

## **Expanding Frontiers of Indigenous Self-Determination: Recent Developments at the Inter-American Court**

### **Introduction**

Over the past couple of decades, the Inter-American Court of Human Rights (the Court) has developed a prolific jurisprudence on Indigenous rights. This trajectory began in 2001, when the [Awas Tigni decision](#) turned the regional Court into a forerunner in the recognition of collective land rights. Ever since, the Court has advanced cutting-edge standards on issues ranging from Indigenous consultations to environmental rights.

Within this line of precedents, however, the right of Indigenous peoples to self-determination has eluded straightforward conceptualization. For the most part, self-determination was analyzed through the lens of article 21 (right to property) of the American Convention on Human Rights—that is, as a component of the right of Indigenous peoples to their ancestral territories. Meanwhile, other facets of self-determination, such as the right to self-governance, remained underexplored.<sup>1</sup>

Last year, in 2024, the Court began addressing this gap. In two separate judgements, the Court recognized Indigenous self-determination as an independent right protected under Article 26 of the American Convention. The first of these decisions concerned the right of Indigenous communities to determine their internal forms of governance. The second concerned the external expression of Indigenous political participation. These two precedents mark an evolution from previous Inter-American jurisprudence and may foreshadow the recognition of more ambitious standards on Indigenous autonomy. The

objective of this Insight is to summarize these two judgements and to briefly highlight their potential implications.

## **New Standards on the Internal Aspects of Indigenous Self-Determination**

On April 1, 2024, the Inter-American Court delivered its decision in the case of [\*The Rama and Kriol Peoples, The Black Creole Indigenous Community of Bluefields et al. v. Nicaragua\*](#). This dispute arose from a territorial conflict in the southeastern region of Nicaragua. The petitioners include six Indigenous communities of the Rama people, three Afro-descendent communities of the Kriol people, and the Black Creole Indigenous community of Bluefields.

The underlying conflict is complex but can be summarized as follows. Between 2006 and 2015, these communities secured formal recognition of their territorial rights. However, Nicaraguan authorities failed to properly demarcate the lands, thus allowing third parties to encroach and establish agricultural activities in Indigenous territories. Compounding these threats, in 2014, the Nicaraguan government began the process to build the Great Interoceanic Canal of Nicaragua—an infrastructure project that would cut through these very lands and thus required a prior consultation.

As these conflicts unfolded, the communities also experienced difficulties with the mechanisms used by Nicaragua to “certify” the individuals who represented their interests within the consultation and land delimitation process. Under Nicaraguan law, this certification was carried out before an administrative body that was only supposed to formalize the results of community-based elections. However, the mechanism allowed a significant degree of government interference. In 2014, a Nicaraguan judge suspended the certification of the representative of the Community of Bluefields, triggering a new election and resulting in two individuals claiming to be community representatives. Most glaringly, in 2019, the state denied the certification to the authorities elected by the Rama and Kriol Peoples.

In this context, the legal dispute before the Inter-American Court focused on three claims. First, the petitioners argued that the state violated their right to collective property by failing to delimit their territories. Second, they claimed that the construction of the interoceanic canal had violated their right to free, prior, and informed consent as well as their right to a healthy environment. Third—and most critically—the communities contended that the certification process violated their political rights by interfering in the election of their authorities.

The first and second claims were resolved according to existing standards.<sup>2</sup> However, the third claim prompted a novel examination of the right to Indigenous self-determination. The Court affirmed that, under Article 26 of the American Convention, Indigenous peoples have a right to cultural identity, which “protects the distinctive features that characterize any social group” (¶ 125).<sup>3</sup> Applying that norm, in connection with Article 23 (political rights), the Court held that these features include Indigenous “forms of organization and election of authorities and representatives” (¶ 125). Consequently, the Court declared that Nicaragua had a duty to “take any necessary measures to ensure that Indigenous peoples can elect their own authorities and representatives according to their own culture and organizational structures, as an expression of self-determination” (¶ 127).

As a result, the Court’s majority opinion held that Nicaragua’s suspension and refusal to certify Indigenous authorities violated the right to self-determination of the petitioning communities. The sole dissenting opinion, by Judge Patricia Pérez Goldberg, agreed with the majority’s abstract interpretation of Indigenous rights. However, she emphasized that states could still “establish minimal standards to regulate” the exercise of self-determination and, in her opinion, the case “lacked sufficient elements” to determine whether Nicaragua had overstepped these standards.

This case marked the first instance in which the Inter-American Court recognized Indigenous self-determination as an independent right protected under the American Convention. Three months later, the Court continued this new line of precedent with a decision that extended its analysis to the external dimensions of this right.

### **New Standards on the External Aspects of Indigenous Self-Determination**

On June 18, 2024, the Court delivered its decision in the case of [Huilcamán Paillama et al v Chile](#)—a petition filed on behalf of a group of Indigenous individuals that were convicted for participating in a protest. The events took place back in 1992, when the *First Mapuche Tribunal*—a popular tribunal composed of Mapuche traditional authorities—declared that the Chilean state had illegally dispossessed the Mapuche people from their lands. Following this declaration, the *Consejo de Todas las Tierras*, an Indigenous organization, engaged in a series of protests seeking to reclaim Indigenous territories. These protests included the occupation of several properties in the region of Araucanía. After four days of occupation, the Chilean police evicted and arrested a large group of protestors. In total 133 Indigenous individuals were detained and prosecuted under

charges of usurpation, illegal association, robbery, and abetting to criminal activity. About a year later, in 1993, all 133 of them were convicted.

The Inter-American petition denounced several irregularities in the criminal processes brought against these protestors. For starters, the investigation was led by a *Ministro en Visita*—a special type of investigating judge appointed in cases that may cause “public alarm.” Then a court imposed a gag order, prohibiting the public dissemination of information about the trial. Subsequently, when the convictions were issued, some judicial orders imposed penalties for crimes that had not been formally charged, while others failed to properly assess all the charges brought by the prosecution. Most troubling, however, was that throughout the proceedings, the protestors’ affiliation with the *Consejo de Todas las Tierras* was implicitly treated as evidence of criminal conduct.

Presented with these facts, the Court was called upon to decide two sets of legal claims. First, the petitioners argued that Chile had committed numerous violations of their right to due process and judicial protection. Among the many issues that were presented, the petition argued that the protestors were deprived of an impartial judge and that the charges relied on vague criminal provisions. Second, the petitioners argued that the investigations discriminated against the protestors because of their membership in an Indigenous group, which was implicitly used as evidence to criminalize an exercise of freedom of expression and association.

Regarding the first set of claims, the Court developed a meticulous analysis of every irregularity. This is not the place to dissect those determinations. Suffice it to say that several claims were found to have established violations of the Convention, but some were not.

For purposes of this Insight, the second set of claims is the most relevant as it prompted the Court to conduct an *ex officio* analysis of the right to protest as an element of Indigenous self-determination. Originally, the petition did not articulate any violation of said right. The petitioners simply argued that the protestors, as individuals, suffered a violation of the rights protected under Article 13 (freedom of expression), Article 16 (freedom of association), and Article 24 (equality before the law) of the American Convention.

However, the Court invoked the principle of *iura novit curia* to add a collective dimension to the claim. Relying on Article 15 (freedom of reunion), the Court recognized that peaceful protest is a “natural vehicle for collective action” (§ 250). Then, recalling the

application of Article 26 in the *Rama and Kriol Peoples* case, the Court affirmed that Indigenous peoples have a right to their “own forms of organization and election of authorities” (¶ 253). Through a combined application of these two articles, the Court established that the “external dimension of self-determination” guarantees the right of “Indigenous and tribal peoples to exteriorize their opinion and positions, as a prerequisite for their participation in decision-making processes on matters that affect them” (¶ 256).

As a result, the Court held that Chile violated the right to self-determination. In the opinion of the majority, Chilean authorities used the content of the protest and membership in an Indigenous organization as evidence to justify both the investigations and convictions. This, the Court declared, was a way to implicitly criminalize the collective expression of Indigenous peoples’ opinions—in this case, the position of the *Consejo de Todas las Tierras* regarding the restitution of the Mapuche lands.

This decision sparked two dissenting opinions. On the one hand, Judge Nancy Hernandez Lopez considered that the case “lacked sufficient evidence” to prove that the Mapuche people suffered a violation of their self-determination, but she agreed in recognizing that Article 26 of the American Convention protects said right. On the other hand, Judge Humberto Sierra Porto agreed that the case revealed a violation of Indigenous self-determination but disagreed with the majority’s decision to derive that right from Article 26; instead, he argued that self-determination should be protected as an element of other rights.

### **Looking Ahead: A Promising Normative Development**

These cases mark an important development in Inter-American jurisprudence. Despite its abundant precedents, the Court was lagging behind UN Special Procedures in the recognition of Indigenous self-determination as an independent right.<sup>4</sup> After all, it was over a decade ago that the UN Special Rapporteur called upon the international community to recognize that Indigenous self-determination is a right protected under international law.<sup>5</sup> Likewise, the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) advanced this normative project in its 2021 thematic report exploring the challenges to realizing Indigenous self-determination.<sup>6</sup>

Compared with these standards, the recent Inter-American decisions may not seem groundbreaking. However, their relevance lies in their prospective normative potential. Unlike UN Special Procedures, the Inter-American Court is an adjudicatory body with binding jurisdiction and an individual petition mechanism. By recognizing self-

determination as a right protected under the American Convention, these cases open the door to judicializing more aspects of Indigenous self-determination and thus to developing clearer standards about the duties of states towards Indigenous peoples. These two cases already identify two negative duties: the duty to refrain from interfering in internal self-governance, and the duty to refrain from repressing external expressions of Indigenous opinions.

Moving forward, the Court could explore positive duties implied by the right to self-determination. This possibility is especially promising, as it may contribute to standard-setting efforts currently being advanced in other international forums. For instance, the Court could examine the duty of states to implement Indigenous-led health and wellness policies—as advised in a study submitted to the upcoming session of the UN Permanent Forum on Indigenous Peoples.<sup>7</sup> Similarly, the Court could assess whether states have an obligation to provide or guarantee access to the financial resources needed to sustain Indigenous forms of organization, which is a current priority of Indigenous peoples in Mexico,<sup>8</sup> and has also been a recent concern of the UN Environment Programme Finance Initiative.<sup>9</sup> Overall, the potential opened by the Inter-American Court is vast, but the evolution remains to be seen.

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<sup>1</sup> Previously, the clearest recognition of self-determination was in a thematic report by the Inter-American Commission. Inter-Am. Comm. H.R., [Derecho a la Libre Determinación de Pueblos Indígenas y Tribales](#), OEA/Ser.L/VII. Doc. 413 (Dec. 28, 2021).

<sup>2</sup> See [Indigenous Communities of Lhaka Honhat \(Our Land\) Association v. Argentina, Merits, Reparations and Costs Judgment](#), Inter-Am. Ct. H.R. (ser. C) No. 400, (Feb. 6, 2020).

<sup>3</sup> All quotations from the Inter-American Court judgements referenced in this Insight have been translated by the author from the original Spanish. At the time of publication, the Court had not issued an official English version of these judgments.

<sup>4</sup> For example, the Court previously recognized that Indigenous peoples have a right to participate in the political life of the state. However, instead of recognizing this as an aspect of self-determination, the Court analyzed the discriminatory effects of electoral laws. See, [Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs Judgment](#), Inter-Am. Ct. H.R. (ser. C), No 127 (June 23, 2005).

<sup>5</sup> [James Anaya \(Special Rapporteur on the Rights of Indigenous Peoples\), U.N. Doc. A/68/317 UNGA Resolution A/68/317 ¶¶ 73-77](#) (Aug. 14, 2013).

<sup>6</sup> Human Rights Council (Report of the Expert Mechanism on the Rights of Indigenous Peoples), [Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right to Self-Determination](#), U.N. Doc. A/HRC/48/75 (Aug. 4, 2021).

<sup>7</sup> Geoffrey Roth (Study to the UN Permanent Forum on Indigenous Issues), *Evaluating Institutional Structures to Improve the Health and Wellness of Indigenous Peoples Globally: The Indigenous Determinants of Health Measurement Instrument*, U.N. Doc. E/C.19/2025/5 ¶ 13 (Feb. 4, 2025).

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<sup>8</sup> The Inter-American Commission has a pending case concerning Mexico that could introduce this legal question. See, *Bedolla y Comunidades Indígenas Cierran Filas por la Defensa del Autogobierno*, GOBIERNO DE MICHOACAN (Aug. 19, 2022).

<sup>9</sup> UN Environment Program-Finance Initiative, [\*Shared Prosperity: How Financial Institutions can Partner with Indigenous Peoples\*](#) (Oct. 22, 2024).