

# Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala

## ABSTRACT<sup>1</sup>

*This case is about the shutdown and confiscation of equipment of radio stations operated by a number of indigenous peoples in Guatemala. The Court found Guatemala in violation of several articles of the American Convention including Article 13 (Freedom of Thought and Expression), Article 24 (Right to Equal Protection) and Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights).*

### I. FACTS

#### A. Chronology of Events

**1995:** With the Agreement on Identity and Rights of Indigenous Peoples (el Acuerdo sobre identidad y derechos de los pueblos indígenas; “AIDPI”) the State of Guatemala recognizes the historical discrimination of indigenous people.<sup>2</sup> The agreement is also a part of the Peace Accords, signed to end the a 35 years-long civil war in Guatemala.<sup>3</sup> The AIDPI recognizes that the Maya, Xinca, and Garífuna people have the right to write their own cultural narrative, and that the State is obligated to create a platform for indigenous culture and expression to be publicized.<sup>4</sup> The AIDPI also encourages the State to grant Maya communities wide access to communications media, which is critical to the transmission, defense, and development of cultural knowledge and values.<sup>5</sup>

**June 2000:** The Maya Mam indigenous community of Todos Santos Cuchumatán creates a community radio station known as Radio Xob’il Yol Qman Txun.<sup>6</sup> This radio station seeks to contribute to society while also maintaining its connection to Mayan history, values, resources, and potential for human progress and development.<sup>7</sup> The station’s programming includes topics such as traditional music and community news.<sup>8</sup>

**2002-2009:** The Congress of the Republic introduces several bills aimed towards reforming the State’s radio broadcasts.<sup>9</sup> In 2002, the Community Radio Broadcasting Bill (Initiative No. 2621) seeks to guarantee the use of radio frequencies for indigenous people and equalize community radio stations.<sup>10</sup> In 2004, Initiative No. 3142 calls for community radio stations to be incorporated into Guatemala’s legal framework to provide indigenous people with frequencies.<sup>11</sup> In 2005, Initiative No. 3151 seeks to formally recognize community radio

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<sup>2</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 445, ¶ 38 (November 17, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* ¶ 41.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* ¶ 111.

<sup>7</sup> *Id.*

<sup>8</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 111.

<sup>9</sup> *Id.* ¶ 51.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

stations and their continued service through a concession from the Superintendency of Telecommunications.<sup>12</sup> In 2009, Initiative No. 4087 aims to enact the “Community Media Law” which establishes a specific procedure for granting licenses so that radio spectrums are reserved for community radio broadcasters.<sup>13</sup>

**September 2002:** The President of Guatemala signs Government Agreement 316-2002, recognizing the existence of community committees and associations; multiple types of social organization; non-profit peasant, civil, academic organizations, trade unions, and various indigenous communities.<sup>14</sup> The agreement instructs the Ministry of Communications, Infrastructure and Housing and the Ministry of Culture and Sports to grant these entities use of radio frequencies.<sup>15</sup>

**2003:** The Maya Kaqchikel indigenous community of Sumpango establish Radio Ixchel, a community radio station.<sup>16</sup> This radio station broadcasts discussion programs and programs on topics including children, health, and music.<sup>17</sup>

**June 28, 2006:** The Public Prosecutor’s Office asks the trial judge at the Department of Sacatepéquez’s criminal matters, environmental crimes, and drug trafficking to authorize an inspection, search, and seizure at Radio Ixchel, which is operated by Maya Kaqchikel Indigenous People of Sumpango.<sup>18</sup>

**July 7, 2006:** The Criminal Prosecutor of Journalists and Trade Unionists raid Radio Ixchel.<sup>19</sup> Despite lacking authority to take property, law enforcement confiscates the station’s broadcasting equipment.<sup>20</sup> Anselmo Xunic Cabrera, a voluntary station coordinator and member of the Kaqchikel community, is subsequently charged with a criminal offense.<sup>21</sup> Mr. Cabrera appears before the Department of Sacatepéquez’s trial court, accused of theft for operating the radio station without a license.<sup>22</sup>

**August 2007:** The trial court judge determines the case against Mr. Cabrera lacks merit.<sup>23</sup> Radio Ixchel suspends its broadcasts for seven months due to the raid.<sup>24</sup> Community members raise funds to pay for new equipment so that Radio Ixchel can resume broadcasting.<sup>25</sup> However, members fear being arrested for participating in the broadcasts.<sup>26</sup>

**2011:** Asociación Sobrevivencia Cultural (the “Association”) files a lawsuit on behalf of Sacatepéquez’s Maya Kaqchikel of Sumpango, Huehuetenango’s Mam of Todos Santos Cuchumatán, Quetzaltenango’s Mam of Cajolá, and Baja Verapaz’s Achí of San Miguel Chicaj

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<sup>12</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 51.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 52.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* ¶ 111.

<sup>17</sup> *Id.*

<sup>18</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 58.

<sup>19</sup> *Id.* ¶ 59.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 60.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

(hereinafter “Petitioners”) to challenge the constitutionality of Articles 62, 61, 2, and 1 of Guatemala’s Telecommunications Act.<sup>27</sup> The lawsuit states that the articles directly violate the National Constitution by failing to preserve indigenous communities’ right to disseminate their culture and spirituality over radio.<sup>28</sup> Specifically, Article 61 and 62 of the Telecommunications Act allegedly violates Article 4 of the Constitution by implementing a financial bidding system as the only way to obtain radio frequencies.<sup>29</sup> The lawsuit further alleges that this an inherently discriminatory practice against Maya indigenous people, who lack financial resources.<sup>30</sup>

**November 17, 2011:** The Association challenges Articles 1, 2, 61 and 62 of the American Convention as being unconstitutional.<sup>31</sup> The Association also claims that these provisions do not allow Guatemala’s indigenous communities access to the radioelectric spectrum because they do not account for the poverty that impacts these communities.<sup>32</sup>

**March 29, 2012:** The Constitutional Court (*Corte de Constitucionalidad*) dismisses the lawsuit and notifies the petitioners of this decision.<sup>33</sup> It finds that the competitive bidding process and public action procedure does not violate any article of the constitution.<sup>34</sup> The Court further notes that these procedures also do not discriminate on the basis of language, sex, religion, or origin that would restrict, impede or obstruct any person who is interested in obtaining the right to use a radio frequency.<sup>35</sup>

**May 8, 2012:** The Public Prosecutor’s Office and National Police raids “La Voz del Pueblo,” a radio station belonging to the Uqul Tinamit indigenous community.<sup>36</sup> The community resides in Baja Verapaz’s San Miguel Chicaj municipality.<sup>37</sup> During the raid, law enforcement confiscates a transmitter, computer, and sound editor.<sup>38</sup> One of the station’s volunteers, Bryan Cristofer Espinoza Ixpata, is arrested during the raid.<sup>39</sup>

**December 5, 2012:** The President of Guatemala signs Decree 34-2012, which extends usufructuary rights granted by Telecommunications Act for 20 years.<sup>40</sup> The Petitioners argue that this Decree further inhibits equal access to radio frequencies by freezing frequency distribution for 20 years.<sup>41</sup>

**January 15, 2013:** Mr. Espinoza Ixpata is convicted for theft and unlawful use of the 106.3 MHz frequency at La Voz del Pueblo.<sup>42</sup>

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<sup>27</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Admissibility Report, Report No. 51/18, Inter-Am. Comm’n H.R., Case No. 2127, ¶ 6 (May 5, 2018).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* ¶ 7.

<sup>30</sup> *Id.*

<sup>31</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 50.

<sup>32</sup> *Id.*

<sup>33</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Admissibility Report, ¶ 8.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 61.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Admissibility Report, ¶ 9.

<sup>41</sup> *Id.*

<sup>42</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 61.

**April 20, 2016:** The National Police raids Uqul Tinamit's "La Voz del Pueblo" for the second time.<sup>43</sup> The National Police confiscates broadcasting equipment, including microphones, a computer, a console, and a transmitter.<sup>44</sup> Following this raid, the radio station stops its broadcasts.<sup>45</sup>

**2018:** The Inter-American Commission's Special Rapporteur on the Rights of Indigenous Peoples recognizes that the pervasive racism and discrimination towards the Maya, Xinka, and Garífuna people of Guatemala is a structural problem affecting all areas of their life and creating a system of *de facto* racial segregation.<sup>46</sup> Prior to colonization, Guatemala's indigenous communities used a written system to share their culture, but presently oral communication is the primary way these communities can preserve their culture and knowledge.<sup>47</sup>

The United Nations Committee on the Elimination of Racial Discrimination ("CERD") expresses concern about the discrimination of indigenous people in Guatemala.<sup>48</sup> In particular, the high poverty rates, social exclusion, and inability to fully enjoy economic, cultural, and social rights.<sup>49</sup> During the Universal Periodic Review ("UPR"), UN Member States urge the State of Guatemala to reform legislation related to indigenous peoples' access to radio frequencies.<sup>50</sup>

#### B. Other Relevant Facts

Many indigenous people – such as the Maya, Xinka, and Garífuna – coexist in Guatemala.<sup>51</sup> In the 2018 census, 43.6% of the population self-identified as indigenous, yet the Maya, Garífuna and Xinka communities estimated that indigenous people represent 65% of Guatemala's population.<sup>52</sup> Approximately 80% of the indigenous population in Guatemala is poor, with the extreme poverty rate being three times higher among indigenous groups than the non-indigenous groups.<sup>53</sup> The indigenous population also has a high rate of illiteracy since 50% of indigenous children do not go to school.<sup>54</sup> Due to a lack of medicine, personnel and infrastructure, the majority of indigenous communities also lack access to primary health care.<sup>55</sup>

Guatemala's internal armed conflict, as discussed in the Court's prior decisions, had a significant cultural impact on the State's indigenous communities.<sup>56</sup> The human rights violations that occurred during this conflict resulted in the loss of the Maya's religious and cultural practices and values, as well as their political, economic and social institutions.<sup>57</sup> In its prior decisions, the Court has also acknowledged the presence of ethnic and racial discrimination, violence, and stereotypes against the indigenous population.<sup>58</sup>

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<sup>43</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 61.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* ¶ 38.

<sup>47</sup> *Id.* ¶ 40.

<sup>48</sup> *Id.* ¶ 39.

<sup>49</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 39.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* ¶ 35.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ¶ 36.

<sup>54</sup> *Id.*

<sup>55</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 36.

<sup>56</sup> *Id.* ¶ 37.

<sup>57</sup> *Id.* ¶ 36.

<sup>58</sup> *Id.* ¶ 37.

## II. PROCEDURAL HISTORY

### A. Before the Commission

**September 28, 2012:** Asociación Mujb'ab'l Yol Encuentro de Expresiones, Asociación Sobrevivencia Cultural, the Human Rights and Indigenous Peoples Clinic of Suffolk University Law School, and Cultural Survival Inc. (collectively, the “petitioners”) file a petition with the Inter-American Commission on Human Rights.<sup>59</sup> The petition is filed on behalf of four indigenous communities including the Maya Kaqchikel of Sumpango, Maya Mam of Todos Santos Cuchumatán, Maya Mam of Cajolá, and Maya Achí of San Miguel Chicaj.<sup>60</sup> The petitioners allege that the State violated these communities’ equal protection rights, rights to freedom of expression, and cultural identity.<sup>61</sup> The petition also alleges that the State failed to legally recognize indigenous community radio stations by creating prejudiced legal conditions that inhibited access to the radio spectrum and criminalized the development of communication media.<sup>62</sup>

**May 5, 2018:** The Commission finds the petition admissible and issues the Report on Admissibility No. 51/81.<sup>63</sup>

**November 9, 2019:** The Commission issues its Report on the Merits.<sup>64</sup> The Commission makes several recommendations including that the State adopt measures to promote pluralism and diversity in the media, legally recognize the community media in internal regulations, adopt measures necessary to grant effective and equal access to radioelectric frequencies for indigenous communities, refrain from criminalizing community radio stations, and fully compensate the Petitioners for the violation of their human rights.<sup>65</sup> In the Report, the Commission concludes that Guatemala violated the recognized rights in Articles 13, 24, and 26 of the American Convention in relation to Articles 1(1) and (2) of the same instrument to the detriment of Sacatepéquez’s Maya Kaqchikel of Sumpango, Huehuetenango’s Mam of Todos Santos Cuchumatán, Quetzaltenango’s Mam of Cajolá, and Baja Verapaz’s Achí of San Miguel Chicaj.<sup>66</sup>

**January 3, 2020:** The Commission notifies the State of the Merits Report and grants the State two months to report on its compliance with the Commission’s recommendations.<sup>67</sup> The State indicates that it forwarded the Report to the relevant authorities but did not express a willingness to comply with the recommendations cited in the Report nor did the State request an extension of the deadline.<sup>68</sup>

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<sup>59</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 2.

<sup>60</sup> *Id.*

<sup>61</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Admissibility Report, ¶ 1.

<sup>62</sup> *Id.*

<sup>63</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 2. 002

<sup>64</sup> *Id.*

<sup>65</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Report on Merits, ¶¶ 1-5.

<sup>66</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 2, n.1.

<sup>67</sup> *Id.* ¶ 2.

<sup>68</sup> *Id.*

*B. Before the Court*

**April 3, 2020:** The Commission submits the case to the Court after the State failed to adopt its recommendations.<sup>69</sup>

**October 5, 2020:** The Human Rights and Indigenous Peoples Clinic of Suffolk University Law School submits a brief with pleadings, motions, and evidence to the Court.<sup>70</sup>

**January 21, 2021:** The State submits its reply brief and raises a preliminary objection contesting the Commission's and representatives' allegations and request for reparations.<sup>71</sup>

**March 15, 2021:** The Commission and the representatives present their observations on the State's preliminary objection.<sup>72</sup>

**April 28, 2021:** The Court holds a public hearing.<sup>73</sup>

**June 9, 2021-June 10, 2021:** The Court receives six amicus curiae briefs presented by: 1) Researchers at Boston College Law School's International Human Rights Practicum; 2) the World Association of Community Radio Broadcasters and the Latin American Observatory of Media Regulation and Convergence (Observatorio Latinoamericano de Regulación de Medios y Convergencia); 3) the Latin American Association of Communication Researchers (Asociación Latinoamericana de Investigadores de la Comunicación); 4) Mr. José Ignacio Hernández G; 5) the Human Rights Group of the Externado University of Colombia; and 6) the Indigenous People's Law Firm (Bufete para Pueblos Indígenas).<sup>74</sup>

**July 12, 2021:** The State and the Commission submit its final written arguments and observations.<sup>75</sup>

**October 4, 2021 to October 6, 2021:** The Court delivers its judgment in an online session due to the Covid-19 pandemic.<sup>76</sup>

1. Violations Alleged by Commission<sup>77</sup>

Article 13 (Freedom of Thought and Expression)

Article 13 (2) (Prohibition of A Priori Censorship)

Article 24 (Right to Equal Protection)

Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights)

*all in relation to:*

Article 1(1) (Obligation of Non-Discrimination)

Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention.

<sup>69</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 1.

<sup>70</sup> *Id.* ¶ 6.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* ¶ 8.

<sup>73</sup> *Id.* ¶ 9.

<sup>74</sup> *Id.* ¶ 10.

<sup>75</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 10.

<sup>76</sup> *Id.* ¶ 13.

<sup>77</sup> *Id.* ¶ 1.

2. Violations Alleged by Representatives of the Victims<sup>78</sup>

Same Violations Alleged by the Commission.

## III. MERITS

A. *Composition of the Court*<sup>79</sup>

L. Patricio Pazmiño Freire, Acting President  
 Humberto Antonio Sierra Porto, Judge  
 Eduardo Ferrer Mac-Gregor Poisot, Judge  
 Eugenio Raúl Zaffaroni, Judge  
 Ricardo C. Pérez Manrique, Judge

Pablo Saavendra Alessandri, Secretary  
 Romina I. Sijniensky, Deputy Secretary

B. *Decision on the Merits*

**October 6, 2021:** The Court issues its Judgment on Merits, Reparations, and Costs.<sup>80</sup>

The Court found by five votes to one that Guatemala had violated:

Article 13 (Freedom of Thought and Expression); Article 24 (Right to Equal Protection); Article 26 (Duty to Progressively Develop Economic, Social, and Cultural Rights) in relation to Article 1(1) (Obligation to Respect Rights) and Article 2 (Duty to Adopt Provisions of Domestic Law) of the American Convention, to the detriment of Petitioners,<sup>81</sup> because:

The Court organized its analysis as follows:

a) *Indigenous People's Right to Freedom of Expression*

*The Court held that the right to freedom of thought and expression has an individual dimension – the right to impart, receive, and seek information and ideas of all kinds – and a social dimension – the right to access and receive ideas and information of others.<sup>82</sup> For the individual dimension, the dissemination and expression of information are indivisible, such*

<sup>78</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 5, n.3. Cristian Otzín Poyón, attorney for the Nim Ajpu Association of Maya Attorneys and Notaries of Guatemala; Asociación Mujb'ab'1 Yol; Sobrevivencia Cultural; Nicole Friederichs, director and attorney of the Human Rights and Indigenous Peoples Clinic of Suffolk University Law School; and the Human Rights and Indigenous Peoples Clinic of Suffolk University Law School served as representatives of Maya Kaqchikel of Sumpango, Mam of Todos Santos Cuchumatán, Mam of Cajolá, and Achí of San Miguel Chicaj.

<sup>79</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Application for Judicial Review of the Judgement of Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 457, ¶ 1 (July 27, 2022). For reasons of force majeure, Judge Eduardo Vio Grossi and Judge Elizabeth Odio Benito did not participate in the signing and deliberation of this Interpretation of Judgement.

<sup>80</sup>*Id.* ¶ 1.

<sup>81</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, "Declares" ¶ 1.

<sup>82</sup>*Id.* ¶ 80.

that restricting dissemination would directly restrict free expression.<sup>83</sup> For the social dimension, the freedom of expression includes the right to communicate a point of view and implies the right to know reports, opinions, and news.<sup>84</sup> The Court also reaffirmed the significance of pluralism in the context of freedom of expression.<sup>85</sup>

The Court stated that oligopolies or monopolies in the media may affect the freedom of expression, and for this reason the State must promote pluralistic opinions, views, and voices.<sup>86</sup> The State must also promote the presence of public, commercial, and community communication services.<sup>87</sup> In addition to this, the State must democratize access and encourage diverse applications to the media to create space for different forms of media.<sup>88</sup>

The Court obliged States internationally to establish public policies and laws that reflect the importance of media pluralism to the freedom of expression, as well as Article 2 of the Convention.<sup>89</sup> This obligation implicitly guarantees indigenous people's rights to media representation and freedom of expression on both an individual and collective level.<sup>90</sup>

Relying on the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and the Indigenous and Tribal Peoples Convention of the International Labour Organization ("ILO Convention 169"), the Court determined that indigenous people are entitled to disseminate their cultural heritage through radio frequencies and the State is obligated to protect this right from discrimination or anything that hinders indigenous peoples' access to this right.<sup>91</sup>

The Court generally notes that community stations such as *La Voz del Pueblo* and *Radio Ixchel* are independently-managed, non-governmental non-profits meant to serve community interests.<sup>92</sup> Referencing the United Nations Organization for Education, Science and Culture ("UNESCO"), the Court notes that community radio stations consist of community members; base their programming on community participation and access; provide a voice to the voiceless; and reflect the special needs and interests of listeners.<sup>93</sup> Radio is the most popular form of communication in Guatemala's rural and remote areas where the indigenous communities live, due to many factors like the lack of internet service and electricity.<sup>94</sup> As a result of living in these areas, indigenous communities also have insufficient, expensive, or non-existent access to broadcast frequencies and telephone services.<sup>95</sup>

Accordingly, radio stations play a vital role in the lives of indigenous peoples as the only way of communication.<sup>96</sup> In Guatemala, these radio stations both provide a primary source of

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<sup>83</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 81.

<sup>84</sup> *Id.* ¶ 82.

<sup>85</sup> *Id.* ¶ 83.

<sup>86</sup> *Id.* ¶ 86.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* ¶ 89.

<sup>89</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 91.

<sup>90</sup> *Id.* ¶¶ 92-93.

<sup>91</sup> *Id.* ¶¶ 94-99.

<sup>92</sup> *Id.* ¶ 103.

<sup>93</sup> *Id.* ¶ 104.

<sup>94</sup> *Id.* ¶ 105.

<sup>95</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 106.

<sup>96</sup> *Id.* ¶ 107.



information and protect indigenous culture, language, and local consumption.<sup>97</sup> Indigenous communities contribute their own time and money to operate their radio stations, further demonstrating the radio's importance.<sup>98</sup> For example, the Maya Kaqchikel people of Sumpango's Radio Ixchel have been broadcasting programs on music, discussion, health, and children since 2003.<sup>99</sup> Similarly, Maya Mam people of Todos Santos Cuchuatán's Radio Xob'il Yol Qman Txun have been contributing to modern society while also connecting to its history by broadcasting programs on traditional music, community news, and other topics since 2000.<sup>100</sup>

b) *The Need for Broadcasting Regulation*

The Court also recognized the States' need and authority to regulate broadcasting activities, as recognized by the International Telecommunications Union.<sup>101</sup> Because radio broadcasting directly impacts the right to freedom of expression, the State must allocate the used of radio frequencies to broadly recognize this right without discrimination.<sup>102</sup> To grant freedom of expression on a wider scale and allow greater dissemination, the regulation must be clear, democratic, and transparent.<sup>103</sup> Various States under the Convention have also recognized the importance of community radio stations, including Uruguay, Peru, Paraguay, Mexico, Honduras, El Salvador, Ecuador, Columbia, Chile, Brazil, and Bolivia.<sup>104</sup> Additionally, Uruguay, Mexico, Chile, Bolivia, and Ecuador have specifically reserved frequencies for their community's media.<sup>105</sup> Mexico, Argentina, Columbia, and Bolivia have also assigned television and radio frequencies to some communities free of charge to promote equality.<sup>106</sup> Thus, the Court concluded that States must adopt measures to grant equal access to the radio spectrum and guarantee the indigenous community's access to freedom of expression.<sup>107</sup> Such measures address the unique cultural needs of indigenous groups, who suffer from marginalization, social exclusion, poverty, and discrimination.<sup>108</sup>

c) *The Intersection of the Right to Participate in Cultural Life and Broadcasting*

The Court considered indigenous communities' right to cultural participation in relation to Article 26, in conjunction with the right to freedom of expression and the role of community radio.<sup>109</sup> The Court also noted the relevance of Article 29 in determining violations under Article 26, which protects the economic, cultural, environmental, and social rights ("ESCER") provided by the OAS Charter.<sup>110</sup> The Court highlighted that cultural identity is a collective human right for indigenous communities and must be respected in a democratic, pluralist, and

<sup>97</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 108.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* ¶ 111.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* ¶ 112.

<sup>102</sup> *Id.* ¶ 114.

<sup>103</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 112.

<sup>104</sup> *Id.* ¶ 115.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* ¶ 116.

<sup>107</sup> *Id.* ¶ 117.

<sup>108</sup> *Id.*

<sup>109</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 118.

<sup>110</sup> *Id.* ¶ 119. The OAS establishes the commitment of States to ensure a) essential development for their people, which includes culture; b) incorporation and participating, in both urban and rural areas, of the marginal population; c) encourage culture; d) enrich and preserve the cultural heritage of American peoples.

*multicultural society.*<sup>111</sup> *The Court notes that access to cultural life includes the right of everyone to understand their culture and that of others through communication and education of any kind.*<sup>112</sup>

*Essential to cultural life participation is the access to communication and the opportunity to establish independent media.*<sup>113</sup> *Indigenous peoples can use such access and opportunities to participate, learn, and contribute to their own languages and cultures.*<sup>114</sup> *Language, specifically, is crucial to one's identity because its role in expression, transmission, and dissemination of culture through generations.*<sup>115</sup> *Particularly for the Maya people, two fundamental elements of their identity are their language and their worldview.*<sup>116</sup> *Because the Court recognized the right to radio stations as part of the right to freedom of expression, it further held that freedom of expression is intertwined with participation in cultural life.*<sup>117</sup>

*The Court instilled both immediate and progressive obligations of the State, regarding the right to cultural participation.*<sup>118</sup> *First, the State is immediately obligated to adopt measures that allow indigenous people to exercise this right without discrimination.*<sup>119</sup> *Second, the State must progressively and continuously recognize this right through legislation and other appropriate means.*<sup>120</sup> *The Court determined that the current case concerned immediately enforceable obligations, derived from Article 26 of the American Convention.*<sup>121</sup>

*d) The Petitioner's Allegations*

*The State is obligated to broadly guarantee the freedom of expression, while also refraining from any exclusionary or discriminatory acts.*<sup>122</sup> *The Court previously held that States must prevent and not create discriminatory regulations or practices while also taking measures to promote equality.*<sup>123</sup> *Article 1(1) obligates States to guarantee all other Convention rights without discrimination, while Article 24 requires equal treatment under State domestic law and the law's application.*<sup>124</sup> *Thus, a State that violates a Convention right also violates Article 1(1).*<sup>125</sup> *However, discrimination under domestic law is analyzed under Article 24 in relation to Article 1(1).*<sup>126</sup> *In the current case, the Court analyzed Article 24 under the category of "economic status," which includes poverty.*<sup>127</sup>

*Article 24 also promises material equality through two dimensions: (1) a formal dimension establishing equality before the law, and (2) a substantial or material dimension requiring*

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<sup>111</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 125.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* ¶ 127.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* ¶ 129.

<sup>117</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 128.

<sup>118</sup> *Id.* ¶ 130.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* ¶ 131.

<sup>122</sup> *Id.* ¶ 141.

<sup>123</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 134.

<sup>124</sup> *Id.* ¶ 133.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

*affirmative measures for victims of historical marginalization and discrimination.*<sup>128</sup> Thus, the Court recognizes that States must actively fight exclusion and marginalization.<sup>129</sup> States must do so by correcting existing inequality; promoting participation and inclusion of marginalized groups; and guaranteeing the rights of disadvantaged groups and individuals.<sup>130</sup> Further, States must refrain from policies, practices, and laws that both directly and indirectly allow discrimination<sup>131</sup>

The Court noted that State protection must account for the varying social conditions, vulnerabilities, and traditions among indigenous community members.<sup>132</sup> In this particular case, the Court recognized the historical discrimination impacting Guatemala's indigenous communities.<sup>133</sup> Historically, indigenous communities have experienced high rates of poverty, limited access to social security and formal labor markets, high rates of illiteracy rates, lack of access to health care, limited access to telephone and electrical services and endless discrimination in mass media.<sup>134</sup> Accordingly, the State should offset these inequalities by providing indigenous people the financial resources to obtain radio frequencies.<sup>135</sup>

However, the State's radio broadcasting is determined by the General Telecommunications Law ("LGT").<sup>136</sup> The LGT only grants frequencies through public auction, and specifically gives priority to the highest bid.<sup>137</sup> The Court found that this criteria severely restricted opportunities to access the radio spectrum, allowing only commercial, for-profit radio.<sup>138</sup> In 2002, Government Agreement 316 was passed to facilitate spectrum access for organizations such as indigenous communities but failed to do so adequately.<sup>139</sup> The agreement granted only a limited number of undesirable and non-useful frequencies through a legally insufficient mechanism.<sup>140</sup> These frequencies were also not compatible with broadcasting equipment, had poor quality and operating costs, and received limited listenership.<sup>141</sup> Thus, Government Agreement 316 was not an adequate or legitimate means of promoting plural, inclusive, and diverse broadcasting regulation.<sup>142</sup>

Agreeing with the Commission, the Court indicated that an oligopoly likely existed in the State's audiovisual media which was problematic as it lacked significant reform.<sup>143</sup> The Court noted that the State's radio spectrum is dominated by six communication companies: Radio Corporación Nacional, Radio Grupo Alius, Grupo Radio Rumbos, Grupo Radial El Tajín, Central de Radios, and Emisoras Unidas de Guatemala.<sup>144</sup> Although the State argued that LGT granted a broad right to participate in the auctions, the Court emphasized that free competition

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<sup>128</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 135.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* ¶ 136.

<sup>132</sup> *Id.* ¶¶ 137-138.

<sup>133</sup> *Id.* ¶ 139.

<sup>134</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 139.

<sup>135</sup> *Id.* ¶ 140.

<sup>136</sup> *Id.* ¶¶ 45, 142.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* ¶ 143.

<sup>140</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 143.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* ¶ 144.

<sup>144</sup> *Id.*

often creates *de facto* discrimination by ignoring society's diverse vulnerabilities.<sup>145</sup> The majority of Guatemala's indigenous communities lack the technical or financial means to equally compete with applicants for radio frequencies.<sup>146</sup> Thus, the State should have adopted measures to grant indigenous communities *de facto* opportunities to the radio spectrum and remedy their unique disadvantages.<sup>147</sup> The Court found that the State's legal system failed to develop community radio stations or ways for indigenous people to reserve radio frequencies.<sup>148</sup> The Court also found that the State endorsed an indirect form of discrimination and a *de facto* obstruction to indigenous communities' freedom of expression.<sup>149</sup> The State did so by creating a system that only granted radio frequencies to the highest bidders, without establishing other measures to enable media access for indigenous people.<sup>150</sup>

The Court considered how the Petitioners made meaningful efforts to obtain and use community radio stations, despite the inequality and fear of criminal prosecution.<sup>151</sup> Community radio stations are exceptionally important for indigenous communities as a form of representation and expression because the stations allow indigenous people to share music, communicate with one another in their language, and disseminate information and diverse opinions.<sup>152</sup> The Court recognized that the lack of indigenous voices in the media not only impacts the right to expression for indigenous populations but also prevents the general population from accessing different narratives, worldviews, and music in a State where at least half of the population is indigenous.<sup>153</sup>

The Court held that the Petitioners could not use institutional channels to exercise their right to public expression or to receive information of interest in a meaningful way.<sup>154</sup> This lack of access prevented indigenous people from participating in society, and society from knowing or learning about indigenous people's opinions, interest, and needs.<sup>155</sup>

Thus, the Court maintained that the State's broadcasting regulation constituted *de facto* discrimination and unfairly abridged indigenous people's right to freedom of expression.<sup>156</sup> The Court also noted that by operating and managing their own community radio stations, indigenous people created their own form of cultural participation that is vital for their culture's survival.<sup>157</sup> Finally, indigenous groups cannot use the internet for freedom of expression when they lack access to the internet based on the discrimination and poverty they experience.<sup>158</sup> Instead, indigenous people must rely on radio and oral communication to preserve their traditions and languages.<sup>159</sup>

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<sup>145</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 146.

<sup>146</sup> *Id.* ¶ 147.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* ¶ 148.

<sup>149</sup> *Id.* ¶ 149.

<sup>150</sup> *Id.*

<sup>151</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 150.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* ¶ 151.

<sup>154</sup> *Id.* ¶ 152.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* ¶ 153.

<sup>157</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 154.

<sup>158</sup> *Id.* ¶ 155.

<sup>159</sup> *Id.*

*For these reasons, the Court found that the State violated the Petitioners' rights to the freedom of expression, equality, and cultural participation, pursuant to Articles 23, 24, and 26, in relation to Articles 1(1) and 2 of the American Convention.*<sup>160</sup>

The Court found unanimously that Guatemala had violated:

Article 13(2) (Prohibition of A Priori Censorship) of the American Convention in relation to the raids and arrests of the operators of La Voz del Pueblo and Radio Ixchel,<sup>161</sup> because:

*The Court clarifies that State action restricting freedom of expression must be appropriate and proportional to achieving legitimate objectives.*<sup>162</sup> *While the freedom of expression is not an absolute right, Article 13(2) of the Convention prohibits prior censorship and may instill liability for abuses of the freedom of expression.*<sup>163</sup>

*La Voz del Pueblo and Radio Ixchel were operated by the Maya Achi of San Miguel Chicaj and the Maya Kaqchikel Indigenous people of Sumpango without a license.*<sup>164</sup> *Guatemalan authorities raided these stations, seized their broadcasting equipment, and criminally prosecuted indigenous community members.*<sup>165</sup> *The Court analyzed whether this State action, which restricted the freedom of expression, was legitimate under Article 13(2) of the Convention.*<sup>166</sup>

*Article 13(2) liability must (1) be previously established either formally or materially by law; (2) pursue a permitted objective of the American Convention; and (3) uphold democratic society subject to limits of strict legality, necessity, and proportionality.*<sup>167</sup>

*The Court indicated that previously existing law must clearly define criminal conduct to prevent public officials from abusing their discretion.*<sup>168</sup> *To satisfy necessity and proportionality, a state action must be narrowly tailored to serve a legal objective that justifies any resulting restriction on the freedom of expression.*<sup>169</sup>

*Article 246 of the Guatemalan Criminal Code defines theft as the taking, "without due authorization, a movable item, totally or partially owned by another" which is punishable by imprisonment of one to six years.*<sup>170</sup> *Article 451 of the Guatemala Civil Code defines a "movable item" as a "natural force susceptible to appropriation."*<sup>171</sup> *The Court found that the code was improperly applied to indigenous communities who used the radio spectrum but did not appropriate it.*<sup>172</sup> *Thus, the Court concluded that there was not a precise or clearly-defined*

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<sup>160</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 156.

<sup>161</sup> *Id.* ¶ 157.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* ¶ 158.

<sup>164</sup> *Id.* ¶ 159.

<sup>165</sup> *Id.*

<sup>166</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 159.

<sup>167</sup> *Id.* ¶ 160.

<sup>168</sup> *Id.* ¶ 161.

<sup>169</sup> *Id.* ¶ 162.

<sup>170</sup> *Id.* ¶ 163.

<sup>171</sup> *Id.* ¶ 164.

<sup>172</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 164.

*crime for using state radio frequencies without a license.<sup>173</sup> Further, criminally prosecuting those who operate radio stations for indigenous communities does not fulfill any purposes of the American Convention.<sup>174</sup> Rather, the raids and criminal trials violate indigenous communities' rights to participate in cultural life and express freely.<sup>175</sup>*

*In determining the suitability and necessity of restricting the freedom of expression, the Court considered: (1) the indigenous peoples' right to operate and establish community radio stations as part of their right to freedom of expression; (2) the State's broadcasting regulation preventing the indigenous community from accessing the radio spectrum legally; (3) the State's failure to make any legislative or other efforts to recognize and ensure that indigenous communities could operate their radio stations.*<sup>176</sup>

*The Court stated that although criminal instruments are sometimes suitable to restrict unlawful exercises of rights, criminal prosecution is not always proportional or necessary.*<sup>177</sup> *In a democratic society, disciplinary action should be limited to only the most severe attacks upon fundamental legal interests.*<sup>178</sup> *Holding otherwise would allow the State to abuse its punitive power.*<sup>179</sup>

*In this case, the raids on both radio stations, confiscation of broadcasting equipment, and criminal prosecutions of the operators were both unnecessary and inappropriate.*<sup>180</sup> *The State could have used administrative procedures, sanctions, or other less injurious means to achieve its objectives while minimizing harm to indigenous communities.*<sup>181</sup> *The Court also found that the prosecution resulted from an illegal situation of the State's own creation that sacrificed the indigenous peoples' right to express themselves freely.*<sup>182</sup> *Thus, the criminal prosecutions excessively and disproportionately abridged the Petitioner's rights to cultural participation and freedom of expression.*<sup>183</sup> *The State action was an illegitimate restriction of the indigenous peoples' right to freedom of expression.*<sup>184</sup>

*Thus, the Court unanimously concluded that the State is responsible for violating Article 13(2) of the American Convention to the detriment of the Petitioners, in relation to Article 1(1) of the American Convention.*<sup>185</sup>

### C. Dissenting and Concurring Opinions

#### 1. Concurring Opinion of Judge Patricio Pazmiño Freire

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<sup>173</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 165.

<sup>174</sup> *Id.* ¶ 166.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* ¶ 167.

<sup>177</sup> *Id.* ¶ 168.

<sup>178</sup> *Id.*

<sup>179</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 168.

<sup>180</sup> *Id.* ¶ 169.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* ¶ 170.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* ¶ 171.

<sup>185</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 172.

In a concurring opinion, Judge Pazmiño Freire agreed with the Court's decision and emphasized the international rights law doctrine.<sup>186</sup> Judge Pazmiño Freire noted that the media's goal is to educate, entertain, denounce, and inform the population.<sup>187</sup> However, indigenous people's voices are excluded and restricted because their stories are not considered relevant or "big news."<sup>188</sup> Since colonial times, indigenous communities have suffered and continue to suffer structural and historical exclusion under neocolonial models with stigmatizing political systems and institutionalized discrimination.<sup>189</sup>

Judge Freire emphasized that legal and social institutions suffered a radical breakdown due to the pandemic.<sup>190</sup> In States like Columbia, Peru, and Ecuador people are protesting and asking for changes to their social and political systems, similar to how Chile attained a constitutional change after three decades.<sup>191</sup> Years of failed social, political, and economic models show that Latin America's promises of democracy do not always become reality.<sup>192</sup> Judge Pazmiño Freire noted that States must establish public policies with a human rights focus.<sup>193</sup> As Vice President and Judge of the Court, Judge Pazmiño Freire emphasized a gender and cultural perspective to achieve the greatest consistent participation of communities, human groups, and social movement in Latin America's diverse region.<sup>194</sup> He indicated that the Court should enhance its representative democracy and participation by expanding its definition of democracy.<sup>195</sup>

Judge Pazmiño Freire supported an interpretation of democracy that recognizes indigenous and tribal community radio and communication as an expression of freedom of communication, and a means of reinforcing other human rights such as participation in public interest matters.<sup>196</sup> These collective rights have been incorporated into democratic constitutionalism, collectively known as "Good Living."<sup>197</sup> Judge Pazmiño Freire also emphasized the importance of equitable redistribution and democratization for effective access to radio frequency use.<sup>198</sup> In conclusion, these changes, which partly form democratic constitutionalism, must be integrated into the Court's jurisprudence.<sup>199</sup>

## 2. Partially Dissenting Opinion of Judge Eduardo Vio Grossi

In a partially dissenting opinion, Judge Vio Grossi disagreed with the opinion's reference to Article 26 of the Convention in the first operative paragraph of the judgment.<sup>200</sup> Judge Vio Grossi criticized the majority's interpretation of Article 26 because the Convention only recognizes rights that are "*protected*," "*guaranteed*," "*enshrined*," "*recognized*," or

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<sup>186</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Pazmiño Freire, Inter-Am. Ct. H.R. (ser. C) No. 445, ¶ 1 (November 17, 2021).

<sup>187</sup> *Id.* ¶ 4.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* ¶ 5.

<sup>190</sup> *Id.* ¶ 7.

<sup>191</sup> *Id.*

<sup>192</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Pazmiño Freire, ¶ 8.

<sup>193</sup> *Id.* ¶ 9.

<sup>194</sup> *Id.* ¶ 10.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* ¶ 12.

<sup>197</sup> *Id.*

<sup>198</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Pazmiño Freire, ¶ 14.

<sup>199</sup> *Id.* ¶ 15.

<sup>200</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eduardo Vio Grossi, Inter-Am. Ct. H.R. (ser. C) No. 445, ¶ 1 (November 17, 2021).

“*established*” therein, which is not the same as being “*derived*” from the Organization of American States Charter.<sup>201</sup> The OAS Charter addresses the rights under Article 26 as “*principles and mechanisms*” and “*basic objectives*.”<sup>202</sup> In other words, these are not described as rights but rather part of public policies that need to be adopted to give these rights an effect.<sup>203</sup>

In disagreeing with the judgment’s interpretation of Article 26, Judge Vio Grossi also disagreed with the judgment’s interpretation Article 16(1), which should have been analyzed independently.<sup>204</sup>

### 3. Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot

Judge Ferrer Mac-Gregor Poisot agreed with the judgment’s decision, but issued a separate opinion to further discuss right to “self-determination” referenced in the judgment.<sup>205</sup> The three sources of indigenous peoples’ rights in the United Nations – the Expert Mechanism on the Rights of Indigenous Peoples, the Permanent Forum for Indigenous Issues, and the Special Rapporteur on the Rights of Indigenous People – have stated the right to self-determination is vital.<sup>206</sup> The Inter-American System has not developed the right to self-determination within the structure of regional instruments, but the Commission has recognized it in the context of tribal and indigenous communities.<sup>207</sup> Recognizing this right is fundamental for indigenous people to fully exercise other human rights.<sup>208</sup> Indigenous people’s rights to use, establish, and be represented in media is connected to the right to self-determination.<sup>209</sup> Although not explicit, the Court made several considerations that reference an intimate relationship between the right to self-determination, freedom of expression, and participation in cultural life.<sup>210</sup> Judge Ferrer Mac-Gregor Poisot noted that, unless community radio stations are domestically guaranteed, freedom to engage in cultural life and freedom of expression will be interfered with, and self-determination will not be possible.<sup>211</sup>

Judge Ferrer Mac-Gregor Poisot noted that the judgment is another positive step towards recognizing tribal and indigenous people’s rights in the Inter-American system.<sup>212</sup> The judgment relates cultural participation to communication and the use of radio stations.<sup>213</sup> The judgment also sets precedent as to the right to self-determination which had only been discussed in relation to territories and lands.<sup>214</sup> The African systems and Inter-American Commission have been leaning towards recognizing that the right to self-determination is a key principle for tribal and indigenous communities’ rights.<sup>215</sup> For this reason, the State of

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<sup>201</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eduardo Vio Grossi, ¶ 2.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* ¶ 3.

<sup>205</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. (ser. C) No. 445, ¶ 9 (November 17, 2021).

<sup>206</sup> *Id.* ¶ 20.

<sup>207</sup> *Id.* ¶ 27.

<sup>208</sup> *Id.* ¶ 32.

<sup>209</sup> *Id.* ¶ 40.

<sup>210</sup> *Id.* ¶ 49.

<sup>211</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, ¶ 50.

<sup>212</sup> *Id.* ¶ 67.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* ¶ 69.

<sup>215</sup> *Id.*



Guatemala is obligated to correct inequalities and promote the participation and inclusion of these communities.<sup>216</sup>

#### 4. Concurring Opinion of Judge Eugenio Raúl Zaffaroni

In a separate opinion, Judge Raúl Zaffaroni indicated that the judgment implied the victims of this case exercised a right to use the radioelectric spectrum.<sup>217</sup> However, the question remained as to where this right is recognized, as well as its limits.<sup>218</sup> Finding that the Petitioners' conduct was both atypical and not unlawful, the Court implied that the State's actions were covered by an exemption or justification.<sup>219</sup>

Judge Raúl Zaffaroni also addressed the State's history of discrimination towards indigenous communities throughout the colonial period.<sup>220</sup> During this era, indigenous communities were the victims of genocides and persecution.<sup>221</sup> As a result, the traditions, customs and languages of these communities were under attack.<sup>222</sup> Radio broadcasting served as the primary means of communication for indigenous communities.<sup>223</sup> Thus, denying them access to the radio spectrum meant deepening and repeating the dissolution and dismantling of their native culture.<sup>224</sup>

The judgment considered it unlawful for the Petitioners to use the radio electric spectrum.<sup>225</sup> However, indigenous communities did not have a less harmful or other practicable means to prevent their actions.<sup>226</sup> To satisfy the requirement of necessity, a state action must be narrowly tailored to serve a legitimate purpose.<sup>227</sup> Necessity also requires a weighing of harms such that the harm avoided must be greater than the one caused.<sup>228</sup> Here, jeopardizing the preservation of one's culture was greater than the potential damage that may affect commercial broadcasters allowed to use the radio spectrum.<sup>229</sup>

#### 5. Separate Concurring Opinion of Judge Ricardo C. Pérez Manrique

In a separate opinion, Judge Pérez Manrique concurred with the judgment, highlighting the importance of the media's democratization and plurality.<sup>230</sup> The Court has acknowledged that freedom of expression, pluralism, and democracy are inextricably linked.<sup>231</sup> Because the media enables people to disseminate and access information and ideas, the media is essential

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<sup>216</sup> *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, ¶¶ 71-72.

<sup>217</sup> *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eugenio Raúl Zaffaroni, Inter-Am. Ct. H.R. (ser. C) No. 445, ¶ 3 (November 17, 2021).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* ¶ 7.

<sup>220</sup> *Id.* ¶¶ 16-17.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eugenio Raúl Zaffaroni, ¶¶ 18-19.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* ¶ 25.

<sup>226</sup> *Id.* ¶ 24.

<sup>227</sup> *Id.* ¶ 21.

<sup>228</sup> *Id.* ¶ 24.

<sup>229</sup> *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eugenio Raúl Zaffaroni, ¶¶ 23-24.

<sup>230</sup> *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Ricardo C. Pérez Manrique, Inter-Am. Ct. H.R. (ser. C) No. 445, ¶ 3 (November 17, 2021).

<sup>231</sup> *Id.* ¶ 10.

to ensuring and exercising freedom of expression.<sup>232</sup> Community radio access is also important in addressing centuries of segregation, social exclusion, colonization, and discrimination.<sup>233</sup> The State has a duty to consider the broadcaster's role in recovering indigenous peoples' cultural identity since indigenous communities depend on oral communication as a source of information.<sup>234</sup>

Because community radio stations disseminate news, entertain, and educate in both a community's own language and in their own perspective, they are effective and valuable for transmitting information.<sup>235</sup> States must ensure access to licenses for community radio, provide funds to advance infrastructure, hire human resources, and create content that is consistent with its purpose.<sup>236</sup> States should adopt regulations that ensure radio spectrum airwaves are assigned according to criteria that is democratic and guarantees equal opportunities for individuals to access them.<sup>237</sup> The criteria may include guidelines like evaluating the needs of a particular community and assessing the needs of broadcasters to effectively reach communities.<sup>238</sup> Without this, a State would weaken individuals' right to freedom of expression, public debate, and the democratic quality of a given State.<sup>239</sup>

#### IV. REPARATIONS

The Court ruled that the State had the following obligations:

##### *A. Specific Performance (Measures of Satisfaction and Non-Repetition Guarantee)*

##### 1. Judgment as a Form of Reparation

The Court stated that the judgment itself is a form of reparation.<sup>240</sup>

##### 2. Adopt Measures to Protect Petitioners Operate Community Radio Stations

The State must adopt the measures necessary to ensure that the Petitioners can use their community radio stations freely and without criminal prosecution within one year of this judgment.<sup>241</sup>

##### 3. Publish the Judgment

Within six months of being notified of the judgment, the State must publish an official summary of the judgment in a nationally circulated newspaper and in the Official Gazette.<sup>242</sup> The summary must be published in Spanish and in the Petitioner's primary Mayan

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<sup>232</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Ricardo C. Pérez Manrique, ¶ 11.

<sup>233</sup> *Id.* ¶ 21.

<sup>234</sup> *Id.* ¶ 22.

<sup>235</sup> *Id.* ¶ 25.

<sup>236</sup> *Id.* ¶ 35.

<sup>237</sup> *Id.* ¶ 42.

<sup>238</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Ricardo C. Pérez Manrique, ¶ 42.

<sup>239</sup> *Id.* ¶ 52.

<sup>240</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, "Declares" ¶ 3.

<sup>241</sup> *Id.* ¶ 184; "Declares" ¶ 4.

<sup>242</sup> *Id.* ¶ 185.

languages.<sup>243</sup> The State must also publish the summary on an official State website and the Superintendency of Telecommunication's website in a manner accessible to the public which should be available for at least one year.<sup>244</sup>

#### 4. Modify Domestic Regulations to Recognize the Importance of Communication Through Community Radio Stations

Within a reasonable time, the State must modify their domestic regulations to: (1) recognize community radio stations, particularly indigenous ones, as a unique means of communication; (2) regulate the way community radio stations are operated and establish a simple procedure to obtain licenses; and (3) reserve a sufficient and adequate segment of the radio spectrum for indigenous community radio.<sup>245</sup>

The State must also legally recognize community radio stations and distinguish them from commercial and non-commercial radio stations.<sup>246</sup> For example, the State should consider how certain community radio stations are privately owned non-profit organizations, where the community participates in management, programming, operation, and ownership of the stations.<sup>247</sup> Licenses should also be simple to obtain and free of charge, thus, allowing communities de facto spectrum access.<sup>248</sup> The State must also effectively guarantee that indigenous communities have access to the radio spectrum.<sup>249</sup>

#### 5. Prevent Criminal Prosecution of Indigenous Individuals Operating Community Radio Stations

The State must immediately stop prosecuting indigenous persons who operate community radio stations and suspend government raids of stations as well as seizures of broadcasting equipment.<sup>250</sup> The State is subject to these restrictions until it develops legal mechanisms to ensure radio spectrum access and corresponding frequencies to indigenous communities.<sup>251</sup>

#### 6. Annul Convictions Against Indigenous Community Members

Within one year, the State must annul the convictions and any consequences related to using the radio spectrum against indigenous community members.<sup>252</sup>

#### 7. Report on Compliance Measures

The State must provide the court with a report on compliance measures within one year of notification of the Judgment.<sup>253</sup>

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<sup>243</sup> *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, Merits, Reparations and Costs, ¶ 185.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* ¶ 196.

<sup>246</sup> *Id.* ¶ 197.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* ¶ 198.

<sup>249</sup> *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, Merits, Reparations and Costs, ¶ 200.

<sup>250</sup> *Id.* ¶ 202.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* ¶ 203.

<sup>253</sup> *Id.* "Declares" ¶ 10.

### B. Compensation

The Court assessed non-pecuniary and pecuniary damages together, and awarded the following amounts:

#### 1. Pecuniary Damages

The Court awarded \$15,000 in pecuniary damages to the Maya Achí indigenous community of San Miguel Chicaj and the Maya Kaqchikel indigenous community of Sumpango, whose radio stations were raided.<sup>254</sup> Although no specific amounts were requested and no expense receipts were provided, the Court presumed that the Maya Achí indigenous people of San Miguel Chicaj, operators of radio station “La Voz del Pueblo,” and the Maya Kaqchikel indigenous people of Sumpango, operators of radio station Radio Ixchel, incurred expenses from the seizure of their radio equipment.<sup>255</sup>

#### 2. Non-Pecuniary Damages

The Court awarded \$20,000 in non-pecuniary damages to all the Petitioners, which will be delivered to the designated representatives of each community.<sup>256</sup>

#### 3. Costs and Expenses

The Court awarded \$20,000 to the Human Rights and Indigenous Peoples Clinic for the costs and expenses of litigation.<sup>257</sup>

#### 4. Total Compensation (including Costs and Expenses ordered):

\$130,000

### C. Deadlines

The State must compensate the Petitioners for non-pecuniary and pecuniary damages, and directly reimburse the communities, organizations and individuals with the expenses and costs established in this judgment within one year of the judgment’s notification.<sup>258</sup>

## V. INTERPRETATION AND REVISION OF JUDGMENT

[None]

## VI. COMPLIANCE AND FOLLOW-UP

[None]

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<sup>254</sup> Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Merits, Reparations and Costs, ¶ 210.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* ¶ 221.

<sup>258</sup> *Id.* ¶ 223.

## VII. LIST OF DOCUMENTS

A. *Inter-American Court*

## 1. Preliminary Objections

[None]

## 2. Decisions on Merits, Reparations and Costs

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct, H.R. (ser. C) No. 445 (November 17, 2021).

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Pazmiño Freire, Inter-Am. Ct, H.R. (ser. C) No. 445 (November 17, 2021).

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eduardo Vio Grossi, Inter-Am. Ct, H.R. (ser. C) No. 445 (November 17, 2021).

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eduardo Ferrer MacGregor Poisot, Inter-Am. Ct, H.R. (ser. C) No. 445 (November 17, 2021).

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Eugenio Raúl Zaffaroni, Inter-Am. Ct, H.R. (ser. C) No. 445 (November 17, 2021).

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Separate Opinion of Judge Ricardo C. Pérez Manrique, Inter-Am. Ct, H.R. (ser. C) No. 445 (November 17, 2021).

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Call to a Hearing, Inter-Am. Ct, H.R. (ser. C) No. 445 (November 17, 2021)

## 3. Provisional Measures

[None]

## 4. Compliance Monitoring

[None]

## 5. Review and Interpretation of Judgment

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Application for Judicial Review of the Judgement of Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 457 (July 27, 2022).

*B. Inter-American Commission*

1. Petition to the Commission

[None]

2. Report on Admissibility

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Admissibility Report, Report No. 51/18, Inter-Am. Comm'n H.R., Case No. 2127 (May 5, 2018).

3. Provisional Measures

[None]

4. Report on Merits

Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, Report No. 164/19, Inter-Am. Comm'n H.R., Case 13.608 (November 9, 2019).

5. Application to the Court

[None]