restricting freedom of expression. In other words, "this last step of the examination must consider whether the restriction is strictly proportionate, in a manner such that the sacrifice inherent therein is not exaggerated or disproportionate in relation to the advantages obtained from the adoption of such limitation."[234]

163. As for the analysis of the requirement of legitimate purpose in the case *sub judice*, the Court notes that the crime of theft applied in the case of unlicensed radio operators is contemplated in Article 246[235] of the Guatemalan Criminal Code, which states:

> Article 246. Theft. Whoever takes, without due authorization, a movable item, totally or partially owned by another, shall be punished with imprisonment of one to six years.

164. The definition of a "movable item" or asset is found in Article 451 of the Civil Code of Guatemala, which states in subparagraph three that "movable goods are natural forces

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229 *Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86* of May 9, 1986. Series A No. 6, paras. 35 and 37, and *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs, supra,* para. 85.

230 *Cf. Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs.* Judgment of January 27, 2009. Series C No. 193, para. 56, and *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs, supra,* para. 85.

231 *Cf. Case of Kimel v. Argentina. Merits, reparations and costs, supra,* para. 77, and *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of August 30, 2019. Series C No. 380*, para. 105.

232 *Mutatis Mutandis, Cf. Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011, Series C, No. 238, para. 89, and *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs, supra*, para. 105.

233 *Cf. Case of Herrera Ulloa v. Costa Rica*. *Preliminary objections, merits, reparations and costs, supra,* para. 123, and *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs, supra,* para. 108.

234 *Cf. Case of Kimel v. Argentina. Merits, reparations and costs, supra,* para. 83, and *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs. Supra,* para. 108.

235 Observations brief of the State of July 25, 2017 (evidence file, folio 645).

susceptible to appropriation."[236] Based on this, the Court finds that the application of the definition of theft in the criminal prosecution of persons who operate indigenous community radio stations is inappropriate, because it appears to confuse the use of the radio spectrum with its appropriation, inasmuch as the latter always implies the removal of property.[237] Thus, the use of the definition of theft amounts to "analogical integration" (the criminalization of an offense not established in law by resorting to an analogical procedure) which is contrary to the American Convention.

165. Therefore, since there is no "clear and precise legal definition of this conduct" - that is, the use of a radio frequency without a license from the state authorities - the Court finds that in this case the requirement of strict legality is not met.

166. Furthermore, as indicated previously (*supra* para. 160) the imposition of subsequent liability for the exercise of freedom of expression must respond to an objective permitted by the American Convention, such as respect for the rights or reputations of others or the protection of national security, public order, public health or public morals. In the instant case, the criminal prosecution of the people who operated indigenous community radio stations does not fulfill any of the aforementioned purposes; on the contrary, the raids on the radio stations in question and the criminal trials violated the rights of indigenous peoples to freedom of expression and to participate in cultural life.

167. As for the analysis of the suitability, necessity and proportionality of the restriction of freedom of expression, the Court deems it essential to take into account that (i) the right to freedom of expression of indigenous peoples includes their right to establish and operate community radio stations; (ii) the laws that regulate broadcasting in Guatemala prevented, in practice, the Maya Kaqchikel indigenous people of Sumpango and the Achí of San Miguel Chicaj from legally accessing the radio spectrum, and (iii) the State has not made legislative or other efforts to recognize community broadcasters and ensure that the aforementioned indigenous communities could operate their radio stations.

168. With respect to the suitability and necessity of the criminal action to achieve the sought-after purpose, the Court has indicated previously, and reiterates the point in this case, that although a criminal instrument may be suitable to restrict the abusive exercise of certain rights, provided that it serves the purpose of safeguarding the juridical good to be protected, this does not mean that the use of criminal proceedings to impose subsequent liabilities for the exercise of freedom of expression is necessary or proportional in all cases.[238] In this regard, the Court has indicated that criminal law is the most restrictive and severe means to impose liabilities for unlawful behavior, particularly when the sanctions involve custodial sentences. Therefore, the use of the criminal law must respond to the principle of minimum intervention, due to its nature as an *ultima ratio*. In other words, in a democratic society, punitive power should only be exercised to the extent that it is strictly necessary to protect fundamental legal interests from the most serious attacks that damage or endanger them. Otherwise, it would lead to the abusive exercise of the punitive power of the State.[239]

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[236] According to one of the expert witness, based on this provision, it was interpreted that the radio spectrum is a movable asset because it is a natural force susceptible of appropriation. *Cf.* Affidavit rendered by Rudy Estuardo Santos, *supra* (evidence file, folio 1489).

[237] The State itself has identified this flaw, given that since 2012 a bill has been under discussion in the Guatemalan Congress (Initiative No. 4479) for the purpose of creating a specific criminal offense for the use of the radio electric spectrum without a state license.

[238] *Cf. Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 67.

[239] *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*, *supra*, para. 73, and Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs, *supra*, para. 119.

169. In this context, the criminal prosecution of the persons who operated the indigenous community radio stations, the raids on Radio Ixchel and Radio "La Voz del Pueblo" and the confiscation of their broadcasting equipment, are inappropriate and unnecessary. This is because the State could have used other less injurious means than those provided for in criminal law, such as administrative procedures and sanctions, which would achieve the same objective, but would affect the indigenous communities in a less onerous manner.

170. Finally, taking into account all the above points, this Court finds that the acts carried out by the State to the detriment of the Maya Kaqchikel and Maya Achí communities were not only derived from a situation of illegality indirectly created by the State itself, but also resulted in an absolute sacrifice of the right to freedom of expression of these peoples, for the purpose of ensuring the full enjoyment of the right to freedom of expression of those who allegedly suffered some interference in the transmission of their radio stations. Therefore, the Court considers that the criminal prosecution in question was disproportionate, since it excessively affected the freedom of expression and the right to participate in cultural life of the Maya Kaqchikel indigenous peoples of Sumpango and the Maya Achí of San Miguel Chicaj.

171. Accordingly, this Court considers that the raids and seizure of equipment of the Radio Ixchel and "La Voz del Pueblo" community radio stations, carried out on the basis of Guatemala's domestic laws and through a court order, constituted illegitimate actions and restrictions of the right to freedom of expression, contrary to the Convention.

172. In view of the foregoing, the Court concludes that the State is responsible for the violation of Article 13(2) of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of the Maya Kaqchikel indigenous people of Sumpango and the Maya Achí indigenous people of San Miguel Chicaj.

VIII
REPARATIONS

173. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[240]

174. Reparation for the harm caused by the breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishing the situation prior to the violation. If this is not feasible, as occurs in the majority of cases of human rights violations, the Court may order measures to protect the rights that have been violated and repair the harm caused by those violations.[241] Accordingly, the Court has considered the need to provide different types of reparation in order to fully redress the damage caused; therefore, in addition to pecuniary compensation, other measures such as satisfaction, restitution, rehabilitation, and guarantees of non-repetition have special relevance owing to the severity of the harm caused.[242]

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[240] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, paras. 24 and 25, and *Case of Garzón Guzmán et al. v. Ecuador*, *supra,* para. 95.

[241] *Cf. Case of Velásquez Rodríguez v. Honduras*. Reparations and costs, *supra*, paras. 25 and 26, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 95.

[242] *Cf. Case of the Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Ríos Avalos et al. v. Paraguay, supra***,** para. 179.

175. The Court has also established that reparations must have a causal nexus with the facts of the case, the violations declared, the damage proven, and the measures requested to redress the respective harm. Thus, the Court must analyze the concurrence of these factors in order to rule appropriately and according to the law.[243]

176. Therefore, taking into account the considerations on the merits and the violations of the American Convention declared in this judgment, the Court will now examine the claims presented by the Commission and the representatives of the victims, together with the corresponding observations of the State, in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation, for the purpose of ordering measures to redress the harm caused.[244]

A. Injured party

177. Pursuant to Article 63(1) of the Convention, this Court considers that anyone who has been declared a victim of the violation of any right recognized therein is an injured party. In this case, the Court considers as "injured party" the Maya Kaqchikel indigenous people of Sumpango, in Sacatepéquez; the Achí indigenous people of San Miguel Chicaj, in Baja Verapaz; the Mam indigenous people of Cajolá, in Quetzaltenango; and the Mam indigenous people of Todos Santos Cuchumatán, in Huehuetenango who, as victims of the violations declared in Chapter VII, shall be the beneficiaries of the reparations ordered by the Court.

B. Measures of restitution

178. The ***representatives*** asked the Court to order the State to return "all the confiscated radio equipment and to pay for the damaged or replaced equipment." Given that they do not have proof of the cost of the aforementioned damage caused, they asked the Court to establish an amount in equity.

179. The ***State*** argued that, since all the raids on the radio stations and the seizures of property were carried out in accordance with the law and with a court order, "a request for reparation misrepresents the criminal proceedings, where the main purpose of the seizure (confiscation) is to prevent the property over which the parties are in dispute from changing its status." It added that the Court's jurisdiction or its powers do not allow it to "review a judicial process, or to consider the return or restitution of an asset that is the subject of an illicit act."

180. Considering, on the one hand, that the ***Court*** determined, in paragraphs 170 to 172 of this judgment, that the raids on the indigenous community radio stations and the seizure of their broadcasting equipment constituted a restriction of freedom of expression not authorized by the Convention, and on the other hand, that the Court was not provided with precise information on the equipment seized and the respective costs, the Court considers it pertinent to establish in equity, in the section on compensation, an amount for pecuniary damage.

C. Measures of satisfaction

181. The ***Commission*** asked the Court to order the State to ensure the legalization of the community radio stations operated by the victims that are still in operation.

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[243] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 222.

[244] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, paras. 25-27, and *Case of Vicky Hernández et al. v. Honduras. Merits, reparations and costs, supra,* para. 147.

182. The ***representatives*** asked the Court to order the State to implement the following measures of satisfaction: i) "[to] halt all criminal prosecutions and raids on indigenous peoples' community media, including existing indigenous community radio stations that have access to radio frequencies"; ii) to publish the main paragraphs of this judgment in a newspaper with national circulation, in the "Official Gazette" and on the official website of the "Superintendency"; and iii) to disseminate widely in the media an apology to the indigenous peoples for the "emotional harm caused by the criminalization of community radio stations."

183. The ***State*** declared that it "categorically opposes and rejects the claims of the alleged victims and the [Commission] that attribute responsibility to the State for alleged human rights violations." Therefore, it considered that "in the absence of international responsibility, it is not appropriate to order this reparation." However, the State affirmed that if the Court determines its responsibility and the need to publish the judgment, it would publish it "in the terms it deems appropriate." The State also objected to the request to issue a public apology for causing "alleged emotional harm for unlawful acts perpetrated by making illegal use of the radio frequencies, since this would be consenting to the unlawful use of a radio frequency."

C.1. Legalization of indigenous community radio stations in operation

184. The Court recalls that Radio X Musical, operated by the Maya Mam indigenous people of Cajolá, and Radio Uqul Tinamit "La Voz del Pueblo," operated by the Maya Achí indigenous people of San Miguel Chicaj, both of which have ceased broadcasting, as well as Radio Ixchel, operated by the Maya Kaqchikel indigenous people of Sumpango, and Radio Xob'il Yol Qman Txun, operated by the Maya Mam indigenous people of Todos Santos Cuchumatán, have had to operate without authorization due to the broadcasting regulations in Guatemala. Thus, the Court deems it pertinent to order the State to adopt, within one year, the necessary measures to allow the four indigenous communities mentioned above to operate their community radio stations freely, without interference or criminal prosecution. This, until effective legal mechanisms have been implemented to guarantee the indigenous communities of Guatemala access to the radio spectrum, and the allocation of the corresponding frequencies, under the terms of the frequency reservation ordered (*infra* para. 196).

C.2. *Publication of the Judgment*

185. As it has done in other cases,[245] the ***Court*** orders the State to publish, within six months of notification of this judgment: a) the official summary of the judgment prepared by the Court, once, in the Official Gazette and in a newspaper with wide national circulation, in a legible and adequate font, in Spanish, as well as in the principal Mayan languages used by the indigenous communities declared victims in this judgment; and b) this judgment, in its entirety, available for at least one year, on an official website of the State and on the website of the Superintendency of Telecommunications of Guatemala, in a manner accessible to the public and from the home page of the website. The State shall immediately inform this Court once it has issued each of the publications ordered, regardless of the one-year term granted to present its first report as ordered in the operative paragraphs of this judgment.

C.3. Other measures requested

186. With respect to the representatives' request for the publication of an apology to the indigenous peoples, the Court finds that the measures of satisfaction ordered previously,

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[245] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Garzón Guzmán et al. v. Ecuador*, *supra,* para. 117.

together with the other measures of reparation ordered in this judgment, are sufficient and adequate to remedy the violations suffered by the victims.

D. Guarantees of non-repetition

187. The ***Commission*** asked the Court to order Guatemala to adopt the necessary measures to i) legally recognize community media in domestic legislation and promote diversity and pluralism in the media; ii) stop using criminal law to criminalize the operation of indigenous community radio stations, and refrain from raiding and confiscating equipment from those indigenous community radio stations that are currently in operation, and iii) ensure that indigenous peoples have access to radio frequencies on equal terms.

188. The ***representatives*** requested that the Court order the State to: i) adopt legislative measures, such as Initiative 4087, or similar legislation, that complies with international standards for community radio and includes legal recognition of community radio stations; ii) establish special measures to guarantee access by indigenous peoples to radio frequencies and provide community radio stations with broad discretion on how to raise funds, "such as donations, community contributions, sponsorships and other legal mechanisms, to support the operation of the radio station […], including to cover radio workers' salaries"; iii) establish a radio frequency reserve in each municipality for use by community radio stations, and iv) halt all criminal prosecutions and raids against indigenous peoples' community media, including existing indigenous community radio stations that have access to radio frequencies.

189. The ***State*** pointed out that "any solution with respect to the use of radio frequencies must first be based on the respective technical studies on telecommunications and take into account that these frequencies are a limited natural resource and, therefore, must be publicly protected in accordance with domestic regulations." It reiterated that it has never allowed the segmentation of social sectors within the media, or the promotion benefits for a specific group, thereby preventing diversity in the media. Furthermore, it emphasized the existence of a legal framework that empowers the Public Prosecutor's Office to criminally prosecute the illegal use of radio frequencies. The State further argued that, by recognizing that the alleged victims had illegally used the radio frequencies, the Commission and the representatives had approved the commission of a crime defined in Guatemalan law; however, it is not reasonable "under any standard or analysis to justify the commission of a crime owing to the alleged lack of regulation." Finally, the State affirmed that it has not denied the right of access to radio frequencies through its domestic legislation, but has complied with the provisions that regulate said frequencies, which are in accordance with the American Convention, in terms of respecting the rights of Guatemalan society without any exclusion whatsoever.

190. In the instant judgment, the ***Court*** found that the regulatory framework concerning broadcasting in Guatemala, especially the LGT, constituted a violation of the rights to freedom of expression, equality before the law and to participate in cultural life, in relation to the obligations to respect and guarantee rights without discrimination and the duty to adopt provisions of domestic law, to the detriment of the Maya Kaqchikel indigenous peoples of Sumpango, the Achí of San Miguel Chicaj, the Mam of Cajolá, and the Mam of Todos Santos Cuchumatán (*supra* paras. 132 to 156).

191. Moreover, as noted in the previous chapters, despite the existence of various legislative initiatives that have been under discussion in the National Congress for many years (*supra* para. 51), Guatemala has not made progress in approving the legal reforms required to adapt its legal system to the content and scope of international rights related to broadcasting, especially with regard to the recognition of community radio stations and the creation of mechanisms that allow indigenous communities to effectively access the radio spectrum. This,

despite the fact that the State itself signed the AIDPI in 1995, in which it undertook to promote indigenous peoples' access to the media and provide them with radio frequencies (*supra* paras. 99 to 100).

192. Based on the foregoing, and taking into account the measures of non-repetition requested by the representatives and the Commission, the arguments presented by the State in relation to these, as well as the body of evidence in this case and the violations identified in Chapter VII of this judgment, the Court will now examine each of the aforementioned measures.

D.1 Legal recognition of community radio and effective access by indigenous peoples to radio frequencies

193. In this judgment, the Court has stressed the importance of community radio stations, not only as tools for the exercise of freedom of expression of certain social sectors, especially indigenous peoples, but also as an essential instrument to guarantee the plurality and diversity of the media. In this regard, the Court considered that the procedure for the acquisition of radio frequencies established by the LGT – i.e. a public auction based on the sole criterion of awarding the frequency to the highest bidder - although it appears neutral since it subjects any interested party to the same rules, ends up having a disproportionate impact on indigenous peoples, who do not have the financial and technical means to compete on equal terms in this procedure.

194. In addition, as noted in Chapter VII of this judgment, the LGT, in practice, does not make provision for community radio stations and Guatemala does not have any other regulations governing their operation, which the Court considers fundamental to ensure that community radio stations can effectively operate. Furthermore, taking into account that indigenous peoples represent approximately half of the population of Guatemala; that most of them live in a situation of poverty, social exclusion and discrimination; and that their community radio stations are essential – and often the only – tools for the enjoyment of their freedom of expression and the survival of their culture, this Court considers that any regulatory changes in this area must, necessarily and specifically, include indigenous community radio stations.

195. It is worth recalling that in 2002 Guatemala signed Governmental Agreement 316-2002, whereby the State created a procedure to facilitate access to AM frequencies for some civil society organizations to operate non-profit, non-political and non-religious radio stations. However, in addition to the fact that only a few such frequencies have been allocated under a mechanism that does not appear to offer sufficient legal certainty, one of the declarants at the public hearing stated that "nobody wanted" those frequencies, that "they are not useful," and that some broadcasting equipment can no longer be connected to those frequencies. He added that few people listen to the frequencies granted, their quality is poor and their operating cost is very high.[246] Thus, the Court considers that Governmental Agreement 316-2002 cannot be considered as a legitimate or adequate instrument to promote a plural, diverse and inclusive regulation of radio broadcasting.

196. Consequently, the Court considers that the State must, within a reasonable period of time, adapt its domestic regulations in order to: (i) recognize community radio stations as differentiated means of communication, particularly indigenous community radio stations; (ii) regulate their operation, establishing a simple procedure for obtaining licenses, and (iii) reserve an adequate and sufficient portion of the radio spectrum for indigenous community radio

246 *Cf.* Statement rendered by Anselmo Xunic, *supra*.

stations.

197. Regarding the legal recognition of community radio stations, the State must take into account the features that distinguish them from commercial radio stations, and from other non-commercial radio stations, i.e. they are collectively privately owned, with community participation in the ownership, programming, management and operation of the radio stations. Furthermore, they are non-profit organizations, but have a social purpose related to the needs and interests of the community.

198. With respect to the regulation of the operation of community radio stations, it should be borne in mind that they may need to use different sources of funding. In addition, the procedures for obtaining licenses should be simple and should not impose requirements that, in practice, prevent community radio stations from submitting an application to the State to acquire a frequency. For the assignation of radio frequencies, both the procedures and the licenses must be free of charge to allow indigenous communities *de facto* access to the spectrum. It is also essential that the State guarantee that indigenous community radio stations can broadcast in their own languages.

199. As this Court has recognized since the case of the *Saramaka People v. Suriname*, and as provided for in ILO Convention 169,[247] as well as in the ADRIP [248] and the UNDRIP, [249] indigenous peoples have the right to be previously consulted on the issues, policies and laws that affect them. Therefore, prior to introducing the regulatory amendments ordered, the Court requires the State to take steps to allow the country's indigenous peoples (not only the victims in this case) to participate in consultation processes regarding such measures.

200. Finally, the Court notes that on several occasions during the processing of this case, the State affirmed that the allocation of radio frequencies to indigenous peoples would not be possible, among other reasons, because the radio spectrum is saturated.[250] Regardless of this, and although this statement has been challenged by an expert and a witness,[251] Guatemala must effectively guarantee indigenous peoples' access to the radio spectrum, by means of the relevant regulatory and administrative arrangements, as stipulated previously.

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[247] Article 6 of ILO Convention No. 169 states: 1. In applying the provisions of this Convention, governments shall: a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures that may affect them directly; b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the aim of reaching agreement or consensus on the proposed measures. Available at: https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_100910.pdf.

[248] Article XXIII of the American Declaration on the Rights of Indigenous Peoples states: "Indigenous peoples have the right to full and effective participation in decision-making, through representatives chosen by themselves in accordance with their own institutions, in matters which affect their rights, and which are related to the development and execution of laws, public policies, programs, plans and actions related to indigenous matters."

[249] Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples states: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." Available at: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_es.pdf.

[250] The statement was based on the National Table for Frequency Allocation (NTFA) of Guatemala. This Table, one of the main tools for the administration of frequencies, prepared and published by the Superintendency of Telecommunications, is intended to illustrate the use of the spectrum, indicating the assigned frequencies and the name of the person or company that acquired them.

[251] In contrast to the State's assertion that Guatemala's radio spectrum is saturated, expert witness Labardini and witness Anselmo Xunic pointed out that the level of saturation is unclear and that it is possible that the spectrum is underutilized. In this regard, the Court does not have sufficient elements to determine the level of saturation of the spectrum.

D.2 Measures regarding criminal prosecutions and raids on indigenous peoples' community radio stations

201. The Court recalls that in paragraphs 157 to 172 of this judgment, it declared the violation of the right to freedom of expression of the Maya Kaqchikel indigenous peoples of Sumpango and the Maya Achí of San Miguel Chicaj, recognized in Article 13(2) of the American Convention, in relation to Article 1(1) thereof, having concluded that Guatemala unlawfully restricted the freedom of expression of those communities by raiding their community radio stations, seizing their equipment and criminally prosecuting their operators. This is because it was the State itself that, by failing to legally recognize community radio stations and not creating specific mechanisms to guarantee indigenous people effective access to the radio spectrum, indirectly generated the exclusion of these peoples, who were forced to operate their community radio stations without authorization because they could not compete on equal terms for the acquisition of frequencies.

202. By virtue of the foregoing, this Court deems it pertinent to order the State to immediately refrain from prosecuting individuals who operate indigenous community radio stations for the crime of theft, and to suspend measures such as the raids and seizure of the broadcasting equipment of these stations, at least until it has effectively ensured legal mechanisms to allow Guatemala's indigenous communities to have access to the radio spectrum and allocated the corresponding frequencies, under the terms of the reservation of frequencies ordered previously (*supra* para. 196).

203. In addition, the Court orders the State to annul, within one year, the convictions handed down against members of indigenous communities, and any consequences thereof, related to the use of the radio spectrum, so that these cannot be taken into account for any future purposes.

E. Compensation

204. In this section, the Court will assess pecuniary and non-pecuniary damage together.

205. The ***Commission*** requested that the Court order the State to make full reparation for the human rights violations declared in its Merits Report, including financial compensation for the raids and confiscation of equipment carried out to the detriment of two of the community radio stations operated by indigenous peoples, alleged victims in this case.

206. The ***representatives*** asked the Court to order the State to compensate each of the alleged victims for the alleged non-pecuniary damage suffered, including the fear presumably caused by the raids on the indigenous community radio stations.

207. The ***State*** denied its international responsibility for the violation of any of the articles of the Convention, and therefore argued that it is not responsible for making reparation to the alleged victims. It emphasized that the Inter-American Commission "did not specify or point out any evidence to determine that pecuniary or non-pecuniary damage was caused" and that it would not be appropriate to order financial compensation as reparation for the raids that allegedly harmed two of the community radio stations in this case, because the State "has acted in compliance with the law, without violating any of the alleged victims' rights." It also affirmed that "the raids and the seizure orders (confiscations) cannot be considered as damage against the two radio stations, since these items were used for a criminal offense." It added that "there cannot be non-pecuniary damage, much less "fear" […], given that the illegal use

of radio frequencies falls within the definition of criminal behavior recognized in Guatemalan legislation" and that "it would not be reasonable to seek compensation for unlawful actions."

208. The ***Court*** has developed the concept of pecuniary damage in its case law and has established that this encompasses the loss of or detriment to the income of the victim, the expenses incurred as a result of the facts and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.[252]

209. The Court has likewise developed the concept of non-pecuniary damage in its case law and has established that this may include both the suffering and distress caused to the direct victims and their next of kin, the impairment of values that are very significant to them, as well as changes of a non-pecuniary nature in the living conditions of the victim or his family.[253] Given that it is not possible to assign a precise monetary equivalent to non-pecuniary damage, this can only be compensated, for the purposes of comprehensive reparation to victims, through the payment of a sum of money, as prudently determined by the Court, applying judicial discretion and the principle of equity.[254]

210. The Court notes that, although no receipts for expenses were provided and no specific amounts have been requested, it can be presumed that the Maya Kaqchikel indigenous people of Sumpango, who operate Radio Ixchel, and the Maya Achí indigenous people of San Miguel Chicaj, who operate "La Voz del Pueblo" radio station, incurred various expenses since the radio equipment seized during the raids was not returned.[255] Therefore, the Court decides to award in equity, for pecuniary damage, the sum of USD $15,000.00 (fifteen thousand United States dollars) for each indigenous community, namely the Maya Kaqchikel of Sumpango and the Maya Achí of San Miguel Chicaj. This amount shall be paid to the representatives designated by each community.

211. The Court also understands that, given the nature of the facts and the violations declared in this judgment, the victims have suffered non-pecuniary damage that must be compensated. Therefore, considering the criteria established in its constant case law and the circumstances of this case, the Court deems it pertinent to establish in equity payment of USD $20,000.00 (twenty thousand United States dollars) for non-pecuniary damage, in favor of the following indigenous communities: Maya Kaqchikel of Sumpango, Maya Achí of San Miguel Chicaj, Maya Mam of Cajolá, and Maya Mam of Todos Santos Cuchumatán. This amount shall be delivered to the representative designated by each community.

212. The Court considers that the amounts awarded in equity compensate and form part of the comprehensive reparation owed to the victims, taking into consideration their suffering and distress.[256]

F. Costs and expenses

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[252] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*, *supra*, para. 43, and *Case of Garzón Guzmán et al. v. Ecuador, supra,* para. 130.

[253] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Garzón Guzmán et al. v. Ecuador, supra,* para. 132.

[254] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs,* supra, para. 53, and *Case of Grijalva Bueno v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of June 3, 2021. Series C No. 426, para. 191.

[255] In his statement made during the public hearing held in the case of the Maya Indigenous Peoples of Kaqchikel of Sumpango et al., Anselmo Xunic Cabrera referred to the funds raised through the financial contributions of "various sectors, including young people, women and peasants" to purchase a new transmitter and be able to broadcast again.

[256] *Cf. Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil. Preliminary objections, merits, reparations and costs, supra*, para. 306.

213. The ***representatives*** asked the Court to order the State to pay the costs incurred by the Human Rights and Indigenous Peoples Clinic, which acted as representative of the alleged victims since September 2012. In the proceedings before the Commission and in the presentation of the case before the Court alone, the representatives claimed to have incurred the following expenses: USD$5,038.00 (five thousand and thirty-eight United States dollars) for translation costs and USD$9,540.00 (nine thousand, five hundred and forty United States dollars) for legal fees. They asked the Court if they could subsequently present updated figures and receipts for expenses incurred during the proceedings before the Court.

214. Subsequent to the filing of the pleadings and motions brief, the representatives reported that they had incurred expenses totaling USD$11,282.72 (eleven thousand, two hundred and eighty-two United States dollars and seventy-two cents) for translation costs and USD$13,760.65 (thirteen thousand, seven hundred and sixty United States dollars and sixty-five cents) for attorneys' fees.

215. In total, the representatives requested payment of USD$25,043.37 (twenty-five thousand and forty-three United States dollars and thirty-seven cents) "in costs." They also requested that this amount be established in equity and "reimbursed directly from the State of Guatemala to the representatives of the victims."

216. The ***State*** pointed out that the representatives did not present any receipts or objective evidence to support the "translation costs," and therefore it rejected the representatives' request for payment of said expenses. It also asked the Court not to consider this request, "even if they (the representatives) were to submit documentation." Furthermore, it argued that "the fact of not speaking Spanish or Castilian, the official language of the respondent State, are situations that should not be used to the detriment of the country, since even the public hearing was conducted by the Court in [the State's] language."

217. The State also objected to the reparation requested under the heading "costs to be incurred" by the victims and the Clinic during the remainder of the proceedings before the Court, since the proper procedural opportunity for offering evidence before the Court is […] during the presentation of the brief of pleadings, motions and evidence."

218. At the same time, the State argued that the representatives did not present "detailed and explicit" information on how the "costs of attorneys' fees" are calculated. It noted that the representatives only provided a "brief explanation in percentages without relating those percentages to the documents presented in Annex 2", which "creates uncertainty regarding the authenticity of the amount determined in the brief and the evidence to support said costs." In addition, the State presented observations on the documents specified below:

(i) The documents described in items ii, iii, iv refer to costs incurred prior to the presentation of the pleadings and motions brief, showing that the representatives had such documentation and prior knowledge.

(ii) The documents attached as proof of costs do not contain any description or reference to show that the fees are actually for the processing of the present case before the Commission or the Court.

219. The ***Court*** reiterates that, according to its case law, costs and expenses form part of the concept of reparation, because the efforts made by the victims to obtain justice, both at national and international level, entail expenses that must be compensated when the State's international responsibility is declared in a judgment. As for the reimbursement of costs and expenses, it is for the Court to prudently assess their scope, which includes expenses generated

before the authorities of the domestic jurisdiction, as well as those incurred in the course of the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be based on the principle of equity, taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.[257]

220. This Court has indicated that "the claims of the victims or their representatives for costs and expenses, and the supporting evidence, must be presented to the Court at the first procedural opportunity granted to them, that is, in the pleadings and motions brief, without prejudice to such claims being updated subsequently with the new costs and expenses arising from the proceedings before this Court."[258] The Court also reiterates that it is not sufficient to merely forward the probative documents; rather, the parties are required to include arguments that relate the evidence to the fact that it represents and, in the case of alleged financial disbursements, to establish clearly the items and their justification.[259]

221. Taking into account the amounts requested by the Human Rights and Indigenous Peoples Clinic and the receipts for expenses presented, the Court decides to establish in equity payment of the sum of USD $20,000.00 (twenty thousand United States dollars) for costs and expenses in favor of the Human Rights and Indigenous Peoples Clinic. This amount shall be delivered directly to the Human Rights and Indigenous Peoples Clinic.

222. At the stage of monitoring compliance with this judgment, the Court may order the State to reimburse the victims or their representatives for any reasonable expenses incurred during that procedural stage.[260]

G. Method of compliance with the payments ordered

223. The State shall pay compensation for pecuniary and non-pecuniary damage, and reimbursement of the costs and expenses established in this judgment directly to the communities, individuals and organizations indicated herein, within one year of notification of this judgment, or it may bring forward full payment, pursuant to the following paragraphs.

224. The State shall fulfill its monetary obligations by payment in United States dollars, or the equivalent in national currency, using for the respective calculation the market exchange rate published or calculated by a relevant banking or financial authority, on the date closest to the day of payment.

225. If, for reasons attributable to the beneficiaries of the compensation it is not possible to pay the amount determined within the period indicated, the State shall deposit said amount in their favor, in an account or certificate of deposit in a solvent Guatemalan financial institution, in United States dollars or the equivalent in national currency, and on the most favorable financial terms permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the accrued interest.

226. The amounts established in this judgment as measures of reparation for the damage

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257 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, paras. 42, 46 and 47, and *Case of Garzón Guzmán et al. v. Ecuador, supra,* para. 138.

258 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39*,* para. 79, and *Case of Garzón Guzmán et al. v. Ecuador, supra,* para. 139.

259 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs,* para. 277, and *Case of Garzón Guzmán et al. v. Ecuador, supra,* para. 139.

260 *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010. Series C No. 217, para. 29, and *Case of Ríos Avalos et al. v. Paraguay, supra*, para. 244.

caused and for reimbursement of costs and expenses shall be delivered in full, without deductions arising from possible charges or taxes.

227. If the State should fall into arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in Guatemala.

IX
OPERATIVE PARAGRAPHS

228. Therefore,

THE COURT

DECLARES,

By five votes in favor and one against, that:

1. The State is responsible for the violation of the rights to freedom of expression, equality before the law and to participate in cultural life, established in Articles 13, 24, and 26 of the American Convention on Human Rights, in relation to the obligations to respect and guarantee rights without discrimination, and the duty to adopt provisions of domestic law, recognized in Articles 1(1) and 2 of the same instrument, to the detriment of the Maya Kaqchikel indigenous peoples of Sumpango, the Maya Achí of San Miguel Chicaj, the Maya Mam of Cajolá and the Maya Mam of Todos Santos Cuchumatán, pursuant to paragraphs 78 to 156 of this judgment.

Dissenting, Judge Eduardo Vio Grossi.

Unanimously, that:

2. The State is responsible for the violation of the right to freedom of expression, recognized in Article 13(2) of the American Convention on Human Rights, in relation to the obligations to respect and guarantee rights, established in Article 1(1) of the same instrument, to the detriment of the Maya Kaqchikel indigenous peoples of Sumpango and the Maya Achí indigenous peoples of San Miguel Chicaj, in the terms of paragraphs 157 to 172 of this judgment.

AND ESTABLISHES:

Unanimously, that:

3. This judgment constitutes, *per se*, a form of reparation.

4. The State shall adopt the necessary measures to ensure that the Maya Kaqchikel indigenous peoples of Sumpango, the Achí of San Miguel Chicaj, the Mam of Cajolá and the Mam of Todos Santos Cuchumatán can freely operate their community radio stations, within one year, pursuant to paragraph 184 of this judgment.

5. The State shall issue the publications indicated in paragraph 185 of this judgment, within six months from notification thereof.

6. The State shall, within a reasonable time, adapt domestic regulations in order to recognize community radio stations as distinct means of communication, particularly indigenous community radio stations; regulate their operation, establishing a simple procedure for obtaining licenses; and shall reserve part of the radio spectrum for indigenous community radio stations, pursuant to paragraphs 196 to 200 of this judgment.

7. The State shall immediately refrain from criminally prosecuting the individuals who operate indigenous community radio stations, conducting raids on said radio stations or seizing their broadcasting equipment, until it has ensured effective legal mechanisms to allow access by indigenous communities of Guatemala to the radio spectrum and allocated the corresponding frequencies, pursuant to paragraph 202 of this judgment.

8. The State shall annul the convictions handed down against members of indigenous communities for using the radio spectrum, and any related consequences, pursuant to paragraph 203 of this judgment.

9. The State shall pay the amounts established in paragraphs 210, 211 and 221 of this judgment as compensation for the confiscated broadcasting equipment, for pecuniary and non-pecuniary damage, and as reimbursement of costs and expenses, in the terms of paragraphs 223 to 226 of this judgment.

10. The State shall submit a report to the Court, within one year of notification of this judgment, on the measures taken to comply with it, without prejudice to the provisions set forth in paragraph 185 of this judgment.

11. The Court will monitor full compliance with this judgment, in exercise of its authority and in compliance with its obligations under the American Convention on Human Rights, and will consider this case closed once the State has complied fully with its provisions.

Judges L. Patricio Pazmiño Freire, Eduardo Ferrer Mac-Gregor Poisot, Eugenio Raúl Zaffaroni, and Ricardo Pérez Manrique informed the Court of their separate concurring opinions. Judge Eduardo Vio Grossi advised the Court of his partially dissenting opinion.

DONE at San José, Costa Rica, in a virtual session held on October 6, 2021, in the Spanish language.

IACtHR. *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*. *Merits, Reparations and Costs*. Judgment of October 6, 2021. Judgment adopted in San José, Costa Rica in a virtual session.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Registrar

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Registrar

CONCURRING OPINION OF

JUDGE PATRICIO PAZMIÑO FREIRE

CASE OF THE MAYA KAQCHIKEL INDIGENOUS PEOPLES OF SUMPANGO ET AL. V. GUATEMALA

JUDGMENT OF OCTOBER 6, 2021

(Merits, Reparations and Costs)

1. My concurring opinion in the case of the *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala* seeks to put into perspective the doctrine of international human rights law, in general, and the right to freedom of expression, in particular, from a culturally appropriate perspective and within the framework of the regulatory development produced in the region by the democratic constitutionalism of "Good Living" (*Buen Vivir* or *Sumak Kausay)*.

2. In a world that appears increasingly polarized and bombarded by the pandemic of disinformation and "fake news", the construction of community communication spaces offers a unique opportunity to foster social dialogue, cultural exchange and healthy coexistence in democracy. Not just any kind of democracy, but a true, participatory democracy.[1]

3. Community, popular, alternative, citizen, participatory and free radio stations are multiplying all over the world. They are identified by their objectives of social transformation and their search for a just system with respect for human rights, with access and participation of the majority. There are many individuals and groups everywhere who never tire of reiterating and acting on the basis of their aspirations: in order to build democratic societies, the exercise of the human right to freedom of expression and communication must be recognized and guaranteed.

4. And in order to exercise this right to freedom of expression, there must be channels of communication that facilitate the real participation of the greatest number of voices, regardless of their economic capacity and/or their ownership of radio broadcasting frequencies. The internet and our use of new technologies have expanded our capacity to communicate and transmit knowledge. However, in rural areas, radio continues to have an essential value. With the advent of these technologies and new ways of communicating, we cannot turn our backs on these communities and widen the already existing digital gap. The duty of the State is to fully and inclusively integrate these important forms of organization and expression. This does not imply transforming or trying to ''formalize'' or co-opt these basic organizational forms in our society; rather, the aim is to catalyze, transmit and promote social and popular culture. To inform, educate, entertain or denounce, is a multiple and complex task performed by these media. However, from a discriminatory and eminently racist view of the world, they are excluded or restricted under formalisms or infra constitutional regulations. Under exclusionary perspectives, the information they provide is not considered relevant because it is local - in a system that prioritizes events in the cities or "big news", or in which education is stigmatized for its linguistic diversity or because of its content and popular roots.

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[1] *Cf.* Pazmiño, Patricio. *Descifrando Caminos. Del Activismo Social a la Justicia Constitucional*. Flacso, 2010.

5. The judgment under consideration has to do with the historical and structural exclusion that indigenous and tribal peoples have suffered since colonial times and continue to suffer now, in the neoliberal post-modern era, under neocolonial models with institutionalized discriminatory and stigmatizing political systems. We are not only talking about the effects that might be felt indirectly today or about isolated practices; rather, we are facing a complex hegemonic legal, political, economic and media system that continues to reproduce the structures of exclusion and inequality.

6. We owe indigenous and tribal peoples a strong institutional framework based on justice and a clear democratic context that respects, assists and complements their interests, culture and history so that, respecting their ancestral worldview and traditions, they are afforded and granted full participation at all levels of decision-making when their communal life projects are in question or at risk. I would like to reiterate what has already been my dissenting judicial opinion that:

7. The context is important, because as I write this opinion our political, social and legal institutions have suffered a radical breakdown as a result of the devastation wrought by the pandemic. In this situation, the historical and brutal inequality that has burdened our region since colonial times has become evident. And this context is also very relevant because at this moment there are many protests throughout our region, in Colombia, Ecuador and Peru, where people are demanding solutions to their political and social systems, just as in Chile, where a long-awaited constitutional change was achieved after three decades.

8. If ignoring this context is like trying to blot out the sun with a finger, considering that a political system is a fixed formula for guaranteeing democracy is as fruitless an endeavor as damming a river with sand. Years of failed attempts at economic, social, and political laboratory models and failed experiments in our region show us that at the very core of Latin America's discontent lies the gap between democratic promise and reality. At the dawn of a new decade, the people have decided that their rulers are not up to the task of finding solutions to the problems we face as societies. Longstanding and deep-rooted problems, just to name a few: unbridled corruption, the greatest inequality in the world, crime and murder rates comparable to war zones.

9. I am fully convinced that, first and foremost, the answer to these problems lies in consolidating public policies from a human rights perspective. However, I am not similarly convinced when I am told that the political pathologies we are experiencing can be solved with a simple formula prescribed by international bodies, a formula that includes damming up the river of popular discontent with prefabricated models of democracy. In fact, this river of social demands will never find its course in inflexible, imported, and model democratic systems. The remedy would be much worse than the disease.[2]

10. As a judge and Vice President of this judicial institution, which makes decisions in a collegiate manner, I have always been constant in my line of legal thinking regarding the need to always have an appropriate cultural and gender perspective, and to consistently seek to achieve the highest democratic participation of social movements, communities and, in general, all human groups in our diverse region. I reiterate that:

> [i]n our region, where there is a plurality of deeply-rooted, traditional, and culturally-

[2] *Cf.* Dissenting opinion, Judge Patricio Pazmiño Freire. *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights (Interpretation and scope of Articles 1, 23, 24 and 32 of the American Convention on Human Rights, Article XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter).* Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, paras. 18-19.

> diverse legal and political systems, representative democracy, in its most limited conception, is insufficient to meet the requirements of the democratic principle. Several years ago, following the disastrous dictatorial era, starting in the eighties, a constitutionalism has been developing in Latin America that seeks not only to recognize the rights of women, indigenous and tribal peoples, and sexually-diverse groups, but also to achieve their full participation in public affairs.[3] For this reason, I believe that the Inter-American Court, as a frame of reference for the juridical debate on treaty obligations, should expand the concept of democracy in order to enrich both the notion of representative democracy and its participatory component. To this extent, the democratic principle is not only exhausted in terms of formal representation, but also requires incorporating the concept of substantial participatory, inclusive, non-exclusive democracy that is generous and lavish in its acceptance of transformations and changes, far removed from confrontation and hatred of the diverse, the different, the other.[4]

11. The fact that this case has come to the attention of the Court, despite such a regrettable and unjustified delay, is a clear demonstration of the urgent need for this high court to address the problem, in this case regarding the community media of indigenous peoples and communities. It is necessary to reinforce a holistic, systematic, progressive and integrated interpretation, gradually moving away from the formalist and paleo-positivist legal ideology that characterizes many of our judicial systems, which, as in the case at hand, end up reproducing deeply unequal exclusionary structures of domination, discrimination and derision, if not neo-colonization of culture. This not only affects indigenous peoples and communities but also other groups, individuals and collectives that perceive themselves as different, as well as millions of citizens who survive in appalling conditions of chronic and widespread poverty in our countries.

12. Consequently, in this analysis, as in many other cases, I encourage the endorsement of a conventional hermeneutic based on assumptions that are guided by a willingness to recognize the following: that the right of indigenous and tribal peoples to communication and community radio is not only limited to defending the right to freedom of expression and communication, but is also a substantive component that reinforces and guarantees other human rights, such as the participation of individuals, groups and indigenous peoples in decisions on matters of public interest that affect them. These collective rights enjoy a significant endorsement and comparative constitutional normative development in the region, and have been incorporated into the processes of so-called democratic constitutionalism, within the collective rights known as *Sumak Kausay* (Good Living).

13. An important aspect to highlight is that this profuse constitutional regulation on the right to participation "is a substantive part of 'more advanced institutions [, such as,] popular consultations at the local or national level, primary elections for the selection of candidates, plebiscites, referendums, the recall of popularly elected officials,''[5] prior consultations, environmental consultations, as well as the innovative creation of new functions of public administration, such as the electoral function and the effective participation of citizens in the management, control and oversight of government authorities.

14. Similarly, it is necessary to emphasize that the collective rights to participation are intrinsically linked to and form part of the rights to development, equality and a dignified life,

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[3] *Cf.* Pazmiño, Patricio. *Descifrando Caminos. Del Activismo Social a la Justicia Constitucional*. Flacso, 2010.

[4] Dissenting opinion, Judge Patricio Pazmiño Freire. *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights (Interpretation and scope of Articles 1, 23, 24 and 32 of the American Convention on Human Rights, Article XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter).* Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 22.

[5] *Cf.* Pazmiño, Patricio. *Descifrando Caminos. Del Activismo Social a la Justicia Constitucional*. Flacso, 2010, p. 50.

in order to strengthen a model of democracy that institutionalizes the redistribution of wealth and access to the goods and benefits generated by society, avoiding the perpetuation of democratic forms of organization that clearly socialize discrimination by allowing the replication of corporate monopolies in the media conglomerates that dominate the communications market. In this context, I stress the importance and significance of the democratization and equitable redistribution of the radioelectric spectrum and effective access to the use of frequencies.

15. In conclusion, I must emphasize that many of these substantive regulatory changes, which form part of democratic constitutionalism, [6] are the result of profound constitutional transformations, carried out peacefully and democratically, approved and promulgated throughout the first decade of this century in Ecuador, Bolivia and Venezuela. These changes must be incorporated into the Court's legal thinking as part of the inter-American judicial dialogue, since they constitute the regional *corpus juris*, but mainly because they are the result of constitutional reformulation processes based on constituent assemblies with broad social and popular participation. These reflect an important experience that moves away from traditional and cosmetic reforms and legislative constitutional changes designed by powerful elites or exclusive, selective groups, generally the beneficiaries of the changes they claim to produce.

L. Patricio Pazmiño Freire
Judge

Pablo Saavedra Alessandri
Registrar

[6] Pazmiño, Patricio. *Justicia y Constitucionalismo democrático*. Porrúa Mexico, 2021.

SEPARATE OPINION OF
JUDGE EDUARDO FERRER MAC-GREGOR POISOT

CASE OF THE MAYA KAQCHIKEL INDIGENOUS PEOPLES OF SUMPANGO ET AL. V. GUATEMALA

JUDGMENT OF OCTOBER 6, 2021
(Merits, Reparations and Costs)

I. INTRODUCTION

1. In the instant case,[1] the Inter-American Court of Human Rights (hereinafter "Inter-American Court" or "the Court") analyzed the impediments faced by four indigenous communities in Guatemala to freely exercise their right to freedom of expression and their right to participate in cultural life through the community radio stations.[2] This was due to the existence of legal obstacles, at the domestic level, which impeded their access to radio frequencies, as well as a policy of criminalization of community radio broadcasting operated without authorization. The judgment also addressed the lack of legal recognition of community media by the State and the discriminatory rules governing radio broadcasting.

2. Although this case considered fundamental elements of the rights of indigenous peoples that are present in the jurisprudence of the Inter-American Court since 2001,[3] it is the first time that the Court refers to their right to freedom of expression[4] — in its collective and individual dimensions— and to participate in cultural life, as a component of their cultural rights,[5] exercised through indigenous community radio stations.

3. The central aspect of the judgment is, precisely, the analysis of the violations of the aforementioned rights, in addition to the right to equality before the law.[6] All these rights are analyzed in a unified manner, as indicated in the jurisprudence of this Court.[7] Indeed, the Inter-American Court was able to establish the intrinsic connection that exists between the violations found; thus, for indigenous communities, having access

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1 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala. Merits, reparations and costs.* Judgment of October 6, 2021. Series C No. 440.

2 The communities declared victims in the judgement were: Maya Kaqchikel of Sumpango, Maya Achí of San Miguel Chicaj, Maya Mam de Cajolá and Maya Mam de Todos Santos Cuchumatán.

3 Since the first case, concerning *the Mayagna* (*Sumo*) *Awas Tingni* Community *v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, until the most recent, *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras.* Judgment of August 31, 2021. Series C No. 432.

4 Article 13 of the American Convention in Human Rights.

5 Article 26 of the American Convention in Human Rights.

6 Article 24 of the American Convention in Human Rights.

7 In this regard: "141. The Court has repeatedly maintained the interdependence and indivisibility of civil and political rights and economic, social and cultural rights, because they should all be understood integrally as human rights, without any specific hierarchy, and be enforceable in all cases before the competent authorities." *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 141.

to their own community radio stations constitutes a fundamental vehicle for their freedom of expression, as well as being "an indispensable element to promote the identity, language, culture, self-representation and the collective and human rights of indigenous peoples."[8] In this regard, the Court stated that "the guarantee of the right to establish and use their radio stations as part of the indigenous peoples' right to freedom of expression, is essential for the realization of their right to participate in cultural life through the aforementioned means of communication."[9]

4. The Inter-American Court divided its analysis of the merits into two parts. In the first, it essentially analyzed the violations derived from the regulation of broadcasting in Guatemala in the specific case; in the second, it examined the violations resulting from the criminal prosecution of the indigenous community radio operators identified as victims in this case.

5. In the first part, the Court not only recapitulated and reaffirmed the main aspects of its jurisprudence regarding the rights to freedom of expression, to participate in cultural life and to equality before the law, but also recognized the right of indigenous communities to establish and use their own media, particularly community radio stations, given the vital importance of such media for those communities. Likewise, the Court emphasized the close connection existing between the rights mentioned in this case, since the operation of their community radio stations assures indigenous communities an adequate space to express, transmit and discuss their ideas and opinions and to participate in the public debate. It also allows society to know about these ideas, and serves as an essential tool to transmit their history, language, music and culture.

6. In examining the regulation of broadcasting in Guatemala, the Court took into account, on the one hand, the historical and structural situation of poverty and discrimination in which the country's Maya indigenous communities live; and, on the other, the essential role played by community radio stations for the four indigenous communities identified as victims in the case. Based on this analysis, the Inter-American Court considered that the regulatory framework related to the acquisition of radio frequencies – which establishes the public auction as the only means to obtain a frequency and the highest bid as the sole criterion for adjudication - "instead of promoting a plurality of voices through mechanisms that ensure diversity in the media […] ends up creating, indirectly, space for only one type of radio - commercial, for profit radio."[10] Consequently, the Court concluded that the regulation of radio broadcasting in Guatemala "promotes, in practice, indirect discrimination and a *de facto* impediment to the exercise of freedom of expression by indigenous peoples"[11] and their right to participate in cultural life through their community radio stations.

7. In the second part of the examination of the merits, an interesting analysis is made regarding the restriction of the right to freedom of expression of two indigenous communities by virtue of the criminal prosecution of their members who operate or operated the radio stations of these communities. The Court concluded that this

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8 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 128.

9 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 128.

10 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 142.

11 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 149.

restriction was illegitimate because it did not comply with any of the requirements for the establishment of subsequent liability (legality, purpose, suitability, necessity and proportionality). It is worth noting that the Inter-American Court recognized that the criminal prosecution of the indigenous community radio operators "not only derived from a situation of illegality indirectly created by the State itself, but also resulted in an absolute sacrifice of the right to freedom of expression of these peoples."[12] Thus, the Court found that the acts carried out in the context of the criminal prosecution of the indigenous community radio stations "constituted illegitimate actions and restrictions of the right to freedom of expression, contrary to the Convention."[13]

8. It is worth emphasizing the important role played by civil society through the *amicus curiae* briefs filed in this case. Said briefs referred to:

(i) the situation of vulnerability of indigenous communities in the face of the discrimination they have suffered, freedom of expression as a collective right and the indirect discrimination generated by the lack of legislation regulating community radio stations;[14]

(ii) the legal standards applicable to freedom of expression and broadcasting and the regulatory framework applicable to community radio stations;[15]

(iii) the situation of community radio stations in Guatemala and a factual and legal analysis of the violations;[16]

(iv) the economic foundations and legal principles that regulate administrative intervention regarding the radio electric spectrum and how the legal-administrative system of the radio spectrum should be adapted to the general principles of the inter-American *corpus iuris*;[17]

(v) the right of indigenous communities to access the electromagnetic and radio electric spectrum without discrimination and the legislation and practices of other States in the region;[18]and

(vi) the context of marginalization, discrimination and exclusion of indigenous peoples in Guatemala, the role of community radio stations and the need for their recognition, the discriminatory nature of the auction, the implications of the lack of regulation governing community radio stations despite the Constitutional Court's exhortation, as well as the legislative initiatives presented before the Guatemalan Congress and the international standards applicable to the matter.[19]

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12 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 170.

13 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 171.

14 Purpose of the *amicus curiae* brief presented by researchers of the International Human Rights Practicum of Boston College Law School.

15 Purpose of the *amicus curiae* brief presented by el *Observatorio Latinoamericano de Regulación de Medios y Convergencia* and the World Association of Community Radio Broadcasters.

16 Amicus curiae brief presented by ALAIC - *Asociación Latinoamericana de Investigadores de la Comunicación* (Latin American Association of Communication Researchers)

17 Amicus curiae brief presented by José Ignacio Hernández G.

18 Amicus curiae brief presented by the Human Rights Group of the Externado University of Colombia.

19 Amicus curiae brief presented by *Bufete para Pueblos Indígenas* (Law Firm for Indigenous Peoples).

9. I fully agree with the decision reached in the judgment, which declares the violation of the rights to freedom of expression, equality before the law and to participate in cultural life, established in Articles 13, 24 and 26 of the American Convention, in relation to the obligations to respect and guarantee rights and the duty to adopt provisions of domestic law, referred to in Articles 1(1) and 2 of the same instrument.

10. Nevertheless, I am issuing this separate opinion to highlight and develop certain elements of the case that, in my view, represent important advances in inter-American jurisprudence, and also to explore a particular aspect regarding the right to "self-determination" of indigenous and tribal peoples referred to in paragraph 95 of the judgment. Regarding the latter, the existence of the right of indigenous peoples to establish and use their own media is recognized, based on the content and scope of the right to freedom of expression, but "also taking into account the rights of indigenous peoples to non-discrimination, *self-determination* and cultural rights."[20]

11. The judgment addresses in detail the relationship between freedom of expression and cultural rights – in particular the right to participate in cultural life.[21] Likewise, it discusses the differentiated impact of the *situation of exclusion and discrimination* in which indigenous communities live (especially due to their economic position) and how this particular situation also impacts their enjoyment of cultural rights and freedom of expression.[22] However, with regard to the right to self-determination, it does not develop its content or its special importance in the context of the rights of indigenous communities, and I therefore consider it necessary to examine this aspect in greater depth, in light of the advances in international law.

12. Accordingly, this opinion is divided into the following sections: i) the right to self-determination of indigenous and tribal peoples: community media as vehicles of culture (paras. 13-50); ii) *material equality as a basis for combating the exclusion of socially vulnerable groups* (paras. 51-66); and iii) *Conclusions* (paras. 67-72).

[20] *Cf. Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 95.

[21] *Cf. Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 128.

[22] *Cf. Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, paras. 135 ff.

II. THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS AND TRIBAL PEOPLES: COMMUNITY MEDIA AS VEHICLES OF CULTURE

II.1. The right to self-determination of indigenous and tribal peoples in international law

A. United Nations

13. The first mention of the right "to self-determination"[23] is found in the Charter of the United Nations. Since its adoption in 1948, it has been stated that "[the] purpose] of the United Nations [is]: 2. [t]o develop friendly relations among nations based on respect for the principle of equal rights and *self-determination of peoples*, and to take other appropriate measures to strengthen universal peace."[24] This right was subsequently reflected in Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which states: "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[25]

14. It should be noted that neither the Charter of the United Nations nor the International Covenants adopted in 1966 envisaged a scenario in which these rights would have a direct impact on the rights of indigenous and tribal peoples. However, it has been the Committees established within the framework of the United Nations that have developed the implications of the right to self-determination in greater depth.

15. The Human Rights Committee, in General Comment No. 12 on the right to self-determination, indicated that "[t]his right is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[26] The Committee considers it "an inalienable right of all peoples" and "by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[27]It also added that "[i]n no case may a people be deprived of its own means of subsistence."[28]

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[23] This wording has its roots in the decolonization movement and was taken from the second paragraph of the *Declaration* on *the Granting of Independence to Colonial Countries and Peoples*, adopted by the General Assembly through resolution 1514 (XV), of December 14, 1960, which established the regulatory framework for the independence of colonial territories. In paragraph 2 of that resolution, the General Assembly stated that all peoples have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. In paragraph 6 of the resolution, the Assembly declared that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations. UN, Draft report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/EMRIP/2021/2, of May 3, 2021, para. 3.

[24] *Cf.* United Nations Charter of 1948, Article 1(2).

[25] See Article 1(1) of the International Covenant on Civil and Political Rights and Article 1(1) of the International Covenant on Economic, Social and Cultural Rights.

[26] *Cf.* Human Rights Committee, *General Comment No. 12,* Right to *Self-determination*, March 13, 1984, para. 1.

[27] *Cf*. *Ibid.* para. 2.

[28] *Cf*. *Ibid.* para. 5.

16. For its part, the Committee on the Elimination of Racial Discrimination, in General Recommendation No. 21 regarding the right to self-determination, considered this to be "a fundamental principle of international law."[29] It added that "the implementation of the principle of self-determination requires every State to promote, through joint and separate action, universal respect for and observance of human rights and fundamental freedoms."[30]

17. In addition, the Committee made a distinction between two aspects of the right to self-determination. On the one hand, there is "internal self-determination," i.e. the right of all peoples to pursue freely their economic, social and cultural development without outside interference; and on the other hand, there is "external self-determination" i.e. all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation.[31]

18. Finally, the Committee referred to an aspect that is directly related to the rights of indigenous peoples when it stated that all the rights of all peoples should be fully protected and that the protection of individual rights without discrimination on grounds such as, *inter alia*, ethnicity, should guide government policies. Thus, in the words of the Committee, "governments should be sensitive towards the rights of persons of ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth, and to play their part in the government of the country of which its members are citizens."[32]

19. Despite these gradual advances in international law, the right to self-determination had not been directly established in favor of indigenous peoples' development, including their cultural development. This view was transformed in 2007 with the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (hereinafter "UNDRIP") which, in Article 3, established that "[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[33] Thus, in this sense, self-determination has four pillars that support the rights of indigenous peoples: a) political self-determination,[34] b) economic self-determination, c) social self-determination and d) cultural self-determination. Given the specificities of the judgment

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[29] *Cf.* Committee for the Elimination of Racial Discrimination, *General Recommendation No. 21 on the Right to Self-determination*, 48th session, 1996, para. 2.

[30] *Cf*. *Ibid.* para. 3.

[31] *Cf*. *Ibid.* para. 4.

[32] *Cf*. *Ibid.* para. 5.

[33] United Nations Declaration on the Rights of Indigenous Peoples, Article 3. In its preamble the Declaration reaffirms that " […]*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development, *Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law, […]".

[34] For example, self-government also forms part of the right to self-determination, but in its political aspect. See Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples.

issued by the Inter-American Court, I will only refer to this last aspect of the right to self-determination.

20. The three United Nations mechanisms for the rights of indigenous peoples - the Special Rapporteur on the Rights of Indigenous Peoples, the Permanent Forum for Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples - have considered that the most important right for indigenous peoples is the right to self-determination, "as without the enjoyment of this right, they could not enjoy the other fundamental human rights of indigenous peoples."[35]

21. According to the Special Rapporteur on the Rights of Indigenous Peoples, the right to self-determination is a human right and its realization is essential for indigenous peoples to enjoy all the collective and individual human rights to which they are entitled.[36] This right has both an external and an internal dimension, which are manifested in the exercise of control over their lives and in their participation in making all decisions that may affect them, in accordance with their own cultural patterns and authority structures.[37] For the Rapporteur, this right should be understood as "as a right to control their past, their present and their future: control of the past, in the sense of developing their own account of their history; control of the present, in relation to the power to maintain the elements that characterize them as distinct societies; and control of the future, in reference to the security of knowing that they will be able to survive as diverse peoples on their own terms.[38]

22. In general, indigenous cultural self-determination "has been described as the right to recapture indigenous peoples' identity, reinvigorate their ways of life, reconnect with the Earth, regain their traditional lands, protect their heritage, revitalize their languages and manifest their culture, all of which are considered "as important to

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[35] *Cf.* United Nations Permanent Forum on Indigenous Issues. *Consolidated report on extractive industries and their effects on indigenous peoples.* E/C.19/2013/16. February 20, 2013. para. 19.

[36] *Cf.* UN, Report of the Special Rapporteur on the Rights of Indigenous Peoples, A/74/149, July 17, 2019, para. 15.

[37] In this regard see: "15. The right to self-determination has an internal and external dimension. The former is determined by the physical dimensions of the State and the rights of all peoples to pursue freely their economic, social and cultural development, including by taking part in the conduct of public affairs without outside interference. For the first time, the Human Rights Committee made a specific reference to internal self-determination under article 1 of the International Covenant on Civil and Political Rights in landmark cases against Finland in 2019 and cited the Declaration as an authority in its analysis of indigenous rights. In its decisions, the Committee noted that the Sámi Parliament ensured an internal self-determination process that was necessary for the continued viability and welfare of the indigenous community as a whole. It found that Finland had improperly intervened in the Sámi's rights to political participation regarding their specific rights as an indigenous people, finding a violation of Articles 25 and 27 of the Covenant, as interpreted in the light of Article 1. 16. A primary manifestation of "external" determination, is the right of indigenous peoples, in particular those divided by international borders, to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders (Article 36, para. 1). At the time of adoption of the Declaration, all States recorded their sense that the adoption of the Declaration, and all articles contained in it, was subject to the application of the reservation contained in article 46 on territorial integrity." UN, Draft report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/EMRIP/2021/2, May 3, 2021, paras. 15 and 16.

[38] *Cf.* UN, Report of the Special Rapporteur on the rights of indigenous peoples, A/74/149, July 17, 2019, para. 15. para. 19.

indigenous people as the right to make final decisions in their internal political, judicial, and economic settings."[39]

23. That said, with respect to the right of indigenous peoples to cultural self-determination, we should recall that the Committee on Economic, Social and Cultural Rights considers culture to be a broad and inclusive concept that encompasses all expressions of human existence, *inter alia*, ways of life, language, customs and traditions, through which individuals, groups and communities express their humanity and the meaning they give to their existence, and construct a worldview that represents their encounter with the external forces that affect their lives. For the Committee, the right to take part in cultural life is also interdependent with other rights set forth in the International Covenant on Economic, Social and Cultural Rights, such as the right of all peoples to self-determination.[40]

24. The articles set forth in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) contemplate different manifestations of the right to cultural self-determination of indigenous peoples. For example, it protects their right to practice and revitalize their cultural traditions and customs.[41] It also ensures their right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literature.[42] Indigenous peoples also have the right to "establish and control their educational systems and institutions providing education in their own languages, in a manner consistent with their cultural methods of teaching and learning."[43] In addition, I must emphasize, the right *"to establish their own media in their own languages and to have access to all other forms of non-indigenous media without discrimination."*[44]

B. African System of Human Rights

25. In the African Human Rights System, the African Charter on Human and Peoples' Rights (hereinafter "the Banjul Charter") was a truly revolutionary instrument for the historic moment in which it was adopted since, for example, it adds social rights in conjunction with freedom rights and expressly incorporates the notion of "peoples" in its articles. Furthermore, and with regard to self-determination, Article 22 of the Charter replicates almost exactly the provisions of Article 1 of the 1966 United Nations Covenants by stating that "all peoples shall have the right to their economic, social and cultural development with due regard for their freedom and identity and the equal enjoyment of

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[39] UN, Draft report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/EMRIP/2021/2, May 3, 2021, para. 10.

[40] *CESCR. General Comment No. 21: Right of everyone to participate in cultural life,* Doc. E/C.12/GC/21/Rev.1, May 17, 2010), para. 13.

[41] United Nations Declaration on the Rights of Indigenous Peoples, Article 11. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

[42] United Nations Declaration on the Rights of Indigenous Peoples, Article 13.

[43] United Nations Declaration on the Rights of Indigenous Peoples, Article 14. In similar vein: Article 15(1). Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations, which shall be appropriately reflected in education and public information.

[44] United Nations Declaration on the Rights of Indigenous Peoples, Article 16.

the common heritage of mankind."[45] Although this right is regarded as a "right to development," in fact it refers directly to the right of peoples to self-determination.[46]

26. For its part, the African Court of Human and Peoples' Rights, in its judgment in the case of *Ogiek v. Kenya,* held that Article 22 of the African Charter was applicable to indigenous peoples since they have the right to "determine and develop priorities and strategies for exercising their right to development."[47]

C. Inter-American System of Human Rights

27. In the Inter-American System, the right to self-determination has not developed within the framework of regional instruments. Rather, it is the Inter-American Commission on Human Rights that has undoubtedly positioned this right in the context of indigenous and tribal peoples, and has referred to this right in several of its reports.

28. In the report on *Indigenous and Tribal Peoples' Rights over their Ancestral Lands* (2009), the Inter-American Commission stated that "lack of access to ancestral territory" impedes the exercise of the right of indigenous and tribal peoples to self-determination" and that "there is a direct relationship between self-determination and the rights to land and natural resources."[48]

29. In 2013, in its report on *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas,* the Commission indicated that the "principle of no-contact" is an expression of the right of indigenous peoples in voluntary isolation to self-determination, since one of the reasons for protecting the rights of indigenous peoples in voluntary isolation is cultural diversity, and that the loss of their culture is a loss for all humanity."[49]

30. Subsequently, in 2015, in its report on *Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities,* the IACHR argued that the right to self-determination is a "collective right" and, based on this fact, it has recognized that indigenous peoples, in addition to the individual human rights established in international law, possess the right to freely determine their economic, social and cultural development in order to ensure their existence and well-being as distinct peoples.[50]

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45 Article 22(1) African Charter on Human and Peoples' Rights.

46 Article 22(2) of the African Charter indicates that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

47 African Court on Human and Peoples' Rights, *Case of Ogiek v. Kenya. Judgment of May 26, 2017,* paras. 209 to 211. It should be noted that in this case the African Court on Human and Peoples' Rights analyzed Article 22 in light of Article 23 of the United Nations Declaration on the Rights of Indigenous Peoples. This pronouncement was also made in the context of a related case concerning the lack of prior consultation of the Ogiek indigenous community.

48 IACHR, Report on *Indigenous and Tribal Peoples' Rights over their Ancestral Lands* (2009), para. 165. Also see, IACHR, Report on *Business and Human Rights: Inter-American Standards* (2020), para. 343.

49 IACHR, Report on *Indigenous Peoples in Voluntary Isolation and Initial Contact in the Americas* (2013)*, para.* 22.

50 IACHR, Report on *Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*(2015), para. 237.

Furthermore, the IACHR indicated that an intrinsic element of self-determination is that indigenous and tribal peoples have the right to cultural integrity and identity.[51]

31. In its Report on *Indigenous Women (2017)* the IACHR referred to the Expert Mechanism on the rights of indigenous peoples, which has stated that "the right to culture in the context of indigenous peoples includes the right to self-determination, to their own culture, customs and languages."[52] It added that "[i]n order to ensure respect for the right to self-determination of indigenous peoples, the close connection between indigenous peoples' cultural and language rights and the rights related to their lands, territories and natural resources must be recognized."[53]

32. Finally, in the *Report on the Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region (*2019*)* the IACHR stated that "[t]he recognition of this right is a fundamental premise for the full exercise of the other human rights of indigenous peoples, both individual and collective."[54] It also indicated that a specific manifestation of the right to self-determination would be the right to development, recognized in Article 29 of the American Declaration on the Rights of Indigenous Peoples.[55]

33. For its part, the Court, in the context of tribal peoples and their rights over their natural resources, in the case of *Saramaka v. Suriname,* considered that "by virtue of the right to self-determination" recognized under Article 1, indigenous peoples may "freely pursue their economic, social and cultural development" and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence."[56] Thus, the Inter-American Court interpreted that "[t]he above analysis supports an interpretation of Article 21 of the American Convention to the effect of calling for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied."[57]

34. Although it did not specifically mention the right to self-determination, in the cases of the *Kichwa People of Sarayaku v. Ecuador*[58] *and Río Negro Massacres v. Guatemala*, the Court acknowledged that indigenous peoples have a right to economic, political, social and cultural development. [59]

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[51] IACHR, Report on Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities(2015), para. 239.

[52] IACHR, Report on Indigenous Women (2017), para. 219.

[53] IACHR, Report on Indigenous Women (2017), para. 220.

[54] IACHR, Report on the Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region (2019), para. 24.

[55] Report on the Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region (2019), para. 26.

[56] *Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007. Series C No. 172, para. 93.

[57] *Cf. Case of the Saramaka People v. Suriname, supra*, para. 95.

[58] *Cf. Case of the Kichwa People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012, para. 217, footnote 288.

[59] *Cf. Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012 Series C No. 250. para. 160, footnote 250.

35. Finally, within the framework of the inter-American system, the right of indigenous peoples to self-determination attained full recognition in 2016, with the adoption of the American Declaration on the Rights of Indigenous Peoples, wherein Article III states that "[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[60] Also, as a specific part of the right to cultural self-determination, Article XIV (Systems of Knowledge, Language and Communication) indicates that "3. Indigenous peoples have the right to promote and develop all their systems and means of communication, including their own radio and television programs, and to have equal access to all other means of communication and information. The States shall take measures to promote the broadcast of radio and television programs in indigenous languages, particularly in areas with an indigenous presence. The States shall support and facilitate the creation of indigenous radio and television stations, as well as other means of information and communication."[61]

II.2. Contributions in the present case

36. In the judgment, the Inter-American Court stressed the importance of a pluralistic and diverse media in a democratic society, since it "constitutes an effective guarantee of freedom of expression."[62] This, ultimately, translates into an obligation of the State to "adopt the necessary measures to provide all segments of the population with access to means of communication,"[63] so that "no individuals or groups are excluded, *a priori*."[64]

37. To achieve this objective of ensuring media access by different sectors of the population, the Court indicated that States must democratize access "in such a way that it recognizes, promotes or encourages diverse forms and applications that each sector can utilize to access and operate such media and, consequently, create spaces for differentiated forms of media and the corresponding legal instruments to provide them with legal certainty."[65]

38. Accordingly, the Court identified not only the right of indigenous peoples to be represented in the various media,[66] but also the right of indigenous peoples to establish and use their own media, especially community radio stations, by virtue of the "content and scope of the right to freedom of expression," as well as the rights of indigenous peoples to non-discrimination, self-determination and their cultural rights.[67]

39. This statement is of the utmost importance inasmuch as it implies a recognition by the Court that, on the one hand, the right to freedom of expression is exercised through the mass media and its realization cannot occur without the guarantee of plurality and diversity of the media; on the other hand, in the specific case of indigenous

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60 American Declaration on the Rights of Indigenous Peoples, Article III.

61 American Declaration on the Rights of Indigenous Peoples, Article XIV. 3.

62 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 88.

63 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 88.

64 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 88.

65 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 89.

66 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 92.

67 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 95.

peoples, due to their distinctive way of life and the rights that must be ensured to them, it is necessary to preserve the right to have their own media, in order to exercise their rights to freedom of expression, to participate in cultural life and to equality before the law (in both its dimensions).

40. From my perspective, this is a very important aspect of the judgment, since it establishes a special link between the right of indigenous communities to create and use their own media and their right to self-determination, among others. In other words, the guarantee of the former allows for the realization of the latter.

41. On this point, the expert witness Dr. Labardini identified a collective right of indigenous peoples to their own communication, and emphasized that, in this case, such right was intrinsically linked to their rights to cultural identity and self-determination.[68] She also argued that "[i]ndigenous peoples have a collective right to communication and culture, in addition to individual freedom of expression, and for their collective survival they require their own media on all platforms."[69]

42. Likewise, Special Rapporteur Tzay emphasized in his expert opinion that:

> For indigenous peoples, freedom of expression has an essential collective dimension, decisive for the full enjoyment of other collective rights, such as the right to autonomy and the right to culture. For example, radio has been used to develop indigenous life plans. The right to disseminate and receive information is an essential, basic and fundamental human right, directly associated with the right to freedom of expression. It has been recognized in human rights instruments as a right that States must guarantee without discrimination. Freedom of expression encompasses not only freedom of information, but also the right to communicate in response to the growing influence of print, radio and television media and the emergence and proliferation of information and communication technologies, such as the internet and social media.[70]

43. As mentioned previously, the right to self-determination of indigenous peoples is protected by various national and international instruments, among them, Convention 169 of the International Labour Organization on Indigenous and Tribal Peoples, [71] the United Nations Declaration,[72] and the American Declaration on the Rights of Indigenous Peoples.[73] This ensures that indigenous peoples can freely determine their political status and freely pursue their economic, social and cultural development. [74]

44. Similarly, as indicated previously, in the *Case of the Saramaka People v. Suriname*, the Court explicitly recognized "the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with

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68 *Cf*. Written version of the expert opinion presented to the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folios 1610 and 1611).

69 Written version of the expert opinion presented to the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folio 1611).

70 *Cf.* Written version of the expert opinion presented to the Court by José Francisco Calí Tzay (evidence file, folio 1420).

71 Article 3 of Convention 169.

72 Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.

73 Article III of the American Declaration on the Rights of Indigenous Peoples.

74 *Cf.* Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.

the territory they have traditionally used and occupied."[75]

45. The former UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, stated that self-determination responds to "the aspirations of indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision-making that affects them, [which] is aimed at reversing the historical pattern of exclusion."[76]

46. In this context, the guarantee of the right of indigenous peoples to establish and use their own media is also an instrument for the realization of their right to self-determination. It allows them to reaffirm their cultural identity and their worldview, offer their own narrative, discuss the issues that interest and affect them, practice and disseminate their languages, participate in public debate, and try to eradicate discriminatory stereotypes often endorsed by the mainstream media.

47. In this regard, it is worth citing part of the expert opinion of Lorie Graham:

> "The full realization of the right to self-determination requires autonomy with respect to the context and content of the media that reach indigenous nations and communities, as well as on the choice of the means of communication that are most appropriate to satisfy the needs and concerns of each indigenous nation. Indigenous media can help reverse the erosive effects of discrimination and assimilation by promoting the development of traditions, customary law, indigenous languages and culture. Moreover, the political, economic, social and cultural development of indigenous communities, as well as their participation in decision-making processes of the State, can be facilitated by the development of indigenous media (as well as greater access to non-indigenous media). By ensuring the free flow of information and the facilitation of communication at community level, indigenous peoples can work to strengthen their political status *vis-à-vis* the State, while pursuing their own vision of economic, cultural and social development."[77]

48. As mentioned previously, self-determination encompasses different facets, including, the cultural one. Thus, the right to self-determination is positioned as a collective right that indigenous communities have – not only in relation to land and territories, which is the aspect in which the right to self-determination has been most developed and positioned— and which allows them not only to control their past, present and future, but also to define the ways in which they wish to revitalize their culture, such as the use of language to transmit information.

49. Although it is not explicitly stated, several considerations made by the Inter-American Court in the judgment point to a close relationship between the right to participate in cultural life, the right to freedom of expression and the right to self-determination. For example, in the judgment, the Court refers to expressions of indigenous peoples' right to self-determination since it considers that "access to their own community radio stations, as vehicles for the freedom of expression of indigenous peoples, is an indispensable element to promote the identity, language, culture, self-

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[75] *Case of the Saramaka People v. Suriname, supra*, para. 95.

[76] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, July 15, 2009, A/HRC/12/34, available at: https://www. https://digitallibrary.un.org/record/665137?ln=en.

[77] Expert opinion of Lorie Graham rendered by affidavit on May 27, 2021 (evidence file, folios 1478 and 1479).

representation and the collective and human rights of indigenous peoples."[78] It also indicates that "the right to freedom of expression and the right to participate in cultural life are intimately connected, since the guarantee of the right to establish and use their own radio stations as part of the indigenous peoples' right to freedom of expression, is essential for the realization of their right to participate in cultural life through the aforementioned means of communication."[79]

50. Although I fully agree with this view, the fact is that unless community radio stations, as instruments for ensuring the rights to freedom of expression and participation in cultural life, are guaranteed at the domestic level, this not only interferes with the two aforementioned rights, but also nullifies the right to self-determination.

[78] *Cf. Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 128

[79] *Cf. Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 128.

III. MATERIAL EQUALITY AS A BASIS FOR COMBATING EXCLUSION OF SOCIALLY VULNERABLE GROUPS

51. Since the case of *the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families,*[80] the Inter-American Court has expressly recognized material equality as a fundamental component of the right to equality, provided for in Article 24 of the American Convention. Indeed, in that case the Inter-American Court stated that "the obligation to ensure *material or substantial* equality is derived from Article 24 of the Convention" which "means that the right to equality entails the obligation to adopt measures that ensure that the equality is *real* and *effective*; in other words, to correct existing inequalities, to promote the inclusion and participation of historically marginalized groups, and to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving *material* equality. To this end, States must *actively* combat situations of exclusion and marginalization."[81]

52. In particular, the Court established that the victims of the explosion at the fireworks factory "were immersed in patterns of structural and intersectional discrimination,"[82] since they lived in a situation of structural poverty and were Afro-descendant women and girls who had no alternative but to accept high-risk employment. The Inter-American Court considered that the sum of these factors facilitated the installation and operation of a factory dedicated to a particularly dangerous activity, without any oversight, and "led the […] victims to accept work that jeopardized their life and integrity and that of their underage children."[83] In this context, the Court concluded that the State did not adopt the measures necessary to ensure material equality in relation to the victims' right to work and, consequently, found the State of Brazil responsible for the violation of Articles 24 and 26, in relation to Article 1(1) of the American Convention, to the detriment of the 60 people who died in, and the six survivors of, the explosion at the fireworks factory.

53. In that case, the Court examined Articles 1(1) and 24 of the Convention jointly, in view of the situation of exclusion in which the victims found themselves due to the presence of the discriminatory factors mentioned above, as well as the existing inequalities due to the lack of affirmative actions to mitigate the conditions in which they worked, or so that they could have access to other forms of employment.

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[80] *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407.

[81] *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, supra,* para. 199.

[82] *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*, *supra*, para. 197.

[83] *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, supra*, para. 203.

54. Subsequently, in the cases of *Vicky Hernández,*[84] *Guachalá Chimbo,*[85] and the *Miskito Divers,*[86] the Court also found violations of Article 24 of the Convention in the material dimension. In the cases of *Guachalá Chimbo* and the *Miskito Divers*, the Court recalled the two dimensions of the right to equality protected under Article 24 of the Convention. It clarified that the formal dimension is that which establishes equality before the law, while the material or substantial dimension refers to the duty to adopt "affirmative measures of promotion in favor of groups historically discriminated against or marginalized by reason of the factors referred to in Article 1(1) of the American Convention."[87]

55. The judgment in the case of the Maya *Kaqchikel Indigenous Peoples of Sumpango et al.* follows this same line inasmuch as, to determine the violation of Article 24 of the Convention, the Court took into account the situation of poverty and discrimination that affects most of the indigenous peoples in Guatemala, the absence of measures aimed at combating this situation and the maintenance of a regulatory framework for broadcasting that ignores and perpetuates it.

56. In this regard, the Court had already recognized, in previous cases, the context of poverty and discrimination in which Guatemala's indigenous communities are immersed. In the case of the *Plan de Sánchez Massacre*, the Court noted that:

> The Guatemalan Army, based on the "Doctrine of National Security," identified members of the Maya indigenous people as "domestic enemies," since they considered that they were or could be the social base for the guerrilla forces. These people suffered massacres and "scorched earth operations" that involved the complete destruction of their communities, homes, livestock, harvests and other means of survival, their culture, the use of their own cultural symbols, their social, economic, and political institutions, and their cultural and religious values and practices.[88]

57. Similarly, in the case of the *Río Negro Massacres*, the Inter-American Court considered that:

> The Mayan people were the ethnic group most affected by the human rights violations committed during the armed conflict, suffering forced displacement and the destruction of their communities, homes, livestock, harvests and other elements necessary for survival […] the slaughter and the destruction of property were carried out simultaneously or successively against the same communities, because both actions formed part of a common pattern of action against the group.[89] […] The immediate impoverishment of the families that suffered from the measures taken under the scorched-earth policy, and who were forced to displace, was increased by the significant difficulty of recovery owing to the total loss of the family wealth, sometimes built up over years and even generations.[90]

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84 *Case of Vicky Hernández et al. v. Honduras. Merits, reparations and costs.* Judgment of March 26, 2021. Series C No. 422.

85 *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs.* Judgment of March 26, 2021. Series C No. 423.

86 *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra*.

87 *Case of Guachalá Chimbo et al. v. Ecuador, supra*, para. 167, and *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra*, para. 108.

88 *Case of Plan de Sánchez Massacre v. Guatemala, supra*, para. 42(7).

89 *Case of the Río Negro Massacres v. Guatemala, supra*, para. 58.

90 *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 62.

58. In the case of *Chichupac Village*, the Court ordered three measures of reparation in recognition of the racial discrimination against indigenous peoples in Guatemala. For example, it decided that the State should include "permanent training programs in human rights and international humanitarian law in the curriculum of the different educational, vocational, professionalization and training centers of all branches of the Guatemalan Army. This training should […] include the need to eradicate racial and ethnic discrimination, racial and ethnic stereotypes, and violence against indigenous peoples […]."[91] In addition, the Court ordered Guatemala to incorporate "in the curriculum of the national education system, at all levels, an education program […] promoting respect for and knowledge of the different indigenous cultures, including their worldview, histories, languages, knowledge, values, cultures, practices and ways of life. This program should focus on the need to eradicate racial and ethnic discrimination, racial and ethnic stereotypes, and violence against indigenous peoples […]."[92]

59. In the present case, the situation of poverty and social exclusion affecting the majority of Guatemala's indigenous peoples[93] and the historical and structural discrimination against these communities[94] were not only expressly recognized by the Court in the judgment, but also constituted one of the essential factual grounds for its declaration of the violation of their rights to equality before law, freedom of expression and to participate in cultural life.

60. Indeed, the Court noted that, in view of the structural discrimination, poverty and exclusion to which indigenous communities are subjected, the State had the obligation to "correct existing inequalities" and "promote the inclusion and participation" of these peoples.[95] Thus, in light of this obligation and the right of indigenous peoples to establish and use their own media, the Court concluded that Guatemala "should have taken all necessary measures to ensure their access to radio frequencies, in order to guarantee their material equality *vis à vis* other social groups with the financial resources to compete in auctions for the acquisition of radio frequencies."[96] Such measures should also include, as the Court emphasized, "adopting affirmative actions to reverse or change existing discriminatory situations."[97]

61. It is worth noting that the Guatemalan legislation that was considered to be in breach of the right of indigenous peoples is the main tool for the regulation of broadcasting in the country, the General Telecommunications Law. The Court verified that this law, despite appearing to be neutral, since it treated everyone equally, has had a brutal indirect impact on indigenous peoples because the vast majority of them do not have the financial resources to participate, on equal terms, in auctions for the acquisition of radio frequencies.

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91 *Case of Members* of *Chichupac Village and Neighboring Communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 313.

92 *Case of Members* of *Chichupac Village and Neighboring Communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 319.

93 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, paras. 36, 117, 133, 139, 147, 149 and 194.

94 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, paras. 37 to 39, 117, 139, 147 and 194.

95 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, paras. 140 and 147.

96 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 140.

97 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 147.

62. In this regard, the expert witness Adriana Labardini emphasized the need for the State to adopt "affirmative measures toward substantive equality,"[98] i.e., the necessary measures for indigenous peoples to be able to legally obtain a license to use radio frequencies. She also stressed the importance that indigenous peoples receive differentiated treatment, owing to the "profound asymmetries between the indigenous and non-indigenous populations in our region,"[99] which justifies differentiated treatment for the former, in order to achieve real material equality. According to Dr. Labardini, in this case, affirmative measures, "applied in an objective, justified and proportional manner, [would] act as a counterbalance to the structural discrimination of which indigenous peoples have been victims for centuries."[100]

63. With regard to indigenous peoples' access to their own media, Ms. Labardini noted that some countries, such as Mexico, Argentina, Bolivia, Colombia and Uruguay, have allocated radio and television frequencies to some native communities free of charge,[101] among other affirmative measures.

64. Similarly, in his expert opinion, the Special Rapporteur on the Rights of Indigenous Peoples, Francisco Tzay, stressed the importance of adopting affirmative measures to "guarantee equal opportunities and equitable access to radio frequencies for indigenous communities without discrimination."[102] At the same time, he recalled that:

> Special protections are required to address the collective dimension of indigenous peoples' rights in a multicultural and multilingual State. […]International law requires the application of affirmative measures to protect the collective rights of indigenous peoples, based on their unique status as distinct peoples and holders of rights. […] the unequal treatment of persons in unequal situations is not tantamount to discrimination.[103]

65. In the present case, the Court's understanding and recognition of the importance of affirmative actions aimed at addressing the situation of extreme vulnerability that affects indigenous peoples, as well as the essential contributions of the expert opinions, prompted it to consider necessary the modification of the regulatory framework for radio broadcasting in Guatemala. In this regard, it ordered the State to adapt, within a reasonable period of time, "its domestic regulations in order to (i) recognize community radio stations as differentiated means of communication, particularly indigenous community radio stations; (ii) regulate their operation, establishing a simple procedure for obtaining licenses, and (iii) reserve an adequate and sufficient portion of the radio

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98 Written version of the expert opinion presented to the Court by Adriana Sofía Labardini Inzunza on June, 2021 (evidence file, folio 1577).

99 Written version of the expert opinion presented to the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folio 1603).

100 Written version of the expert opinion presented to the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folio 1603).

101 *Cf.* Written version of the expert opinion presented to the Court by Adriana Sofía Labardini Inzunza, *supra* (evidence file, folios 1576 to 1577).

102 Written version of the expert opinion presented to the Court by José Francisco Calí Tzay on May 24, 2021 (evidence file, folio 1412).

103 Written version of the expert opinion presented to the Court by José Francisco Calí Tzay on May 24, 2021 (evidence file, folio 1412).

spectrum for indigenous community radio stations."[104]

66. The above guarantee of non-repetition implies a necessary differentiated treatment of Guatemala's indigenous peoples and thus is aimed at guaranteeing material equality in terms of access by these peoples to their own means of communication.

IV. CONCLUSIONS

67. This judgment marks another step forward in the recognition of the rights of indigenous and tribal peoples in the inter-American system. Not only because it is the first case that concerns indigenous community radio stations, but also because it refers to and describes, in a detailed manner, the right to cultural participation as a right that is involved in relation to collective means of communication.

68. Indeed, following its case law on the justiciability of ESCER, and particularly following the case of *Lhaka Honhat v. Argentina,*[105] the Court analyzes the right of indigenous peoples to participate in cultural life and its relationship with radio broadcasting, from the perspective of the violation of Article 26 of the American Convention and "taking into account the intersection of this right with freedom of expression and the role of community radio as an instrument for the realization of these rights."[106]

69. Likewise, the judgment sets a precedent with respect to the right to self-determination (economic, social, political or cultural). Until now, the main experience of the inter-American system in referring to this right has been related to lands and territories (see *supra*, paras. 33 and 34).[107] This case highlights the fact that the obstacles that may exist for indigenous peoples to claim their right to participate in cultural life may also involve the right to self-determination. The experience of the United Nations, the Inter-American Commission and the African system analyzed here, reveals a growing tendency to recognize more forcefully the right to self-determination as a key principle when it concerns the collective rights of indigenous or tribal communities.

70. The present judgment also follows the recent jurisprudential line regarding the *mandate of material equality*, derived from Article 24 in conjunction with Article 1(1) of the American Convention.[108] As I have stated previously, equality and non-discrimination are two of the most fundamental principles and rights of international human rights law and are essential components of a constitutional democracy. Therefore, their scope must be understood jointly, in contexts of a clear situation of disadvantage, inequality and exclusion.[109]

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104 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 196.

105 *Case of the Indigenous Communities* of the *Lhaka Honhat* (*Our Land) Association v*. *Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400.

106 *Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 118.

107 In the cases of the *Saramaka People v. Suriname*, *Pueblo Kichwa People of Sarayaku v. Ecuador and Río Negro Massacres v. Guatemala.*

108 *Cf. Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra,* para. 135.

109 See my Separate Opinion in the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 123.

71. The historical discrimination to which indigenous peoples in Guatemala have been subjected was demonstrated in the judgment. Indeed, the persistence, over the years, of high rates of poverty and extreme poverty in these communities, their limited access to formal labor markets and to social security, the high levels of illiteracy among their members, their precarious access to health care, telephone and electricity services, as well as the constant manifestations of discrimination against indigenous peoples in the mass media show that indigenous peoples are still subjected to a situation of structural discrimination.[110]

72. Therefore, the State had the obligation to "correct existing inequalities" and " promote the inclusion and participation" of these peoples. Considering this obligation and the right of indigenous peoples to establish and use their own media, the State should have taken all the necessary measures to ensure their access to radio frequencies, in order to guarantee their material equality *vis à vis* other social groups with the financial resources to compete in auctions for the acquisition of radio frequencies.[111] Such actions were not taken, thereby perpetuating the situation of exclusion and marginalization of the communities declared as victims in the instant case.

73. Although the Inter-American Court had already established affirmative actions in its case law, with special emphasis placed on socially excluded groups, this development of inter-American jurisprudence means that these actions and these groups now find a starting point, based on which States must adopt measures to realize their rights. This is particularly important in this case, given the situation of poverty and historical and structural discrimination in which the Maya indigenous communities in Guatemala live.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Registrar

110 *Cf. Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 139.

111 *Cf. Case of the Maya Indigenous Peoples of Sumpango et al v. Guatemala, supra*, para. 140.

CONCURRING OPINION OF

JUDGE EUGENIO RAÚL ZAFFARONI

CASE OF THE MAYA KAQCHIKEL INDIGENOUS PEOPLES OF SUMPANGO ET AL. V. GUATEMALA

JUDGMENT OF OCTOBER 6, 2021

(Merits, Reparations and Costs)

1. The importance of the subject matter and the richness of the content of this judgment make it worthy of some clarification, without which one of its substantive aspects may seem lacking in a legal explanation. Therefore, I consider it necessary to make explicit a consideration that is implicit in it and that contributes to remove any doubt about the completeness and coherence of this Court's decision.

2. The judgment establishes that the State's domestic legislation that regulates the use of the radioelectric spectrum does not comply with the American Convention on Human Rights because it deprives indigenous communities of access to the use of this space. It also decides that they will be able to make use of it until the State adapts its domestic regulations to the provisions of the Convention. Therefore, it declares lawful the use made of the spectrum by the communities, as well as the use that they may make of it in the future, at least until domestic legislation is amended.

3. This necessarily implies the recognition that the victims in this case exercised a right, and that they will be able to continue exercising it in future, which demands an explanation that remains tacit in the judgment, i.e., under what title is that right recognized and, therefore, what are its limits?

4. This question is not dispelled by establishing that the victims' conduct is not defined as theft because it is a clear "analogical integration" of the criminal law (the criminalization of an offense not established in law by resorting to an analogical procedure), which is expressly prohibited by the American Convention and by the entire legal culture of our regional republican and democratic constitutional tradition.

5. Given that criminal law restricts very limited areas of unlawfulness, giving rise to a selective discontinuity of a few unlawful conducts by establishing them as crimes through association with a penalty, atypicality does not determine unlawfulness nor does it create it, so that any atypical conduct may be unlawful in the light of other areas of the legal system (civil, administrative, etc.). However, the present judgment, by allowing the victims to exercise the right to use the radioelectric spectrum, considers that such conduct is not only atypical but also licit -not unlawful- in light of the State's overall legal system. However, the text of the judgment does not make explicit the reason for this general lawfulness, i.e., why it does not consider it to be unlawful.

6. Any criminal court would exhaust the task of analyzing the conduct of the victims through the mere verification of its unlawfulness. However, this Court, whose nature and function obviously differs from that of any criminal judge, decides in this judgment that the victims did not act unlawfully. Thus, it is required to explain the

reason for this last assertion, which is also essential in order to establish the limits to the lawfulness recognized in the judgment itself.

7. Given that this judgment finds that the conduct of the individuals belonging to communities that have violated or violate the current domestic legislation concerning the use of the radio spectrum, in addition to being atypical, is in accordance with the law –i.e. is not unlawful-, it implicitly assumes that they are covered by some cause of justification or lawfulness. Thus, in line with the requirement of strict legality imposed by the ACHR, the State has not only incurred in a violation of the Convention by taking coercive measures and analogically applying the definition of theft; it has also violated strict legality by not applying its own domestic laws that provide for situations in which unlawfulness is excluded, commonly known as causes of justification or lawfulness.

8. In this case, and in order to classify the victims' conduct as the exercise of a right, it is necessary to assume that the State violated strict legality with respect to its own internal rules governing justification exemptions, given that the requirement is not exhausted in the criminal definition, but extends to any limit or condition for punishment.

9. Therefore, it is necessary to individualize the precept that protects such conduct and which, in breach of strict legality, was not applied to the case by the judges when criminally prosecuting the victims. It was essential to make this explicit, not for merely speculative purposes, but also because the grounds of lawfulness or justification enable different areas of permitted scope. In other words, they enable different spaces for the exercise of rights and, in any event, it is necessary to determine the limits of that space recognized by this Court to the victims.

10. The Guatemalan Criminal Code establishes grounds of justification in the traditional terms used in all comparative legislation in the region and, in general, in line with the classification and current legal embodiment in all regulations of the continental European tradition transferred to our countries, which in substance do not differ either from those recognized in Anglo-Saxon common law. In this sense, Guatemalan law does not deviate from what may be considered the principles of justification that are part of the heritage of universal legal culture.

11. In this regard, Article 24 of the Guatemalan Criminal Code states the following: Grounds of justification: ***Self-defense****: Whoever acts in his own defense, in defense of his property or rights, or in defense of the person, property or rights of another, provided that the following circumstances are met: a) unlawful aggression; b) reasonable necessity of the means used to prevent or repel it, c) lack of sufficient provocation on the part of the defender. It is understood that these three conditions are met with respect to an individual who repels a person who intends to enter or has entered the dwelling or premises of another, if his attitude denotes the imminence of danger to the life, property or rights of the owners. The requirement set forth in paragraph c) is not necessary in case of the defense of his relatives within the degrees of law, his spouse or partner, his parents or adopted children, provided that the defender did not take part in the provocation.* ***State of necessity****: Whoever has committed an act compelled by the need to save himself or others from danger, not caused by him voluntarily, nor otherwise avoidable, provided that the act is in proportion to the danger. This exemption is extended to the person who causes damage to the property of others, if the following conditions are met: a) reality of the harm to be avoided; b) that the harm is greater than that caused by preventing*

it; c) that there is no other practicable and less harmful means to prevent it. The person who had the legal duty to confront the danger or sacrifice himself cannot allege a state of necessity. ***Legitimate exercise of a right****: Whoever carries out an act, ordered or permitted by law, in legitimate exercise of the public office he holds, of the profession to which he is dedicated, of the authority he exercises, or of the assistance he renders to justice.*

12. The legitimate exercise of a right is the ultimate element common to all grounds of legality and refers to any permitted precept from any branch of the legal system. However, in this case the lawfulness of the victims' conduct does not arise from any other provision of the State's legal system other than those contained in the criminal code itself. Therefore, it is necessary to determine whether the conduct of the victims was - or would be - covered by the formula of self-defense or by the state of necessity. This is important, given that the scope of the exercise of the right arising from them is different, since the latter imposes a weighing of rights, which the former does not require.

13. The factual situation concerns indigenous communities with an oral culture who are deprived of oral communications via radio and telephone precisely because the radio spectrum is distributed in accordance with market rules; in other words, they are excluded because of their limited financial capacity. These communities belong to cultures that have suffered genocide and subjugation over five centuries in the Americas, during the different stages of colonialism, from the early period that almost extinguished millions of the continent's inhabitants, subjected the survivors to servitude and enslaved another twenty million Africans.

14. These communities continued to suffer after the independence of our countries, because during the neocolonial period the racist stratifications of the original period remained unaltered, so that further genocides and attempts at extermination were committed. In the specific case of the Maya cultures, Mexicans recall the long caste war in the Yucatan during the last fifty years of the second half of the nineteenth century, which cost one hundred thousand lives.

15. The positivist intelligentsia in all our countries despised the native cultures in a shameful way, dreaming of white republics free of indigenous and black people. In the specific case of Guatemala, we cannot forget the crude racism of some of its intellectuals, such as Carlos Samayoa Chinchilla, secretary of the dictator Ubico, who argued that indigenous people had fulfilled their mission and that it was necessary to extinguish them. This racism, typical of the biological reductionism of the nineteenth century, has left traces of colonialism in part of our regional thought, which to this day, affects the principle of equality in a way that demands the utmost care from this Court to remove any of its direct or indirect, explicit or implicit manifestations.

16. It is therefore appropriate to revisit the historical record of the clearest precursor of human rights, not to say the first manifestation of these rights in our region, dating from the dawn of the early colonization period and marked by the clear and forceful philosophy of Fray Bartolomé de Las Casas.

17. To the original and neocolonial stages in Guatemala were added more recently the persecution and genocides of the national security period and the suffering during the ensuing civil war. Throughout the colonial period, the native cultures were attacked in every possible way to destroy their symbolic worlds, their traditions, customs and worldviews, and their religions and their languages were

persecuted - in other words, their existence as cultures. Despite this, they have survived and resisted, with values much more respectful and caring of the natural world than the culture that tried to impose itself on them.

18. These are oral cultures, as opposed to the written communication of the colonizing cultures. Technology means that the dissemination of the word is now extended to all inhabitants through the use of the radio spectrum. To prevent indigenous communities from using this means of extending their oral communications is not only harmful to freedom of expression, but much more than that, in this case, it is discrimination that perpetuates the colonial enterprise of ethnocide, the dismantling and dissolution of the native cultures.

19. Denying these cultures access to radio broadcasting because of the market-based distribution of the radio spectrum, means repeating and deepening the injury to their very existence. The harm inflicted upon them is much greater than that against any other human group whose right to freedom of expression is violated, since it affects their cultural heritage and their corresponding identity.

20. Based on the two causes of justification provided for in Guatemalan law, it could be argued that the use of the radio spectrum by communities against the rules of domestic law can be protected by legitimate self-defense, for which reason it should be considered that this legislation implies an illegitimate aggression by the State itself. The unlawfulness of the legislation in light of the American Convention is recognized by this judgment. The necessity of the victims' conduct is another requirement that is met, since they did not have the possibility of appealing to the authorities to end their exclusion. Finally, there was no provocation on the part of the communities.

21. The requirement of self-defense that is problematic among those provided for in Guatemala's Criminal Code is illegitimate aggression, because although a law can configure an aggression of that nature, according to the specifics of the case it is debatable. Moreover, self-defense gives rise to a very broad space of lawfulness, because it can cause a greater harm than the one avoided, in accordance with the guiding principle of the law: no one is obliged to endure an unlawful aggression. For these last reasons I consider that it is not possible to affirm conclusively that the State has violated strict legality by not applying its provisions on self-defense.

22. Therefore, in order to explain the coherence of this judgment, I consider that in this case it is unquestionable that the State violated strict legality because it did not correctly apply the justification of the state of necessity, that is, of the second cause of lawfulness provided for in the Code and which I believe is implicit in the text of the judgment. I base this affirmation on the verification that the victims' conduct meets the three requirements contemplated in Article 24 of the Code to justify patrimonial damage.

23. In the first place, the communities engaged in conduct that could cause a possible patrimonial damage to the detriment of the legitimate users who would have paid for the use of the spectrum, to the point that the State itself has characterized it as such when attempting to apply analogically the most basic classification of crimes against property. As for the real nature of the damage that it sought to prevent, it is unquestionable that it constituted a present and ongoing harm, since it was affecting oral communication, which is the only form used in the culture of these

communities: it imposed a technological mutism on the expansion of radio communication.

24. The limitation of the conduct permitted by the state of necessity has, even in this case, the advantage of being narrower than self-defense. Thus, the decision reached in this judgment does not run the risk of anyone engaging in improper abuses. This greater limitation is due to the fact that the state of necessity requires a weighing of harms, according to which the one avoided must be greater than the one caused. There is no doubt that the harm caused by jeopardizing the preservation of one's own culture is more serious than the relative and potential patrimonial damage that could affect commercial broadcasters authorized by law to use the spectrum. The last requirement of necessity is also met, because the communities had *no other practicable and less harmful means to prevent it*, since it was futile to appeal to the State authorities.

25. In conclusion, by applying the state of necessity expressly provided for in Guatemalan law, this judgment, in addition to considering unlawful the conduct of those who made use of the radio electric spectrum in violation of the law that was contrary to the American Convention, also considers it justified - that is, lacking anti-juridicality or unlawfulness - and, therefore, authorizes its continuation until the State adapts its legislation to the ACHR.

26. I understand that this is the explanation that is not made explicit in the judgment, but is implicit in it and consolidates the logical completeness of its legal reasoning.

This is my opinion.

Eugenio Raúl Zaffaroni
Judge

Pablo Saavedra Alessandri
Registrar

SEPARATE CONCURRING OPINION OF
JUDGE RICARDO C. PÉREZ MANRIQUE

Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala

JUDGMENT OF OCTOBSER 6, 2021
(*Merits, Reparations and Costs*)

I. INTRODUCTION

1. The judgment in this case holds the State of Guatemala responsible for the violation of the rights to freedom of expression, to equality before the law and to participate in cultural life, established in Articles 13, 24 and 26 of the American Convention on Human Rights (the Convention or ACHR), in relation to the obligations to respect and guarantee rights without discrimination and the duty to adopt provisions of domestic law, to the detriment of the Maya Kaqchikel indigenous peoples of Sumpango, the Achí of San Miguel Chicaj, the Mam of Cajolá and the Mam of Todos Santos Cuchumatán.

2. The rights of these indigenous communities were violated because they were prevented from freely exercising their right to freedom of expression and their cultural rights through their community radio stations. This impediment was based on legal obstacles that prevented their access to radio frequencies, as well as the criminalization of community broadcasting without authorization. In addition, there was no legal recognition of community media and the radio broadcasting regulations were discriminatory.

3. In this opinion, I concur with the aforementioned judgment emphasizing the importance of plurality and democratization of the media for democratic debate. First, I explain in detail how I consider that the Inter-American Court should approach cases involving violations of economic, social, cultural and environmental rights, based on the universality, indivisibility, interdependence and interrelatedness of all human rights as the basis for their justiciability. Secondly, I analyze the importance of plurality in the media generically in a democratic state under the rule of law. Thirdly, I discuss the importance of community radio stations for indigenous communities.

II. THE QUESTION OF THE RIGHT OF INDIGENOUS PEOPLES TO PARTICIPATE IN CULTURAL LIFE AS A JUSTICIABLE ECONOMIC, SOCIAL AND CULTURAL RIGHT PER SE

4. As I have explained in previous opinions, and reiterating the arguments stated therein,[1] based on the universality, indivisibility, interdependence and interrelation

[1] *Cf.* Including my concurring opinions on the following judgments: *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (Ancejub-Sunat) v. Peru* of November 21, 2019; *Case of Hernández v. Argentina* of November 22, 2019; *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina,* of February 6, 2020*;* and *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil,* of July 15, 2020.

of human rights, I endorse this Court's jurisdiction to examine individual violations of economic, social, cultural and environmental rights. This is based on the conviction that human rights are interdependent and indivisible, in the sense that civil and political rights are intertwined with economic, social, cultural and environmental rights, and are therefore inseparable, as is evident in the present case.

5. Thus, I have affirmed that such interdependence and indivisibility allow us to see the human being in an integral manner as a full holder of rights and this influences the justiciability of his rights. A similar view is expressed in the Preamble of the Protocol of San Salvador: *"Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, the violation of some rights in favor of the realization of others can never be justified."*

6. Within this vision, Article 26 of the Convention serves as a framework article, since it alludes in general terms to economic, social, cultural and environmental rights, the interpretation and assessment of which refers us to the OAS Charter. The Protocol of San Salvador defines and gives content to economic, social, cultural and environmental rights. It also states that it is essential that those rights be reaffirmed, developed, perfected and protected (see Preamble). Finally, the inter-American *corpus juris* includes a set of instruments that also refer to ESCER.

7. Thus, I consider that this judgment demonstrates the coexistence of several rights of the victims that are indivisible and justiciable before this Court *per se*, as explained in paragraphs 153 to 156 of the judgment. Consequently, Article 19(6) of the Protocol of San Salvador does not constitute an impediment for the Court to consider the joint violation of these rights in the present case.

8. As stated in the first and second operative paragraphs of the judgment, in this case the Court declared the violation of the rights to freedom of expression, equality before the law and to participate in cultural life, established in Articles 13, 24 and 26 of the American Convention, in relation to the obligations to respect and guarantee rights without discrimination and the duty to adopt provisions of domestic law, contained in Articles 1(1) and 2 of the same instrument. Therefore, I understand that based on the view I have held with respect to the interpretation and application of the American Convention, the right to participate in cultural life is justiciable based on the coexistence of the violation of several conventional rights, without the need to resort to justifications based on the autonomous invocation of Article 26 of the Convention.

III. IMPORTANCE OF PLURALITY AND DEMOCRATIZATION OF THE MEDIA FOR DEMOCRATIC DEBATE

9. As stated in paragraphs 87 to 89 of the judgment, I emphasize that the plurality of the media together with its democratization are essential to foster the development of a diverse and transparent debate that is indispensable in a democratic State. That is why, according to the Court's jurisprudence, the failure to allow the exercise of the right to freedom of expression under equal conditions prevents public debate on issues of interest to society, which is essential for the protection of democracy and the pluralism of the media.[2]

[2] *Cf. Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary, objections, merits, reparations and costs*. Judgment of June 22, 2015. Series C No. 293, para. 234.

10. The concepts of democracy, pluralism and freedom of expression are inextricably linked, as stated by the Inter-American Court: "*[f]reedom of expression and information is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion.*"[3] Furthermore, *"these are requirements of the pluralism inherent in a democratic society, which requires the greatest possible flow of information and opinions on issues of public interest.*"[4] That is why freedom of expression is not limited to the recognition of the right to speak or write, but "*also includes, and cannot be separated from, the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.*"[5]

11. The media play an essential role in ensuring people's freedom of expression, since they enable them to disseminate their own ideas and information and, at the same time, allow them access to other people's ideas, information, opinions and cultural expressions. Their role is also crucial as a vehicle for the exercise of the social dimension of freedom of expression in a democratic society and therefore they must reflect the most diverse information and opinions.[6]

12. The importance of pluralism has been highlighted by the OAS General Assembly in several resolutions, which reaffirm that: "*free and independent media are fundamental for democracy, for the promotion of pluralism, tolerance, and freedom of thought and expression, and for the facilitation of dialogue and debate, free and open to all segments of society, without discrimination of any kind.*"[7] In particular, the Court has indicated that the plurality of the media and news constitutes an effective guarantee of freedom of expression, and that the State has a duty to protect and ensure this under Article 1(1) of the Convention, by minimizing restrictions to information, encouraging a balanced participation and by allowing the media to be open to all without discrimination, because the idea is that "*no individuals or groups are, a priori, excluded*." The Court has also stated that social communications media play an essential role as vehicles for the exercise of the social dimension of freedom of expression in a democratic society and therefore must reflect the most diverse information and opinions.[8]

13. States likewise have the international obligation to adopt the necessary measures "to give effect to" the rights and principles established in the Convention, as stipulated in Article 2 of this inter-American instrument. To this end, they must establish laws and public policies that guarantee the pluralism of information and news via the different media, such as the press, radio and television.[9]

14. With regard to the States' obligations in relation to the aforementioned rights, the United Nations Human Rights Committee in General Comment No. 34 indicated that States Parties should take appropriate steps to "*provide for an equitable allocation of access and frequencies between public, commercial and community*

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[3] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 70.

[4] *Case of Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008. Series C No. 177, para. 87.

[5] Advisory Opinion OC-5/85, *supra*, para. 31.

[6] *Case of Granier et al.(Radio Caracas Television) v. Venezuela*, *supra*, para. 142, and Advisory Opinion OC-5/85, *supra*, para. 34.

[7] *Cf. Case of Granier et al. (Radio Caracas Television) v. Venezuela, supra*, para. 141.

[8] *Cf. Case of Granier et al. (Radio Caracas Television) v. Venezuela*, *supra*, para. 142.

[9] *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, *supra*, para. 145.

broadcasters" in audiovisual services with limited numbers.[10] That is why radio and television broadcasting allocations must consider democratic criteria that guarantee equal opportunities for access by all individuals.[11] The Inter-American Court has referred to the need to provide sufficient guarantees against arbitrariness, as well as a pluralistic approach to licensing procedures.[12]

15. At its 26th session, the Intergovernmental Council of UNESCO's International Programme for the Development of Communication (IPDC) approved the "Media Development Indicators: A Framework for Assessing Media Development." These indicators establish international standards on broadcasting regulation that must be observed by the organization's Member States. For the purposes of this discussion, it is worth highlighting the following indicators:

> - *The regulatory system ensures equitable access to the frequency spectrum to a plurality of media, including community broadcasters.* [13]
>
> - *Media use language/s, which reflect the linguistic diversity of the target area.*[14]
>
> - *Community media (print or broadcast) is produced for specific groups, for example indigenous peoples, tribal peoples, and refugees.*[15]

16. Based on the aforementioned positive mandates, the *amicus curiae* brief of José Ignacio Hernández G. argues that:

> "*By transferring these principles to the regulation of telecommunications services, we may conclude that the defense of competition, as a task of administrative intervention in the sector, does not prevent the recognition of special treatment to ensure access to telecommunications services by those in situations of vulnerability and inequality [...] under these considerations, the State of Guatemala has the duty to implement administrative intervention techniques which, by means of positive discrimination, promote access to the radio spectrum to satisfy the communication needs of the indigenous communities. This duty, however, is not expressly recognized in the General Telecommunications Law, which, on the contrary, establishes an administrative procedure common to all applications for use of the radio spectrum."*[16]

IV. COMMUNITY RADIO STATIONS

17. According to the World Association of Community Broadcasters (AMARC),

> *Community radios and television broadcasters are private entities with public objectives. They are managed by various types of non-profit social organizations. Their fundamental characteristic is the participation of the community in ownership as well as programming, management, operation, financing and evaluation. They do not engage in religious proselytism and do not depend on or form part of political parties or private firms.*[17]

18. From this definition it is possible to determine the main features that characterize community media:

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[10] Human Rights Committee. General Comment No. 34 (2011), Freedom of opinion and freedom of expression (Article 19 of the International Covenant on Civil and Political Rights), September 12, 2011, CCPR/C/GC/34, para. 39.

[11] OAS, IACHR. *Freedom of expression standards for free and inclusive broadcasting*. OEA/Ser.L/V/II 30, December 30, 2009, para. 208.

[12] *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, *supra*, para. 244

[13] https://unesdoc.unesco.org/ark:/48223/pf0000163102_eng.

[14] https://unesdoc.unesco.org/ark:/48223/pf0000163102__eng.

[15] https://unesdoc.unesco.org/ark:/48223/pf0000163102_eng.

[16] Amicus curiae brief of José Ignacio Hernández G, para. 31 (merits file, folio 899).

[17] World Association of Community Radio Broadcasters (AMARC). Principles for a Democratic Regulatory Framework for Community Radio and Television Broadcasting, principles 3 and 4.

1) Focus on social objectives and non-profit. Financing for their operations may come from a wide range of sources, including advertising, provided the radio station is non-profit.

2) Managed by social organizations. Social organizations should be understood to mean not only organizations that promote the defense of the values and culture of indigenous peoples, as in the present case, but also all those that legitimately wish to have access to a means of communication. Management should be carried out in such a way as to give the widest possible participation to the community of reference, especially for the programming of contents.

3) Independence from government, commercial and religious institutions and political parties*.*

19. Community radio stations are non-profit organizations with an essentially social purpose that serve the needs and interests of groups or communities, affirming their message with contents of a diverse nature, but of common interest. Acting independently from government, private corporations, religious groups and political parties, they constitute an essential space for democratic debate. These groups must be taken into account by governments in order to have the voice and message that their community status demands.

V. THE IMPORTANCE OF COMMUNITY RADIO STATIONS FOR INDIGENOUS PEOPLES

20. As stated in the *amicus curiae* brief of the Latin American Association of Communication Researchers (*Asociación Latinoamericana de Investigadores de la Comunicación)* ALAIC:

> *Indigenous peoples have their own political, legal and cultural systems and a worldview that differs from other cultures that exist in the countries. Within a State, different sets of legal norms coexist, taking into account that the official law is not the only one, but that there are other legal practices such as indigenous justice, or community justice. (...) This implies the obligation of States to ensure that indigenous peoples are duly consulted on matters that affect or may affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization.*[18]

21. Community media are fundamental to guarantee the indigenous peoples of our region full respect for freedom of expression and access to information.[19] Therefore, as argued by the expert witness José Francisco Calí Tzay, given the history of colonization and racial discrimination, indigenous peoples should enjoy a *sui generis* legal status to rectify the mistakes of the past and recognize the collective dimension of their rights in a multicultural state.[20] This collective dimension is decisive for the full enjoyment of other collective rights, such as the right to autonomy and the right to culture. For example, radio has been used to develop indigenous life plans.[21] Thus, access to community radio plays a key role in

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[18] *Amicus Curiae* brief of the *Asociación Latinoamericana of Investigadores de la Comunicación* (ALAIC), p. 28 (merits file, folio 872).

[19] IIDH. *Medios comunitarios: Su relevancia como ejercicio de la libertad de expresión*, para. 105.

[20] Written version of the expert opinion presented before the Court by José Francisco Calí Tzay, para. 7 (evidence file, folio 1413).

[21] Written version of the expert opinion of José Francisco Calí Tzay*, supra,* para. 28 (evidence file, folio 1420).

addressing the social exclusion and segregation caused by centuries of racial discrimination and colonization.[22]

22. Therefore, the State has a duty to consider the role of these broadcasters in the process of recovering central aspects of the cultural identity of indigenous peoples whose traditional representative structures have been weakened by the State's policies and laws, or the lack of them.[23] This, considering that indigenous communities rely on the oral dissemination of knowledge and information as it is the most accessible option for communities with a high rate of illiteracy.[24] Indeed, in many cases, these types of radio stations occupy the spaces left by the mass media and channel their communications to where minority groups often have greater opportunities for access.[25]

23. In this regard, the *amicus curiae* brief submitted by the Latin American Association of Communication Researchers (*Asociación Latinoamericana de Investigadores de la Comunicación* - ALAIC) stated:

> *The failure by the State to adapt its domestic laws to guarantee the democratization of the media and plurality in the concession of radio frequencies is in breach of international human rights standards, especially those related to the rights to communication, freedom of expression, access to internal information and the dissemination of culture, among others; the State also fails to comply with the Constitution of Guatemala, which in Article 39 prohibits the establishment of monopolies and privileges. Furthermore, the new technologies are advancing and community radio stations have been left behind due to non-compliance and lack of legal instruments. For example, lack of access to the internet, as well as to certain technologies, which have not reached indigenous communities in an equitable manner, also reproduces patterns of exclusion and violation of the human right to freedom of expression and, therefore, the State, as the guarantor of rights for society, should regulate this issue and extend it to all citizens.*[26]

24. Along these lines, the *amicus curiae* brief presented by Juan Castro, who argues that indigenous community radio stations are a form of popular communication, maintains that the significant and unique characteristics of community radio stations are the following:

1. They contribute to the revival and advancement of the local language.

2. They encourage and strengthen the resistance of the people or the community in the face of the mass media.

3. They contribute to the development of people's opinions, ideas and knowledge about the regional and national situation.

4. They value and take into account the socio-cultural context of the audience, creating operational spaces adapted to work routines, agricultural seasons, festive occasions etc.; thus, they tend to be flexible and adaptable.

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[22] Written version of the expert opinion of José Francisco Calí Tzay, *supra,* para. 13 (evidence file, folio 1415).

[23] Written version of the expert opinion of José Francisco Calí Tzay, *supra,* para. 24 (evidence file, folio 1418).

[24] Written version of the expert opinion of José Francisco Calí Tzay, *supra,* para. 13 (evidence file, folio 1415).

[25] OAS, IACHR. *Annual Report 2002. Volume III: Report of the Special Rapporteur for Freedom of Expression*. Chapter IV: Freedom of expression and poverty, para. 39.

[26] *Amicus Curiae* brief of ALAIC, p- 33 (merits file, folio 877).

5. Community radio regards its audience as a subject and direct participant; on this basis, it transmits projects, ideas and criticisms, thereby generating spaces for dialogue and simultaneously creating environments conducive to strengthening ties among actors within the community.

25. This is why community radio stations are valuable and effective mechanisms for the transmission of information, since they educate, entertain and disseminate news not only in their own languages but also from the community's own perspective, so that data or information is quickly understood and is of great value to the people who receive it.

26. The indigenous peoples of Guatemala, in particular, had a highly developed system of written cultural transmission that was almost eradicated by colonization. Consequently, they were forced to adapt to an oral transmission of culture to preserve their knowledge and their languages.[27]

27. Nowadays, indigenous knowledge is transmitted mainly through traditions and oral communication, so that radio plays a vital role in maintaining culture and providing education and information to indigenous communities in indigenous languages.[28] This is clearly reflected in representative Ami Van Zyl-Chavarro's comment that *"indigenous people use their radio stations to promote their culture, transmit their language and tell their stories to the younger generations, to inform about health issues and discuss events."* Therefore, the State has the obligation to promote respect for and dissemination of indigenous cultures, the eradication of any form of discrimination, and to contribute to the appropriation by all Guatemalans of their cultural heritage.[29]

VI. THE INTERNET IS IMPORTANT BUT NOT SUFFICIENT: THE DIGITAL DIVIDE

28. In the course of the hearings held before the Court, it was learned that in some cases representatives of indigenous peoples use the internet. For the purposes of resolving this case, it is appropriate to ask whether digital media can provide an alternative to community radio for these peoples.

29. I understand that Hertzian radio cannot be replaced in any sense by the reception of content via the internet. Even less so in this specific case.

30. The levels of digital connectivity in Guatemala are a long way from being able to satisfy the need for effective support to be able to transmit audiovisual content over the internet. According to statistics prior to the COVID-19 health emergency - which will likely reveal worse figures in the post-pandemic phase- only 29.3% of the Guatemalan population used the internet, based on the results of a census by Guatemala's National Institute of Statistics.[30]

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[27] Written version of the expert opinion of José Francisco Calí Tzay, para. 23 (evidence file, folio 1418).

[28] Written version of the expert opinion of José Francisco Calí Tzay, para. 23 (evidence file, folio 1418).

[29] Written version of the expert opinion of José Francisco Calí Tzay, para. 22 (evidence file, folio 1418).

[30] https://www.efe.com/efe/america/tecnologia/solo-el-29-3-de-la-poblacion-censada-en-guatemala-utiliza-internet/20000036-4068618.

31. This percentage includes both urban and rural populations. However, the breakdown for rural areas shows connectivity conditions that are far from ideal. A similar situation was noted by the Inter-American Telecommunications Commission (CITEL), which reported 459,847 internet subscribers out of a population of approximately 16,342,897 inhabitants. [31] Data consumption -in the case of a telephone connection to listen to a radio station over the internet- is about 144 MB per hour in high quality or 72 in standard quality. In other words, completely inaccessible.[32]

32. It should also be noted that, even where there is full connectivity, the internet is not free of charge and does not guarantee anonymity in terms of preferences and trends, whereas radio is free of charge for the listener, who can listen to what he or she wants without being detected. The communication is broad and with open access. That is why the internet cannot replace the radio as an essential instrument to realize and guarantee the exercise of freedom of expression in this case.

VII. REGULATION OF THE RADIO SPECTRUM: STATE OBLIGATIONS.

33. I will now consider the central issue in this case regarding how the State should manage the radio spectrum in accordance with its international obligations and whether the public auction as the sole means of frequency allocation is a legitimate method under the American Convention.

34. The equitable expression of ideas in the field of radio broadcasting requires States to "*adopt affirmative measures (legislative, administrative, or of any other nature), in a condition of equality and non-discrimination, to reverse or change existing discriminatory situations that may compromise certain groups' effective enjoyment and exercise of the right to freedom of expression.*"[33]

35. States must ensure real access to community radio licenses, as well as funds to invest in infrastructure, recruit the necessary human resources and produce content consistent with its purpose.

36. To achieve this objective, the Inter-American Commission considers it necessary for community radio broadcasting to have a variety of funding sources, including "the possibility of accepting advertising as long as there are other guarantees that prevent the exercise of unfair competition with other radio stations, and provided that it does not interfere with their social purpose*."*[34]

37. The Human Rights Committee, in General Comment No. 34, indicates that States Parties should adopt appropriate measures to ensure "equitable allocation of access and frequencies between public, commercial and community broadcasters*"* in audiovisual services with limited capacity.[35]

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31 https://www.citel.oas.org/es/SiteAssets/Paginas/SistemaTIC/countries/guatemala.html#top.

32 https://radiofidelity.com/do-radio-apps-use-data/.

33 OAS, IACHR (2010). *Freedom of expression standards for free and inclusive broadcasting*. OAS/Ser.L/V/II, para. 11.

34 OAS, IACHR (2010).) *Freedom of expression standards for free and inclusive broadcasting*, *supra*, para. 112.

35 Human Rights Committee. General Comment No. 34, *supra*, para. 39.

38. The allocation of radio and television licenses must consider democratic criteria that guarantee equal opportunities for all individuals to access them."[36] The Inter-American Court has also referred to the need to provide sufficient guarantees against arbitrariness, as well as a pluralistic approach to licensing procedures.[37]

39. The Inter-American Commission has already indicated that "auctions that contemplate only economic criteria or that grant concessions without offering equal opportunity to all sectors are incompatible with democracy and with the right to freedom of expression and information guaranteed under the American Convention on Human Rights and the Declaration of Principles on Freedom of Expression."[38]

40. Thus, it is necessary to define the criteria to be followed for the regulation of the radio spectrum in such a way that community media are allowed to operate legitimately in a democratic society.

41. The granting of licenses exclusively on the basis of public auctions of a financial nature clearly discriminates against community media. In certain contexts, power or antenna limitations can also be discriminatory. Such access to broadcasting frequencies in Guatemala also constitutes a violation of Article 13(3) of the American Convention, since the assignation of radio frequencies solely on the basis of a public auction is a restriction of the right to freedom of expression via "indirect ways or means."

42. States must adopt regulations to ensure that the airwaves of the radio spectrum are assigned according to democratic criteria that guarantee equal opportunities for all individuals to have the access to them. Of course, these criteria may include guidelines such as an evaluation of the need of a particular community to express itself through a media outlet, and its sustainability plan, without implying, in any way, an evaluation of the content. They may also include an assessment of the need for these broadcasters to reach their communities effectively. For this to occur, the State must actively participate in implementing public policies that expand freedom of expression for vulnerable communities such as indigenous peoples– Articles 1(1) and 24(2) of the Convention.

43. It is important to emphasize that a regulatory model must also include the allocation of frequencies by an independent regulatory body. The independence of the regulatory body - acting separately from the government in office - both to assign frequencies and to organize their use, is essential for the proper exercise of freedom of expression.[39]

44. Given that the radio spectrum is a limited public resource, it is important that regulations establish "protected zones" for community radio stations.

VIII. CONCLUSION

45. The Court considers that *"under the principle of non-discrimination established in Article 1(1) of the Convention, recognition of the right to cultural identity is an ingredient and a cross-cutting means of interpretation to understand,*

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[36] OAS, IACHR (2009). *Freedom of expression standards for free and inclusive broadcasting*, *supra*, para. 208.

[37] *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, *supra*, para. 394.

[38] OAS, IACHR (2003), *Justice and social inclusion: Challenges of democracy in Guatemala.* Chapter VII: The situation of freedom of expression, para. 414.

[39] Eve Salomón, https://unesdoc.unesco.org/ark:/48223/pf0000246055_eng.

respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic law."[40] The right to cultural identity *"is a fundamental right - and one of a collective nature - of indigenous communities, which should be respected in a multicultural, pluralistic and democratic society."*

46. Likewise, the cases of "*Yatama v. Nicaragua*" and "*López Álvarez v. Honduras* affirm the fundamental nature of the principle of equality and non-discrimination for the safeguarding of human rights. States have the obligation not to introduce discriminatory regulations into their legal systems and to eliminate regulations of a discriminatory nature, to combat such practices and to establish norms and other measures that recognize and ensure effective equality before the law for all persons.[41]

47. This is because "(...) *the right to freedom of expression of community radio necessarily includes both the individual and the social dimension of the exercise of this right: to express and to receive information."*[42] *"Therefore, the work of a community communicator in Guatemala becomes difficult in an atmosphere of fear, repression and dread of being criminally prosecuted and imprisoned. This affects not only the right to formal work, but also the psychological pressures faced by social and community leaders, especially community communicators."*[43]

48. Community radio stations are generally the only means by which the communities they represent have the opportunity to access information and exercise freedom of expression (Article 13 of the American Convention). In the case of indigenous peoples – as demonstrated by the evidence gathered by the Court - it is clear that community radio stations are the only mechanism for accessing information, preserving their own language, as well as providing the only – and therefore essential - means of transmitting their ancestral knowledge and cultural traditions. Moreover, when the State itself needs to reach these communities with health or other messages, it uses community radio to communicate with people who cannot be reached by any other means of communication.

49. Community radio stations do not compete with commercial radio or media. They do not receive advertising from large advertisers, they generally broadcast in their own language which is different from that of the mainstream media, and they have a limited reach in terms of power and scope. Their target audience is the community.

50. Consequently, they do not have the possibility of accessing frequencies via a public auction, which is a requirement that limits – in a manner contrary to the Convention - the freedom of expression of the people who live in the communities, both individually and collectively. The criminal response in this case is contrary to the principle of legality due to the abusive use of the criminal definition of theft; it is illegitimate because it limits freedom of expression in favor of the right to property of the beneficiaries of commercial media and it is also unnecessary and totally disproportionate (Article 13(2), American Convention.

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[40] *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, para. 213 and 217.

[41] *Case of Yatama v. Nicaragua*. Preliminary objections, merits, reparations and costs, Judgment of June 23, 2005. Series C No. 127, para. 185, and *Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 170.

[42] *Amicus curiae* brief of ALAIC, *supra*, p. 15 (merits file, folio 859).

[43] *Amicus curiae* brief of ALAIC, *supra*, p. 33 (merits file, folio 877).

51. The State must implement a radio frequency distribution policy that guarantees the voice and presence of all sectors of society. Community radio stations play a key role in this regard, as noted in my previous considerations. The State is obliged to guarantee clear rules in the distribution of the radioelectric spectrum so that commercial and public media can coexist, and it is also essential to reserve sufficient and adequate space for community broadcasters.

52. If a State does not fulfill this role of regulator in accordance with the principles of a democratic society, guaranteeing the non-discriminatory use of the radio spectrum, it would be affecting the right to freedom of expression of excluded individuals and groups, thereby weakening the quality of democracy and public debate in society, as is the case in Guatemala with respect to indigenous peoples.

53. Article 24 of the American Convention has two dimensions or aspects as stated in the judgment: formal equality before the law and the material dimension which is the right to equal protection before the law. In the case of community radio stations of indigenous peoples, the State is obliged to guarantee their access to frequencies and to guarantee their operation, applying affirmative measures to support their development without interference or measures that could constitute indirect censorship or a restriction of the freedom of expression of indigenous communities. The State must develop public policies to overcome structural inequalities and allow indigenous peoples to have access to community radio stations.

Ricardo C. Pérez Manrique
Judge

Pablo Saavedra Alessandri
Registrar

PARTIALLY DISSENTING OPINION OF
JUDGE EDUARDO VIO GROSSI

CASE OF THE MAYA KAQCHIKEL INDIGENOUS PEOPLES OF SUMPANGO ET AL. V. GUATEMALA,

JUDGMENT OF OCTOBER 6, 2021,
(Merits, Reparations and Costs)

1. I issue this separate opinion regarding the judgement in the above case[1] because I disagree with the reference it makes, in the first operative paragraph,[2] to Article 26[3] of the American Convention on Human Rights[4] which, consequently, makes the violation of the rights to which said provision alludes justiciable before the Inter-American Court of Human Rights.[5]

2. In line with the other separate opinions that I have issued on this matter,[6] which are ratified by this instrument and should therefore be considered as part of it, I do not agree with the provisions of the aforementioned first operative paragraph, among other reasons and in synthesis, because: the Convention only regulates the rights that are

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1 Hereinafter the judgment.

2 "*The State is responsible for the violation of the rights to freedom of expression, equality before the law and to participate in cultural life, established in Articles 13, 24 and 26 of the American Convention on Human Rights, in relation to the obligations to respect and guarantee rights and the duty to adopt provisions of domestic law, contained in Articles 1(1) and 2 of the same instrument, to the detriment of the Maya Kaqchikel indigenous peoples of Sumpango, Achí of San Miguel Chicaj, Mam of Cajolá and Mam of Todos Santos Cuchumatán, pursuant to paragraphs 78 to 156 of this judgment.*"

3 "*The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, and subject to available resources, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.*"

Hereinafter Article 26.

4 Hereinafter the Convention.

5 Hereinafter the Court.

6 Separate opinions issued by Judge Eduardo Vio Grossi on this matter: Concurring, *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, of August 31, 2021*; Partially dissenting, *Case of Guachalá Chimbo et al. v. Ecuador*, of March 26, 2021; Dissenting*, Case of Casa Nina v. Peru, of November 24, 2020;* Partially Dissenting, *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil, of July 15, 2020;* Dissenting*, Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, of February 6, 2020;* Partially dissenting, *Case of Hernández v. Argentina, of November 22, 2019;* Partially Dissenting*, Case of Muelle Flores v. Peru, of March 6, 2019;* Partially dissenting, *Case of San Miguel Sosa et al. v. Venezuela, of February 8, 2018;* Partially Dissenting*, Case of Lagos del Campo v. Peru, of August 31, 2017,* and Individual*, Case of the Dismissed Employees of Petroperú et al. v. Peru, of November 23, 2017.*

"*recognized*"[7] "*established,*"[8] "*guaranteed,*"[9] "*enshrined*"[10] or "*protected*"[11] therein, which is not the case with respect to the rights referred to in Article 26 as being "*derived*" from the Charter of the Organization of American States;[12] the Convention itself refers to such rights separately from civil and political rights, treating them differently from the latter; Article 26 is titled "*Progressive Development,*" and therefore the obligation it establishes is to adopt provisions to give effect to those rights - not that they are, as of now, justiciable before the Court. Moreover, those rights are addressed by the OAS Charter not as such, but rather as "*basic objectives*"[13] and "*principles and mechanisms,*"[14] i.e. as part of public policies that must be adopted to give effect to those rights. Even the reliable history of Article 26 supports this interpretation. In other words, the interpretation of this article provided by the judgment does not correspond to the provisions of Article 31(1) of the Vienna Convention on the Law of Treaties.[15]

3. Finally, I must add that I truly regret that, in voting against the aforementioned first operative paragraph for the reason already indicated, I have also had to do so with

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[7] Article 1(1):"*Obligation to Respect Rights. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."*

Article 22(4): *"Freedom of Movement and Residence. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest."* Article 25(1)*:" Judicial Protection. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.* Article 29(a*): "Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;"* Article 30: "*Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."* Article 31: *"Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention. "*Article 48(1)(f): "*1. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention*."

[8] 45(1): "*Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.*"

[9] Article 47(b): "*The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: ... [it] does not state facts that tend to establish a violation of the rights guaranteed by this Convention;*"

[10] *Supra*, Article 48(1)(f), *cit.* note N° 19.

[11] Article 4(1): "*Right to life. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." Article 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."*

[12] Hereinafter the OAS.

[13] Article 34.

[14] Article 45(f).

[15] Article 31(1). "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

regard to the other provisions of the Convention included therein.[16] This is because it was not handled in the same way as in another case,[17] where the reference to Article 26 was made in an operative paragraph different to the one that cites the other applicable provisions of the Convention, and thus it was possible to disagree with respect to the former and concur with the reference to the latter.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Registrar

[16] Article 16(1) of the Rules of Procedure: "The Presidency shall present, point by point, the matters to be voted upon. Each Judge shall vote either in the affirmative or the negative; there shall be no abstentions."

[17] *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra footnote 6.*