



**United Nations Special Rapporteur on the Rights of Indigenous Peoples,  
José Francisco Calí Tzay**

**Expert Testimony at the request of the petitioners in the case of the  
*Maya Kaqchikel Indigenous Peoples of Sumpango and Others vs. Guatemala***

**Inter-American Court of Human Rights Case No. CDH-3-2020**

**24 May 2021**

### **Mandate and experience**

1. I submit this expert testimony in my capacity as the United Nations (“UN”) Special Rapporteur on the rights of indigenous peoples to the Inter-American Court of Human Rights in relation to the above-mentioned case. I am an independent expert appointed by the UN Human Rights Council in March 2020 to monitor and promote the full realization of indigenous peoples’ rights worldwide. I am specifically mandated by the UN Human Rights Council (resolution 42/20) to promote the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and international instruments relevant to the advancement of indigenous peoples’ rights. I work in close cooperation with other UN mechanisms and regional human rights bodies in carrying out my mandate. My testimony is also informed by my experience as the first indigenous person to be appointed to a UN treaty monitoring body. I was an expert member of the UN Committee on the Elimination of Racial Discrimination (CERD) for 16 years, and President of the Committee from 2016 to 2018.
2. This expert testimony is submitted in accordance with the independence of the Special Rapporteur’s mandate and should not be considered as an express or implied waiver of the privileges and immunities of the United Nations, its officials and experts on mission under the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with the independence of his mandate, was neither sought nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights

3. My testimony will focus on the historical and ongoing racism and racial discrimination faced by indigenous peoples globally and the legal duty of States, under international law, to provide special measures to guarantee the equal protection of indigenous peoples' collective identity and rights. In particular, I will discuss the collective dimension of indigenous peoples' right to media and the associated impacts on the right to participate in decision-making, the right to culture, the right to be free from racial discrimination and the right to free expression as well as the need for special measures. I will explain how access to media, specifically community radio, is critical for transmitting language and culture and how indigenous peoples rely on this medium to inform and educate their communities. Access to information is particularly vital for the survival of indigenous communities during the Covid-19 global health pandemic. I conclude by emphasizing the need for affirmative measures to ensure equal opportunity and equitable access to radio frequencies for indigenous communities, free of discrimination and issuing specific recommendations for redress. Special protections are required to address the collective dimension of indigenous peoples' rights in a pluricultural and multilingual State.

### **Relevant legal standards and commitments**

4. Guatemala has legal obligations under numerous international human rights instruments including the Universal Declaration of Human Rights (UDHR), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the American Declaration on the Rights of Indigenous Peoples (American Declaration) and the binding human rights treaties it has ratified *inter alia*: the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples (ILO Convention 169), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child and the American Convention on Human Rights.
5. The Government's ratification of ILO Convention 169 was a key element in the UN-mediated negotiation to end the conflict in Guatemala. As a party to the only binding instrument that specifically addresses indigenous peoples' rights, Guatemala has committed to respecting the traditional values of indigenous peoples and pledged to develop the pluricultural nature and character of Guatemalan society.
6. In 1996 Guatemala signed the "Acuerdo de Paz Firme y Duradera" – Firm and Lasting Peace Agreement ("Peace Accords") negotiated by the United Nations. This included the Agreement on the Identity and Rights of Indigenous Peoples (AIRIP) and the Agreement on Constitutional Reforms and the Electoral Regime (ACRER). In doing so, Guatemala committed to advancing reconciliation through an intercultural dialogue with indigenous peoples, and by providing constitutional recognition of the collective identity and rights of the Maya, Garifuna, and Xinka.<sup>1</sup>

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<sup>1</sup> AIRIP Sections I-IV; ACRER Section I (A)(4)

## Indigenous peoples have the right to be consulted and participate in decision-making, free from discrimination

7. It is well-established at the international level that given the history of colonization and racial discrimination, indigenous peoples enjoy a *sui generis* legal status to reconcile for past wrongdoings and that recognizes the collective dimension of their rights in a pluricultural state. As affirmed in the UNDRIP and the American Declaration, indigenous peoples have the right to self-determination to freely determine their political status and freely pursue their economic, social, and cultural development.<sup>2</sup> Indigenous peoples also have the right to take part in the political, economic, social and cultural life of the State if they so choose.<sup>3</sup> UNDRIP states clearly that States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.<sup>4</sup>
8. The Peace Accords support consultation and participation and provided a valuable opportunity to build consensus on important issues. Section I (5) of the Peace Accords states that the recognition of the identity and rights of indigenous peoples is fundamental for the construction of a multi-ethnic, pluri-cultural, and multilingual nation. In adopting the AIRIP, Guatemala recognized the discrimination suffered by indigenous peoples and the government committed to review, reform, and eliminate existing legislation that may have discriminatory implications for indigenous peoples as well as adopt legislative and administrative measures that nourish indigenous cultural development.<sup>5</sup>
9. For the indigenous peoples of Guatemala, the AIRIP signified the start of a reconciliation process to secure historical and ongoing claims for redress. There have been some achievements in the peace process: defining concepts such as autonomy, self-determination and participation; and proposals for the development of a multicultural and multilingual State. However, for the most part, the peace process has been slow, especially as it pertains to indigenous peoples' rights. International and regional human rights bodies have repeatedly drawn attention to the lack of compliance with the Peace Accords.<sup>6</sup> My predecessor, the former Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, noted during her county visit to Guatemala in 2018, that the AIRIP has for the most part not been implemented, as only 19 percent of the commitments have been fulfilled.<sup>7</sup> CERD has repeatedly expressed concern over the gaps in implementation of the AIRIP.<sup>8</sup> Unfortunately, implementation of the Peace Accords has focused on the economic aspects, rather than the elimination of racial discrimination. There must be a coherent

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<sup>2</sup> UNDRIP Art. 3, American Declaration Art. 3

<sup>3</sup> UNDRIP Art. 5, American Declaration Art. 23

<sup>4</sup> UNDRIP, Arts. 2 and Art. 15.2

<sup>5</sup> AIRIP Section II (A)(2)(b) and III (3)

<sup>6</sup> Peace Secretariat, Office of the President of the Republic, *Policy Agenda for Peace 2017–2026: Outstanding commitments*

<sup>7</sup> A/HRC/39/17/Add.3, para. 17

<sup>8</sup> CERD/C/GTM/16-17, para. 9, 15; CERD/C/GTM/CO/14-15 para. 9

approach by the State in order to advance implementation of the Peace Accords and build a strong framework focused on addressing discrimination.

10. While a member of CERD, I observed the historic and ongoing social and political exclusion of indigenous peoples worldwide, emanating from the widespread problem of racial discrimination.<sup>9</sup> As a party to ICERD, Guatemala has agreed to adopt the appropriate measures to eliminate and prevent all forms of racial discrimination against indigenous peoples. CERD has expressed concern over the ongoing effects of structural discrimination faced by indigenous peoples in Guatemala manifested in high rates of poverty, social exclusion, and obstacles to the full enjoyment of economic, social, and cultural rights.<sup>10</sup> CERD furthermore expressed concern that manifestations of racial discrimination still persist in the media in Guatemala and specifically recommended that the State take the necessary steps to address such discrimination in mass media.<sup>11</sup> Furthermore, UN members States during Universal Periodic Reviews of Guatemala, have urged the State to adopt legislation specifically classifying racial discrimination and its various manifestations as punishable acts and to reform the legislation concerning access of indigenous people to radio frequencies.<sup>12</sup>
11. Structural discrimination can be perpetuated through apparently neutral legislation that *de facto* discriminates against indigenous peoples as is the case of Guatemala's General Telecommunications Law.<sup>13</sup> Obstacles in accessing radio frequencies results in indirect discrimination against indigenous communities. Articles 61 and 62 of the General Telecommunications Law fail to include indigenous communities (i.e. community radios) as rights-holders and allocates property rights with the bidding and auctioning of radio frequency licensing through competition. Indigenous community radio stations do not have the economic means to outbid a private entity, and if they cannot afford it, they cannot access it.
12. Media and telecommunication laws, such as the General Telecommunications Law, which affect individual and collective rights should be adopted in consultation with indigenous peoples. International law sets out that States shall consult and cooperate with indigenous peoples and obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>14</sup> CERD has urged Guatemala to "adopt the appropriate measures, in consultation with indigenous peoples... to guarantee their right" to free, prior, and informed consent and include them in the decision-making process.<sup>15</sup> The Human Rights Committee, in reviewing

<sup>9</sup> CERD/C/GTM/CO/16-17, para. 13

<sup>10</sup> CERD/C/GTM/CO/16-17, para. 13

<sup>11</sup> CERD/C/GTM/CO/14-15, para. 24

<sup>12</sup> A/HRC/22/8, paras. 99.9, 9.78

<sup>13</sup> Organismo Legislativo del Congreso de la Republica de Guatemala, Decreto Numero 94-96, reformado según decreto número 115-97, *Ley General de Telecomunicación*  
[https://www.palermo.edu/cele/pdf/Regulaciones/GuatemalaLeDTelecomunicaciones\(1996\).pdf](https://www.palermo.edu/cele/pdf/Regulaciones/GuatemalaLeDTelecomunicaciones(1996).pdf)

<sup>14</sup> UNDRIP Arts. 15, 19, 32.2, 38; ILO Convention 169 Arts. 6, 15.2, 22, 27, 28; CESCR General Comment 21, para. 55(e); American Declaration Arts. 23.2, 28.3

<sup>15</sup> CERD/C/GTM/CO/16-17, para. 20 (a)

Guatemala's compliance with the ICCPR, recommended that Guatemala properly consult with indigenous peoples to obtain free, prior and informed consent before implementing "any measure that may have a substantial impact on their way of life and culture."<sup>16</sup> During the Universal Periodic Review, Guatemala was urged by Member States to establish effective consultation processes and ensure the full participation of indigenous peoples in decisions that concern them.<sup>17</sup>

13. Radio access plays a paramount role in addressing the social exclusion and segregation caused by centuries of racial discrimination and colonization. Indigenous communities rely on the oral dissemination of knowledge and information. It is the most accessible option for indigenous peoples who experience a high rate of illiteracy. Additionally, during the current COVID-19 pandemic, Guatemala's indigenous peoples are disproportionately impacted by the coronavirus because of historic and systemic discrimination and limited access to culturally appropriate COVID-19 prevention, treatment information and health care.<sup>18</sup> Access to community radio has been critical in mitigating COVID-19 spread as many indigenous peoples cannot afford internet service, and radio stations can offer culturally appropriate information in indigenous languages.

### **Special measures**

14. International law requires the implementation of affirmative measures to protect indigenous peoples' collective rights based on their unique status as distinct peoples and rights holders. Unequal treatment of persons in unequal situations does not amount to discrimination. Special measures and programs are required to ensure effective equality within a pluricultural and multilingual State.
15. The Human Rights Committee has stated that "[i]n a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions," and that "as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the [International] Covenant [on Civil and Political Rights]."<sup>19</sup> CERD has asserted that "the term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination." Furthermore, CERD has observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration".<sup>20</sup>

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<sup>16</sup> CCPR/C/GTM/CO/4, para. 39 (a)

<sup>17</sup> A/HRC/37/9, paras. 111.22, 111.23

<sup>18</sup> A/75/185

<sup>19</sup> CCPR General Comment No. 18, CCPR/C/21/Rev.1/Add.1, para.10

<sup>20</sup> CERD General Recommendation No. 32, CERD/C/GC/32, para. 8

16. The duty of States to adopt positive measures to ensure that indigenous peoples' rights are respected is well established by the jurisprudence of the Inter-American system. States are obligated to adopt special measures that guarantee the full enjoyment of the fundamental rights of indigenous peoples. These measures are not discriminatory against the rest of the population as indigenous peoples experience increased vulnerabilities and discrimination. Special measures, which are crucial “in safeguarding the physical and cultural survival of indigenous peoples,” have to “recognize the collective manner of indigenous rights.”<sup>21</sup>

## Right to culture

17. Indigenous peoples' individual and collective right to culture is well established in international instruments and reflected in the UNDRIP, ICCPR, ICESCR, ILO Convention 169 and the American Declaration which uphold the right to practice, participate in, revitalize the culture and languages of indigenous peoples, also for the benefit of future generations.<sup>22</sup>
18. UN human rights treaties and their monitoring bodies have indicated that State parties must ensure the accessibility of cultural participation through the adoption of laws and policies that create concrete opportunities for the full enjoyment of culture, without discrimination.<sup>23</sup> The ICCPR holds that State parties must protect the right of religious and linguistic minorities to participate in and enjoy their culture as a community, and to practice their own religion and languages.<sup>24</sup> The Human Rights Committee has expressed that States are under an obligation to ensure that the existence and exercise of this right are protected against their denial or violation.<sup>25</sup>
19. The ICESCR also protects the right to participate in cultural life, including “language, oral and written literature” and that through the individual and collective dimension of accessing culture, “everyone also has the right to learn about forms of expression and dissemination through any technical medium of information or communication.” The Committee on Economic, Social and Cultural Rights has affirmed that State parties must not interfere with cultural practices and ensure the ability and accessibility of cultural participation through the adoption of laws and policies and the provision of effective and concrete opportunities for individuals and communities to enjoy culture fully... without discrimination.<sup>26</sup>
20. The Committee on Economic, Social and Cultural Rights (CESCR) has stated that “indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and

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<sup>21</sup> IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09, paras. 34, 49, 51, 53 and 63

<sup>22</sup> UNDRIP Arts. 13.1 15, 16, 31; American Declaration Arts. 6, 15. 1; ICCPR Art. 27; CCPR General Comment No. 23 para. 1, para. 6.2; ICESCR Art. 15.1(a); CESCR General Comment No. 21 para. 13

<sup>23</sup> CCPR General Comment No. 23 para. 6.1, 9; CESCR General Comment No. 21 Section III (A) (B) (C)

<sup>24</sup> ICCPR Art. 27

<sup>25</sup> CCPR General Comment No. 23 para. 6 (1)

<sup>26</sup> CESCR General Comment No. 21 paras. 15, 16

traditional cultural expressions” and that States should “respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.” The same Committee observes that cultural life “is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present, and a future,” and added that culture encompasses ways of life and all its components, such as language, music, ceremonies, religion, and oral and written literature. Parties to the ICESCR are required to take “appropriate measures to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life.” The Committee has also indicated that States are also required to take steps to prevent third parties, such as businesses competing for radio frequencies, from interfering in the right to take part in cultural life and protect their right to engage in their own cultural practices.<sup>27</sup>

21. At the regional level, the Inter-American Court has recognized that “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.”<sup>28</sup>
22. As part of the peace process, Guatemala acknowledged in the AIRIP that “communications media play a paramount role in the defense, development and transmittal of cultural values and knowledge” and the State has a responsibility “to promote respect for indigenous cultures, the dissemination of such cultures, and eliminate all forms of discrimination and to help all Guatemalans to take full possession of their multicultural heritage.”<sup>29</sup> The AIRIP further recognizes that the Maya, Garifuna, and Xinka peoples are “the authors of their cultural development” and so Guatemala must support this development by eliminating any obstacle that hinders indigenous peoples’ ability to culturally develop.<sup>30</sup> In signing the AIRIP, Guatemala agreed to recognize the language rights of indigenous peoples by implementing measures to: promote the use indigenous languages when providing State social services at the community level; inform indigenous communities, in their own languages of their rights, obligations and opportunities in various areas of national life; and enhance the status of indigenous languages.<sup>31</sup>
23. Originally indigenous peoples in Guatemala had a well-developed written system of cultural transmission that was almost eradicated by colonization. Consequently, indigenous peoples were forced to adapt by switching to oral transmission of culture to preserve our knowledge and language. Now indigenous knowledge is transmitted primarily through oral tradition and communication, so radio plays a vital role in maintaining culture and the provision of education and information to indigenous communities in indigenous languages.

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<sup>27</sup> CESCR General Comment 21 paras. 11, 13, 37, 48, 51, 55 and 63.

<sup>28</sup> IACtHR, Case of the Kichwa Indigenous Peoples of Sarayaku, (Merits and reparations), Judgment of June 27, 2012 para. 217

<sup>29</sup> AIRIP Section III (H) (1)

<sup>30</sup> AIRIP Section III (3)

<sup>31</sup> AIRIP Section III (A) (2) (c) (d) (f)

24. The current General Telecommunications Law prevents indigenous peoples in Guatemala from maintaining, controlling, protecting and developing cultural heritage, indigenous knowledge and traditional cultural expressions because it restricts access to community radio frequencies. Furthermore, in the case of indigenous peoples' community radio stations, the State should consider the important role of these stations in the process of recovering central aspects of indigenous peoples' cultural identity in the face of the weakening of their traditional representative structures generated by the State's own policies and laws, or the lack thereof.

### **Right to media and freedom of expression**

25. The ICCPR protects the right to freedom of expression and opinion and to seek, receive and impart information through any media of choice.<sup>32</sup> UNDRIP sets out clearly in Article 16 that 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. It furthermore affirms that States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity and that States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.
26. The Human Rights Committee in its General Comment No. 34 on Article 19 on Freedom of opinion and freedom of expression has stated that “States parties should not impose onerous licensing regimes and fees on broadcast media, including community and commercial broadcasters. Criteria for the application of such regimes or the charging of such licences must be reasonable and objective, clear, transparent and non-discriminatory, and otherwise comply with the Covenant. In licensing regimes for media with limited capacity, such as satellite or terrestrial audiovisual services, access and frequencies should be allocated equitably among public, commercial and community broadcasters. It is recommended that States parties that have not yet done so establish an independent and public broadcasting licensing body with the power to review applications and grant licences”. The Committee also stated in the same General Comment that “due to the development of modern means of public information, effective measures are required to prevent control of the media which would infringe on the right of everyone to freedom of expression. The State should not exercise monopolistic control over the media but should promote media plurality. States parties should therefore take appropriate measures, consistent with the Covenant, to prevent excessive media dominance or concentration by privately controlled media groups in monopolistic situations that may undermine the diversity of sources and opinions.”<sup>33</sup>
27. In addition, the American Declaration on the Rights of Indigenous Peoples asserts that ‘Indigenous peoples have the right to promote and develop all their systems and media of communication, including their own radio and television programs, and to have equal access to all other means of communication and information. It also underlines that States

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<sup>32</sup> ICCPR art 19(2)

<sup>33</sup> CCPR General Comment No. 34, CCPR/C/GC/34,



shall take measures to promote the broadcast of radio and television programs in indigenous languages, particularly in areas with an indigenous presence and that States shall support and facilitate the creation of indigenous radio and television stations, as well as other means of information and communication.<sup>34</sup>

28. For indigenous peoples, freedom of expression has a fundamental collective dimension, instrumental to fully enjoying other collective rights *inter alia*, right to autonomy and right to culture. For instance, radio has been used to elaborate indigenous life plans (*plan de vida*). 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 communications technology such as the Internet and social media.<sup>35</sup>
29. Both the UN Special Rapporteur on the promotion and protection of the freedom of expression and the Special Rapporteur for freedom of expression of the Inter-American Commission on Human Rights have noted the importance of community radio stations in ensuring indigenous peoples' access to information and in allowing people who have been discriminated against historically to have a voice and to transmit important information affecting their communities.<sup>36</sup> The same Rapporteurs also reiterated the necessity to "guarantee genuine community media on terms under which communities do not have to compete with private actors according to the same criteria."<sup>37</sup>
30. The former Special Rapporteur on the rights of indigenous peoples James Anaya and the Expert Mechanism on the rights of indigenous peoples have stressed the vital role that media can play in the promotion and protection of indigenous peoples' rights and that media can be an essential tool for the revitalization of indigenous languages, especially in the education of indigenous children.<sup>38</sup> My mandate has also expressed concern over the discrimination and invisibility of indigenous peoples which hampers their access national communications or the media, and to have their voices heard in decision-making and results in non-indigenous people speaking for them or making decisions on their behalf or in spite of them.<sup>39</sup>
31. In signing the AIRIP, Guatemala agreed to ensure the "broadest possible access to communications media,"<sup>40</sup> particularly to: (a) create opportunities for the dissemination of

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<sup>34</sup> American Declaration on the Rights of Indigenous Peoples, Article 14 (3)

<sup>35</sup> Economic Commission for Latin America and the Caribbean (ECLAC), "Guaranteeing indigenous people's rights in Latin America Summary," 2014, p. 98

[https://repositorio.cepal.org/bitstream/handle/11362/37051/4/S1420782\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/37051/4/S1420782_en.pdf)

<sup>36</sup> A/HRC/41/35/ADD.1 para. 41

<sup>37</sup> A/HRC/41/35/ADD.1 para. 41

<sup>38</sup> <https://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12419&LangID=E>

<sup>39</sup> A/HRC/27/52, para. 38

<sup>40</sup> AIRIP Section III (H) (2)

indigenous culture in both official and private media and (b) promote the reforms of the existing Telecommunications Act so that frequencies are made available for indigenous community radio stations as well as promote the abolition of any national legislation that hinders the right of indigenous peoples to develop their identity through communications media.<sup>41</sup> Article 35 of the Constitution of Guatemala affirms that “the expression of thought through any mass medium without censorship or prior permission is free.”<sup>42</sup>

32. Independent human rights experts including Special Rapporteurs, the Human Rights Committee, and CERD have recognized the role of mass media in combatting indigenous discrimination in Guatemala and the importance of community radio broadcasting to protect and maintain indigenous culture and languages. They have urged the Guatemalan State to implement appropriate measures to eradicate discrimination in media programs,<sup>43</sup> fulfill its commitment “to make mass media available without restrictions for indigenous communities”,<sup>44</sup> allocate frequencies for community radio stations on an “equitable basis”,<sup>45</sup> adopt a legal framework regarding community radio stations, and reform the General Telecommunications Act that impedes the ability of indigenous communities to obtain radio frequencies.<sup>46</sup>
33. CERD has repeatedly expressed concern over the stalled deliberation and delay in Congressional approval of legislation regarding community radio broadcasting (Draft Bill 4087).<sup>47</sup> The Committee urged the State to prioritize the adoption and implementation of a legal framework, in consultation with indigenous peoples, regarding community radio stations including the reservation of radio frequencies.<sup>48</sup> The Human Rights Committee has explicitly urged the Guatemalan State to ‘assign access and frequencies to public, commercial and community radio broadcasters on an equitable basis, accord legal recognition to the community broadcasting sector so that indigenous peoples are able to express themselves in their own languages and promote their cultures.’<sup>49</sup>
34. During the Universal Periodic Review process, UN member States recommended that Guatemala follow up on the Constitutional Court’s decision to engage in legislative reform “concerning access of indigenous people to radio frequencies to promote, develop, and diffuse their languages, traditions, and other cultural expression,”<sup>50</sup> and reform its radio communication law “in order to guarantee the proper and free functioning of local radios.”<sup>51</sup> Furthermore it was recommended to adopt a framework for the protection of media professionals, based on the UN Plan of Action on the Safety of Journalists and the

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<sup>41</sup> AIRIP Section III (H) (2) (a) (b)

<sup>42</sup> Constitution of Guatemala, 1985 (as Amended to 1993) Art. 35

<sup>43</sup> CERD/C/GTM/CO/14-15, para. 24

<sup>44</sup> E/CN.4/2003/90/ADD.2, para. 93

<sup>45</sup> CCPR/C/GTM/CO/4, para. 39 (e)

<sup>46</sup> A/HRC/39/17/ADD.3, para. 103 (c) p. 19

<sup>47</sup> CERD/C/GTM/CO/16-17, para. 25

<sup>48</sup> CERD/C/GTM/CO/14-15, para. 24

<sup>49</sup> CCPR/C/GTM/CO/4, para. 39

<sup>50</sup> A/HRC/22/8, para. 99.78

<sup>51</sup> A/HRC/22/8, para. 99.78

Issue of Impunity, according to which the protection of journalists should not be limited to those who are formally recognized as journalists, but should cover others, including community media workers, citizen journalists and others who may be using new media as a tool to reach their audiences.<sup>52</sup>

35. A matter of particular concern is the criminalization of community radio station. CERD has repeatedly expressed concern regarding the closing down of community radio stations and the prosecution of community radio operators<sup>53</sup> The Human Rights Committee has expressed concern over the criminalization of indigenous leaders defending their right to freedom of expression and consequently urged the State party to take action to ensure that the right to freedom of opinion and expression be fully protected.<sup>54</sup>
36. During her official country visit to Guatemala in 2018, the previous UN Special Rapporteurs on the rights of indigenous peoples Victoria Tauli-Corpuz received information first-hand. She specifically expressed concern over the criminalization of community radio operators and noted that this often takes the form of breaking into a radio station, seizing equipment and accusing the staff of criminal offences. She furthermore underlined that community radio stations that broadcast in indigenous languages constitute a crucial means of providing indigenous peoples with access to information, particularly in rural areas and that the current General Telecommunications Act gives preference to commercial radio stations and makes it almost impossible for communities to obtain a State-authorized radio frequency, notwithstanding a Constitutional Court ruling in 2012 urging the Congress to reform the law.<sup>55</sup>
37. As the current mandate-holder, I wish to underscore that the criminalization of community radio stations constitutes a violation of the individual and collective rights of indigenous peoples and a setback for the reconciliation and intercultural dialogue that Guatemala committed to with the Peace Accords.

### **Right to remedy**

38. UNDRIP holds that States shall provide indigenous peoples with effective mechanisms for prevention of, and redress for, *inter alia* any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them. UNDRIP also sets out that States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.<sup>56</sup>

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<sup>52</sup> A/HRC/37/9, para. 111.51

<sup>53</sup> CCPR/C/GTM/CO/4 párr. 36; CERD/C/GTM/CO/16-17, para. 25; CERD/C/GTM/CO/14-15, para. 24

<sup>54</sup> CCPR/C/GTM/CO/4, para. 37 (e)

<sup>55</sup> A/HRC/39/17/ADD.3, para. 59

<sup>56</sup> UNDRIP Arts. 8 (2), 11 (2)

39. The AIRIP maps the steps that Guatemala must take to redress the structural discrimination of indigenous peoples and guarantee full access to community radio stations:

- (a) Create opportunities in the official media for the dissemination of expressions of indigenous culture and promote a similar opening in the private media;
- (b) 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 which is an obstacle to the right of indigenous peoples to have their own communications media for the development of their identity; and
- (c) Regulate and support a system of informational, scientific, artistic and educational programmes on indigenous cultures in their languages, through the national radio, television and the written media.”<sup>57</sup>

40. I wish to recommend that the State take concrete measures of remedy and reparation to ensure the recognition of the role of indigenous communicators and community radio stations, notably to:

- Address the legal vacuum in order to guarantee the right of indigenous peoples to access to community media and the exercise of freedom of expression;
- Adopt a legal framework on indigenous peoples' media, reserving frequencies for community radio and equitably allocating access to frequencies between public, commercial and indigenous peoples' radio and television companies;
- Include in the legal framework specific reference to the protection of community media communicators and that the protection of journalists not be limited to those who are formally accredited as such;
- Refrain from applying criminal sanctions for the unauthorized exercise of indigenous peoples' community media, in particular radio broadcasting;
- Establish an independent and public body in charge of radio and television broadcasting licences, with the power to review applications and grant licences;
- Take appropriate measures to prevent excessive media dominance or concentration by privately controlled media groups in monopolistic situations that may undermine the diversity of sources and opinions;
- Take effective measures to prevent the control of community media that infringes on the right to freedom of expression of all persons;
- Actively combat racial bias in the media and manifestations of racial discrimination against community radio stations.

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<sup>57</sup> AIRIP Section III (H)2 (a), (b), (c)

## Global examples of best practices

41. There are many examples of best practices in a broad range of States where Governments are recognizing, promoting and protecting indigenous peoples' right to media, by reserving radio frequencies for community stations and funding indigenous television broadcasting. New Zealand,<sup>58</sup> the United States<sup>59</sup> and Kenya<sup>60</sup> are examples of countries where Governments have funded indigenous community radio to inform and foster cultural heritage and revitalize indigenous languages. In Finland, Norway and Sweden there are Sámi languages radio and television departments in the respective public service broadcasting entities. In Australia, indigenous controlled broadcasting began in the 1970s and currently there are over 120 Aboriginal community radio stations across the country.
42. In Colombia, the Canal Capital news program "Native Colombia" (*Colombia Nativa*) airs twice a week. In Argentina, the indigenous channel "Wall Kintun" was launched as the first open-signal television channel in the country run by an indigenous organization in 2013. In Ecuador, the TV/MICC (Indigenous Campesino Movement of Cotopaxi), was the first television channel in the country run by an indigenous organization. In Nicaragua, both community radio and televised media have played a key role in the full exercise of rights to autonomy, and both have been expanding significantly in the autonomous regions.<sup>61</sup>
43. In Canada, the Aboriginal Peoples Television Network (APTN) was the first national indigenous broadcaster in the world to transmit stories not only within the state but worldwide in indigenous languages.<sup>62</sup> Run by and for the communities, community radio stations in Senegal are broadcast in six indigenous languages to inform communities on

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<sup>58</sup> In New Zealand, the devotion of various *Maori* radio community-based radio stations revived the *Maori* language. The New Zealand Broadcasting Act of 1989 was promoted by the Waitangi Tribe who were concerned about the lack of radio frequencies devoted to their people and now there are 21 *Maori* language radio stations active throughout the islands, which broadcast from New Zealand and is funded by the Government to provide a radio distribution system to all stations, a national radio news service and pool of *Maori* music. p. 3. Cultural Survival, Submission to the Study of the UN Expert Mechanism on the Rights of Indigenous Peoples- Promotion and Protection of the Rights of Indigenous Peoples with Respect to their Cultural Heritage through resolution 27/13 from HRC request (2013).

<https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/CulturalHeritage/CulturalSurvival.pdf>

<sup>59</sup> Ibid. Illustrates the use of community radio in the Sapulpa community in Oklahoma, United States, where the Yuchi radio is utilized to ensure that the indigenous language is still present and alive by encouraging youth to speak on their live broadcast in their native tongue, they also broadcast traditional songs and practical learning tutorials that make the language accessible to all listeners and revitalize the cultural heritage among the indigenous community. p. 5.

<sup>60</sup> Ibid. In Kenya within the Samburu community the radio station, Serian 88.9 FM, broadcasts in the Samburu language and the aim is to broadcast to the community living in arid and semi-arid areas to entertain, inform, and educate. The community radio is important for creating dialogue around harmful practices such as female genital mutilation, and radio is an important source of information and communication to promote awareness of women's rights. p. 6.

<sup>61</sup> ECLAC, *Guaranteeing indigenous people's rights in Latin America*, 2014

[https://repositorio.cepal.org/bitstream/handle/11362/37051/4/S1420782\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/37051/4/S1420782_en.pdf)

<sup>62</sup> The Canadian CED Network (1999), *Aboriginal Peoples Television Network (APTN)*, [https://ccednet-rcdec.ca/sites/ccednet-rcdec.ca/files/ccednet/Profile\\_-\\_APTNx\\_0.pdf](https://ccednet-rcdec.ca/sites/ccednet-rcdec.ca/files/ccednet/Profile_-_APTNx_0.pdf)

issues such as health, education, and sustainable development. UNESCO supports a community radio project in the Tanganyika province of the Democratic Republic of the Congo, which aims to foster peace amongst indigenous peoples in the region.<sup>63</sup> Ghana, Rwanda and Tanzania all recognize community radio stations.<sup>64</sup> In Timor-Leste, UNICEF support, in collaboration with the authorities, community radio stations that combat the spread of COVID-19 by broadcasting in five local languages.<sup>65</sup>

### **UNDRIP as a way forward**

44. I wish to conclude by emphasizing the need for intercultural dialogue with a view to developing a shared understanding of the importance of advancing reconciliation and change in the approach of States to indigenous peoples. Human rights issues and discrimination, once adequately addressed, will result in benefits for the country and society as a whole. The fulfilment of indigenous peoples' rights should not be portrayed as a cost. Such a position estranges indigenous peoples from the State and the country, while promoting the notion within the larger society that indigenous peoples are requesting unwarranted privileges. Moreover, it is not conducive to the spirit of partnership and mutual respect upon which UNDRIP is based.
45. UNDRIP, as a consensus normative framework, provides the best framework to conduct an intercultural dialogue on how to implement indigenous peoples' rights in an environment of reciprocal cooperation.<sup>66</sup> Throughout the UNDRIP calls for 'effective mechanisms' for redress are underscored. Genuine reconciliation requires affirmative steps to provide remedy and redress for indigenous peoples. An essential approach for redress is the consideration of the collective nature of the impact of such violations on indigenous peoples and therefore the incorporation of adequate collective reparation measures.<sup>67</sup>

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<sup>63</sup> <https://en.unesco.org/news/can-indigenous-radio-stations-foster-peace-drc>

<sup>64</sup> "Community radios promote local development across Africa," <https://en.unesco.org/news/community-radios-promote-local-development-across-africa>

<sup>65</sup> "Community radio joins the fight against COVID-19 in Timor-Leste."  
<https://www.unicef.org/timorleste/stories/community-radio-joins-fight-against-covid-19-timor-leste>

<sup>66</sup> Special Rapporteur on the Rights of Indigenous Peoples, Statement at the 12th Session of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 18 July 2019

<sup>67</sup> Special Rapporteur on the Rights of Indigenous Peoples, Report to the General Assembly, A/72/186, 2017, para.