

**SEPARATE CONCURRING OPINION OF
JUDGE SERGIO GARCIA RAMIREZ IN THE JUDGMENT RENDERED IN THE
CASE OF PLAN DE SANCHEZ MASSACRE V. GUATEMALA,
ON APRIL 29, 2004**

1. I concur with the judges of the Inter-American Court in issuing the judgment on the merits in the *Case of Plan de Sánchez Massacre v. Guatemala*, issued on April 29, 2004. I add this separate opinion, in which I examine certain points of said ruling, as well as its possible implications.

2. Solution of an adjudicatory case may be expressed in various judicial and extra-judicial acts, which may have repercussions on the former. Extra-judicial acts that pertain to agreements among the parties appear at any time prior to when the proceeding commences, and even during it, especially –as regards the inter-American system for protection of human rights- during the stage of processing before the Commission. With respect to the period of the court proceeding, strictly speaking, the solution occurs through one or several judgments that decide on the merits (declaratory) and on the corresponding consequences (sentencing), or by means of an act that establishes a specific judicial ruling that ends the dispute, in all its expressions, or a part of it, leaving solution of the remaining parts pending, subject to another ruling of the Court, whether or not prepared by new acts of the parties geared toward an agreement.

3. The rules of the Inter-American process reflect the latter possibility under the item regarding “Early Termination of the Proceedings” (Chapter V of the Rules of Procedure), which includes as causes for discontinuance of the case, both the decision of the applicant not to proceed with it and acquiescence by the respondent (Article 54). I have referred elsewhere to acquiescence within inter-American adjudicatory proceedings (see my *Separate concurring opinions in the Case of Myrna Mack Chang v. Guatemala, November 25, 2003 Judgment*, paras. 10, 11, 13, 17, 18, 21, 24 and 30; and *Case of Bulacio v. Argentina, September 18, 2003 Judgment*, para. 7). The amendments to the Rules of Procedure on November 25, 2003 recognized that said procedural act pertains to the “claims” of the applicant, not to the “facts” alleged by the applicant, the admission of which amounts, strictly speaking, to a confession.

4. Of course, neither acquiescence to the claims nor confession are binding for the Inter-American Court: confession is not, because the court has the power to establish the value and scope of any evidence. Nor is acquiescence -or, if applicable, the decision not to proceed with the case- because the court itself may order that examination of the case continue to ensure better protection of human rights, even if such acts have occurred. Therefore, the interests and requirements of justice are above the interests or the will of the party, and the former are geared toward protection of human rights in the specific case, but also toward potential solution of other cases, both regarding international jurisdiction itself and regarding domestic jurisdictions, by expressing a criterion that leads to that end. This is one of the aspirations and one of the characteristic features of international justice in the field of human rights. Therefore, substantive matters prevail over formal ones.

5. Contrary to what happens in other types of trial, the parties cannot withdraw the case, on their own, from being heard by the court and, therefore, from the judgment that the court may issue and that serves both to solve the problem raised

and as a general protection of human rights, through the specific protection of certain rights of given individuals. This prevalence of public or social interest over specific or institutional interest is well known in certain situations of national trials, where it also sustains the unofficial expediting of the proceeding and the autonomous investigation into the truth.

6. Of course, issuing an acquiescence or a confession entails withdrawal of the preliminary objections filed, as has in fact been done, inasmuch as they are a prerequisite for a subsequent jurisdictional act of the Court, one that could not take place –or whose issuance would be, at the least, very debatable- if the State that confesses or acquiesces argues, at the same time, that the court must not hear the matter raised in the application, due to inadmissibility or lack of competence. Acquiescence is an invitation to hear and decide on the merits.

7. In several more or less recent cases –and of course in the one I am now discussing- the State has made an “institutional acknowledgment” that puts into effect the possibility of immediately deciding on all or some disputed issues. Of course, this acknowledgment is a right of the respondent State, but at the same time it usually reflects implicit fulfillment of an obligation undertaken in light of the American Convention, inasmuch as the States that are parties to it have taken on the duty to respect the rights set forth in said instrument and to adopt such measures as may be necessary for this to be so. It is an expression of the *pacta sunt servanda* principle that corrects the offense committed in violation of that principle. Thus, compliance with the obligation derives from an act of the State (the acknowledgment) and provides an advancement for another act by the Court (the judgment).

8. It is necessary to express, as our court has done in certain cases, including this one, our appreciation of this conduct by the State, which has substantive and procedural implications, making it possible to solve the conflict with a contribution by the parties and not only through a ruling of the court, in accordance with the general motivation and nature of solutions that pertain to agreements among the parties. Their will, insofar as it contributes to the ultimate goal sought by whoever acquiesces or confesses, also contributes to the act of justice that is realized in the final ruling by the court.

9. In its April 29, 2004 ruling, the Court expressed that “the acknowledgment of international responsibility made by the State constitutes a positive contribution to the development of this process and to the effectiveness of the principles behind the American Convention on Human Rights” (para. 50). In this case, as in the *Case of Molina Theissen v. Guatemala* (which I mention here because the respective ruling was issued during the same session of the Court as the ruling in the instant case), the State added to its acquiescence regarding the facts and claims an unprecedented “request for forgiveness” addressed to the victims, the survivors and the next of kin, one that must be duly noted. This is, I believe, the first time that a State makes such a public statement during a trial before the Inter-American Court.

10. The expression “acknowledgment of international responsibility” includes several elements: it announces admission of a responsibility derived from an international commitment and it adds a qualification –“institutional”- that is not explicitly set forth in the provisions of the Inter-American adjudicatory system. Therefore, the Court must specify the meaning of this expression with respect to the

aims of the *sub judice* case, resorting, whenever necessary, to the statements of the parties and to other elements evidenced in the proceeding and which allow it to decide that there has been a confession of facts, an acquiescence to claims, or both, either comprehensively or in part. It is desirable, though not indispensable - inasmuch as the Court can conduct its own examination of matters and decide accordingly-, for those who acquiesce to precisely state what facts they confess and what claims they accept, both in light of the application filed by the Inter-American Commission and regarding the claims mentioned by the victims and their next of kin, under the terms of Articles 36(1) and 53(2) of the Rules of Procedure of the Court.

11. In the instant case, the State of Guatemala withdrew the preliminary objections that it had raised at the outset and it acknowledged its international responsibility. When he explained this act, the agent of the State pointed out that the acknowledgment did not entail any judgment regarding individual criminal liabilities, subject to their own sphere of cognizance. This refers to what I have called the “duty of criminal justice” (see, for example, my article “*Las reparaciones en el sistema interamericano de protección de los derechos humanos*”, in *El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI. Memoria del Seminario* (November, 1999), Inter-American Court of Human Rights, San José, Costa Rica, 2001, v. I, pp. 154-156), which the Inter-American Court examines when it rules on reparations, a matter not addressed in the April 29 judgment. This once again enables observation of the nature of the judgments of the Court, traditionally differentiated and recently unified: on the one hand, they involve a ruling on the violation committed, if that were the case; on the other hand, they condemn certain actions, omissions or entitlements, if this were appropriate.

12. Taking into account the written and verbal expressions of the State, the Court has deemed it pertinent to issue rulings on the subject matter and on the development of the process. Its April 23, 2004 Order and the April 29 Judgment itself sought to do this. The former deemed the preliminary objections to be withdrawn and admitted the acknowledgment of international responsibility; the latter, to which I add this *Opinion*, stated that “the controversy regarding the facts that gave rise to the instant case has ceased” (operative paragraph 1, partly based on the statement made by the State, the nature of which constituted a confession) and that the State “breached the rights set forth” in various Articles of the American Convention (operative paragraph 2, partly based on the statement that, also in accordance with its nature, constituted an acquiescence).

13. As I have said above (*supra sub 4*), the Court could have ordered continuation of the proceeding regarding the facts and the violations that they entail, exercising an authority granted to it by Article 55 of the Rules of Procedure, but after analyzing the evidence regarding both matters (an authority that, I insist, it does not immediately decline due to an act by a party) it deemed that in the case in point the elements for the judicial decision reached were at hand.

14. It could be said that once the confession and the acquiescence had occurred – both of them under the title of acknowledgment of international responsibility- the dispute regarding the merits (facts in violation of rights protected by the Convention) had ceased, and that therefore it was not necessary to receive and weigh evidence (for example, testimony and expert opinions) nor to mention them in the judgment. I do not share this view. It was pertinent to hear the testimony and expert opinions previously offered to and admitted by the Court, which would encompass the reparations that were the new subject matter of the hearing, originally ordered to

address preliminary objections, merits, and reparations. Even though the subject matter of the hearing would be reparations, these could hardly be examined –and this would be factually and juridically impossible- without referring to the facts that are their source and to the violations that explain and justify them.

15. On the other hand, the account of the facts in the judgment, even though the dispute on them has ceased, serves various pertinent purposes. First, it provides the motivation for the judicial ruling itself, which could not be issued in a “vacuum” nor based only and exclusively –for the reasons I gave above, *supra sub* 4, 10 and 13- on the expressions of the will of the parties. It also addresses the “instructive” aim, if I may use this term, that the judgments of an international human rights court must have, which might not exist in the situation of a national criminal court, save for the “general prevention” role of acts of criminal justice. And finally, they help clarify the connection between the stage of the proceeding that is closed by that ruling and the stage that it opens: that of reparations, which involve that “the injured party be ensured the enjoyment of his right or freedom that was violated” and reparation of “the consequences of the measure or situation that constituted the breach of such right or freedom” (Article 63(1) of the American Convention), if applicable. With respect to the latter, it is also necessary to consider -even though the respective formal statement should be made in the ruling on reparations- that the account of the facts, in addition to their admission and that of the attendant violations by the State, in itself has a certain efficacy in terms of redress, as the Court has repeatedly stated.

16. The decision on reparations is based on the facts established during the prior stages of the proceeding and the violations proven during them. Thus, the judgment on the merits is the prerequisite and the condition for the judgment on reparations, save –of course- when both subjects are examined in a single ruling, as the Court now seeks to do, to make the proceeding more concentrated and to better serve the principles of procedural economy and promptness, the observance of which significantly contributes to the adequate development of the Inter-American proceedings and ultimately benefits the victim. The linkage between the facts reflected in the April 29 judgment and the reparations whose specification is yet pending can be seen even more clearly if we consider the explicit references in the judgment to specific aspects of those facts with the aim of deciding equally specific aspects in the reparations (para. 51), a point that I will address *infra*, in paragraph 17 of this *Opinion*.

17. In the course of the proceeding and in the very judgment to which I attach this *Opinion*, there have been references to what the Commission in its application called a “genocidal policy of the State with the intention of destroying, fully or in part, the indigenous Mayan people,” a position that was also expressed by the representatives of the victims. These references suggest that we consider the implications that the violations might have from the perspective of other international instruments, especially the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In this regard, the judgment of the Court contains certain expressions (para. 51) that I share and that I deem pertinent to comment.

18. The Inter-American Court of Human Rights, established by means of a convention in 1969, exercises its competence in accordance with those provisions, agreed upon by the States parties to the American Convention, as well as with the provisions of other instruments that explicitly grant it new areas of subject-matter

competence, also agreed upon by the States parties in the respective international acts, such as the San Salvador Protocol –which defines said competence under the terms of Article 19(6)-, the Inter-American Convention to prevent and punish torture, and the Inter-American Convention on forced disappearance of persons. The States have accepted the adjudicatory jurisdiction of the Court based on an understanding of the scope of said provisions.

19. Now then, the above does not impede the Inter-American Court from invoking elements or references contained in international Law as a whole, when it is appropriate to do so to interpret or integrate the provisions of the aforementioned conventions and protocol, bearing in mind the characteristics of the facts alleged and the text and meaning of the immediately applicable provisions. In this event, other instruments are not directly applied, to decide on violations of the rights or duties set forth in them, but rather they are used as elements of interpretation, assessment or judgment for a better understanding and the immediate application of the principles that explicitly grant it competence; in other words, for the direct application of the provisions contained in the latter. In this regard, it is pertinent to take into account what has been expressed in several rulings (such as the judgments in the *Case of "Street Children" (Villagrán Morales et al.)*, November 19, 1999 Judgment, Series C No. 63, paras. 192-195; and *Case of Bámaca Velásquez*, November 25, 2000 Judgment, Series C No. 70, paras. 208-210, as well as *Advisory Opinion OC-17/2002 of August 28, 2002, on the "Legal status and human rights of the child,"* paras. 24 and 28-30).

20. Abridgment of a right enshrined in a provision of a convention -aside from the fact that it may also be embodied at other levels of national and international legal provisions and culture, which may be the basis for that provision- entails damage to a high-ranking right that warrants protection. Gravity of the damage is linked to the hierarchy of that right, the way it is harmed, and the fact, found in various situations, that the abridgment affects various rights at the same time. In this regard, we can bring in as a useful analogy or reference the criterion previously set forth by the Inter-American Court when it examined Article 4(1) of the American Convention in the judgments in the *Cases of Hilaire, Constantine and Benjamín et al. (June 21, 2002 Judgments)*, to which I also added a *Separate Concurring Opinion*. The issue of "greater gravity" of an abridgment was also addressed, conceptually and juridically, in those cases. Some of the ideas stated then –with variations due to the shift from the criminal to the international order, and bearing in mind the specificities involved with respect to Article 4(1)- are equally applicable to the subject we are now addressing, and they contribute to the establishment of the "greater gravity" that may, also, be reflected in the consequences associated with State responsibility.

21. In the instant case, the facts "gravely affected the members of the Maya achí people in their identity and values and [...] took place within a pattern of massacres" (para. 51). The court has decided to examine the characteristics of these facts, many of which are notorious, "at the time when it rules on reparations" (*id.*). This means that said characteristics may be reflected in the reparations themselves, bearing in mind two aspects that naturally exist: the nature of the facts and the way they occurred (context, means, realization, consequences that will enable consideration of the magnitude and the conditions of the violation). This will lead to establishment of the gravity of the facts and the manner in which they should be assessed in the judgment on reparations. This does not modify the imputation of the facts to the State, due to actions or omissions of its agents, but it contributes to establishing

their greater or lesser gravity and, therefore, the nature of the reparations that the Court may order, if appropriate.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary