

**CONCURRING SEPARATE OPINION
OF THE JUDGE AD-HOC ÁLVARO CASTELLANOS HOWELL**

I fully concur with the judgment issued by the Inter-American Court of Human Rights in the case of *Tiu Tojin v. Guatemala*. As a result of the fact that this Court, pursuant with its attributions and jurisdictional competence, has as its supreme goal to internationally and effectively shelter and protect human rights, after the corresponding deliberation, I have voted in favor of the adoption of said judgment without any reservation in this sense in my conscience.

The facts proven as well as the violations acknowledged by the State of Guatemala, define the grave transgression of the human rights identified in paragraph 54 of that judgment committed against the victims also identified therein. Even more so, as also expressed in the judgment (paragraph 91), the prohibition of the forced disappearance of people and the corollary duty to investigate it and, in its case, punish those responsible, have the nature of *jus cogens*. Therefore, as Judge ad-hoc I find myself in the obligation to specify, below, some personal reflections derived from my participation in the hearing, deliberation, and unanimous resolution of the case *sub-judice*.

A.- Continuance of the hearing of the case, despite the acknowledgment of international responsibility by the State of Guatemala. In section IV of the Judgment a detailed examination of the consequences or scope said acknowledgment shall have in relation to the possibility of an anticipated termination of the proceedings pursuant with Articles 53, 54, or 55 of the Rules of Procedure of the Inter-American Court of Human Rights was carried out. As can be determined in that section, the State of Guatemala's attitude is highly appreciated not only with regard to its acknowledgment of international responsibility, but also with regard to the unconditional acquiescence made during the processing of the present case and of the positive acts performed even after the hearing.¹ Despite the aforementioned, since there is still a clearly acknowledged and proven denial of justice in this case, and up to now the legal responsibilities against the planners and perpetrators of the crime of forced disappearance [...] of María Tiu Tojín and her daughter Josefa has not been attributed, the Court has correctly decided to "precise the grounds of the obligation to investigate the facts of the forced disappearance of María Tiu Tojín and Josefa Tiu Tojín and refer to the legal and factual obstacles that have prevented its compliance within the framework of the transition towards democracy in Guatemala."² Thus, the case was not dismissed or finalized, but instead its continuance was decided. As Judge ad-hoc I would like to especially point out one of the reasons why I agreed with this decision. The Inter-American Commission of Human Rights ("the Commission") requested that despite the acknowledgment and acquiescence by Guatemala, instead of dismissing the case, it will issue a judgment on merits considering the facts as established "based on the importance the establishment of an official truth of the facts has for the victims of violations of human rights and in this case for Guatemalan society as a whole."³ The undersigned wishes to especially point out, the right to know the material truth as part of the right to a fair trial: "The Court has previously established that the right to truth is included within the right of the victim or their next of kin to obtain from the State's competent bodies the explanation of the violating facts and the corresponding responsibilities, through the investigation and prosecution that result from Articles 8 and 25 of the Convention."⁴ It is also

¹ See paragraph 20 of the Judgment.

² See paragraph 29 of the Judgment.

³ See paragraph 25 of the Judgment.

⁴ *Cfr. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C No. 154, para. 148.*

definitely necessary to understand, as stated by the Commission, that said right to know the truth, as part of the acknowledgment of the Right to a Fair Trial (Article 8) and Judicial Protection (Article 25) acknowledged by the American Convention on Human Rights, corresponds individually to each victim, but also to the Guatemalan society in general. I consider there are enough precedents of this Court to substantiate said criterion⁵ and therefore, I found it necessary to clarify why, despite the acknowledgment of responsibility by the State of Guatemala and its acquiescence during the processing of the case *sub judice*, it was, in my opinion, necessary to continue with the examination of the case, pursuant with the aforementioned Article 55 of the Rules of Procedure and issue the judgment with which I fully concurred.

B.- Evidentiary value of the reports of the CEH and the REMHI. More than once the evidentiary value or appropriateness of the documents and reports of the Historic Explanation Commission –CEH- (Guatemala, Memories of Silence), as well as of the Report of the Inter-Diocese Project “Recovery of Historic Memory” – REMHI- of the Human Rights Office of the Archbishopric of Guatemala (“Guatemala, Nunca Más”) have been questioned both internally within Guatemala and before international instances.⁶ However, both competent national courts in Guatemala and this Court⁷ have received, assessed, and taken into account as evidence, the reports of the CEH as well as the REMHI. The present judgment reiterates the evidentiary value of these documents (paragraph 38 and footnotes number 34; 37; 38; 62; and 63). There must be no doubt regarding the pertinent criterion of this judgment stating that the reports and documents used for the preparation of the same and presented by the CEH and the REMHI may have the value of documentary evidence, direct or indirect, main or subsidiary, if they are relevant for the specific case in question, either at a national or international level. The Agreement on the Establishment of the Commission for the Historic Explanation of the Violations to Human Rights and the Acts of Violence that have caused suffering to the Guatemalan People⁸ (hereinafter the “Agreement on the Establishment of the CEH”) states, as part of the purposes of said Commission (“CEH”), that one of them is to “Explain with all objectivity, equity, and impartiality the violations of human rights and the acts of violence that have caused suffering to Guatemalan people, linked to the armed conflict” and as a consequence of it, “Prepare a report that includes the results of the investigations carried out and that offers objective elements of judgment regarding the events occurred during that period covering all factors, internal and external.”

⁵ *Case of Carpio Nicolle et al. v. Guatemala; Case of Montero Arangueren et al. (Detention Center of Catia) v. Venezuela; Case of the Miguel Castro Castro Prison v. Peru*, are just some of these precedents.

⁶ For example, see the separate and partially dissenting opinion of the Judge *ad hoc* Martínez Gálvez in the case of *Myrna Mack Chang v. Guatemala*, as well as section VI of the Judgment issued by the Constitutionality Court of Guatemala in case file No. 3380-2007.

⁷ *Case of the Plan de Sánchez Massacre v. Guatemala* and *Case of Myrna Mack Chang v. Guatemala*.

⁸ “Agreement on the establishment of the Commission for the Historic Explanation of the violations to human rights and the facts of violence that have caused suffering to the Guatemalan people,” signed in Oslo, Norway, June 23, 1994. Within its initial Considerations, there are the following: “**Considering** that the contemporary history of our country registers grave facts of violence, of disrespect to people’s fundamental rights and suffering of the population linked to the armed conflict;” “**Considering** the right of the people of Guatemala to fully know the truth about these events whose explanation will contribute to avoid the repetition of these sad and painful pages and to strengthen the country’s democratization process.”

Regarding the operation itself of the CEH, numeral III that regulates that aspect in the corresponding Agreement of Establishment, literally states the following: **“(III) The works, recommendations, and report of the Commission will not individualize responsibilities or have legal purposes or effects.”** It is in reference to this numeral III that speculations have been made regarding if those works, recommendations, and reports have an evidentiary value within trials or not. This judgment makes it clear they do. In any case, it is obvious that this rule on the operation of the CEH referred to the fact that said Commission could not become a court and assign responsibility to any person individually considered.

C.- Lack of Jurisdiction of the Military Court. The fact that on June 10, 2008, the Military Court of the Fourth Brigade of the General Infantry “Justo Rufino Barrios”, of the municipality of Cuyotenango, department of Suchitepéquez, issued a decision stating its lack of jurisdiction to continue with the investigation diligences regarding the whereabouts of María and Josefa Tiu Tojín, responding to a request of the Public Prosecutors’ Office of the Human Rights Section of the city of Guatemala and that said military court forwarded the case file to the First Instance Court of Criminal, Narcotic, and Environmental Offenses of the Department of the Quiché, can be interpreted in two forms: the first as positive since the State of Guatemala itself, as a result of this case and after the holding of the public hearing to receive evidence, made this request and it was successful in the sense that the military jurisdiction gave way, as should be, to the ordinary criminal jurisdiction.⁹

However, the second interpretation of this same fact is concerning. As clarified in paragraphs 46 and 70 of the Judgment, for more than 16 years the case of María and Josefa Tiu Tojín remained in the investigation phase, period during which there was no progress and the facts were not duly investigated by Guatemalan justice, thus materializing a clear denial of justice and maintaining, even up to this date, a complete impunity in this case. Even more so, the Court observes that *this situation of impunity is characteristic of similar facts occurred during the internal armed conflict in Guatemala, becoming a determining factor that forms part of the systematic patterns that allowed the commission of grave violations to human rights during that time.*”

I find the content of paragraph 118 of the Judgment extremely important and relevant in what refers to the scope and limits, according to this Court, of the military criminal jurisdiction (“restrictive and exceptional scope”). Therefore, there is already jurisprudence that states that “when military justice assumes jurisdiction over a matter that should be heard by the ordinary justice, the right to a competent court and, *a fortiori*, the due process, which is at the same time intimately linked to the right to a fair trial itself, is affected.” (see footnote number 112 of the Judgment).

These limits to the military criminal jurisdiction and its correct application must be observed by the State of Guatemala, derived from the full acknowledgment of the jurisdiction of the Inter-American Court of Human Rights and therefore the binding nature its judgments has on the Guatemalan State when it is part of a proceeding before that Court. Thus, these parameters should be seriously taken into consideration when the discussion on a new military criminal law is taken up again in Guatemala. In the meantime, the case of Tiu Tojín v. Guatemala shall also act as a parameter or reference for the Supreme Court of Justice when it carries out all the steps it must complete in order to fully comply with Decree 41-96 of the Congress of the Republic through which Article 2 of Decree 214-1878 (Military Code) was reformed and therefore finally achieve that “the military jurisdiction be applied only to the members of the armed institution that commit crimes of a

⁹ See paragraph 47 of the Judgment.

military order that affect the army” (third considering clause of the previously mentioned Decree 41-96), since, as observed in this case, at least on this opportunity almost twelve years went by since the Military Code was reformed and the mentioned reform was not effectively put into action.

D.- **Jus Cogens** To conclude this concurring separate opinion, the consideration made by the court in paragraph 91 of this Judgment is especially relevant. This taking into account that some domestic judgments of the Guatemalan jurisdiction (for example the judgment issued in case file number 3380-2007 of the Constitutionality Court) have avoided considering or remembering the grave nature of the offense of forced disappearance and they have wanted to define or classify it as a political crime or as related to a political crime. As correctly stated by the Court, pursuant with the preamble of the Inter-American Convention on Forced Disappearance, of which Guatemala is a State Party, the systematic practice of the forced disappearance of people constitutes a crime against humanity and is also an offense of a continuous and non-extinguishable nature, which entails the consequences established by the applicable international law.

*“...the jus cogens, in my understanding, is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation” (para. 68).*¹⁰

I believe that the Judgment in the case of Tiu Tojín v. Guatemala refers to this definition of “jus cogens”.

For all the aforementioned reasons as well as other important considerations included in the judgment of the case *sub judice* and that I personally praise due to the positive impact they should have on the Guatemalan system for the administration of justice, such as the correct criminal definition of the crime of forced disappearance by the national courts; of the right to a fair trial with “cultural pertinence” when dealing with people who belong to indigenous groups who require said access; as well as the impossibility to argue “State secrecy” and “reasons of national safety” when dealing with violations to human rights; therefore, I fully agree, from beginning to end, with the judgment issued on this day.

Álvaro Castellanos Howell
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary

¹⁰ Concurring opinion of Judge Cancado Trindade, in *Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03* of September 17, 2003. Series A No. 18.