

REASONED CONCURRING OPINION OF JUDGE ALIRIO ABREU BURELLI

When adding my vote to the other Judges of the Inter-American Court of Human Rights, on the judgment of the Myrna Mack Chang vs. Guatemala Case, I would like to submit, separately, the following considerations:

I

Based on what was narrated on the Judgment, the Inter-American Commission on Human Rights claimed, in its application, that the State of Guatemala is responsible for an arbitrary deprivation of the right to life of Myrna Mack, since her murder, perpetrated on September 11, 1990, was a consequence of a military intelligence operation arising from a previous and careful plan by the high command of the Chief of Staff. Said plan aimed at, in the first place, disguising the abettors and perpetrators of the murder, obstructing the police investigation, and leaving the murder as much as possible immersed in impunity. The Commission added that the State has not made use of all the available means to undertake a serious and effective investigation for a complete elucidation of the facts, the process, the prosecution and punishment of the responsible parties, both abettors and perpetrators within a reasonable period. This situation has been aggravated by the existence and tolerance by the Guatemalan State of mechanisms of fact and law preventing the administration of justice.

The State has taken, in the proceeding before the Court, a complex attitude toward the application filed by the Commission. First, it objected to preliminary objections for not depleting the resources of internal jurisdiction, nullity of the subject of the request, lack of veracity regarding the fulfillment of the State duty to persecute and punish the stated violation, lack of solution of State statements regarding variation and revision of the contents of the report by the Inter-American Commission on Human Rights, that led to the filing of the application before the Court, lack of assessment of State implementation of recommendations set forth in the report by the Inter-American Commission on Human Rights, a wrong and extensive interpretation of the recognition by the State of Guatemala; inadmissibility of the application because the State did not solve issues related to the depletion of resources of the internal jurisdiction during the procedural stage corresponding to the declaration of admissibility of the case by the Inter-American Commission on Human Rights, conflict of legal systems (national vs. Inter-American regional), to the detriment of the right conferred on the State and the unions, and wrong interpretation by the Inter-American Commission on Human Rights regarding remedies, recourses, and the observance of the national legal system, represent by themselves a violation of the human right to administer justice.

On February 18, 2003, the State dropped the preliminary exceptions, even when it sustained as the leading defense to be considered, in the final judgment, its allegation about "*the wrong and extensive interpretation of the recognition by the State.*"

When dropping the preliminary exceptions, the State recognized the acceptance of the following facts:

a) the violation to the rights to life, integrity, and dignity of the human person in the case of Myrna Mack Chang, on September 11, 1990, whose abetment, guilt, and direct material liability, was declared by the court having jurisdiction in the

person of Noel de Jesús Beteta Alvarez and who was identified by the same court as the State agent at the moment of the wrongdoing;

b) the State institutional liability for lawbreaking by the State agent Noel de Jesús Beteta Alvarez in the facts herein, pursuant to Article 3 from the Political Constitution of Guatemala;

c) The State institutional liability when, due to non compliance with Article 3 of the Political Constitution of Guatemala and Article 4 of the American Convention, it did not guarantee the right to life and integrity of Myrna Mack Chang; and

d) the institutional State liability for a slow process that started on February 1994 aimed at the identification and punishment of the abettors of the violation of the right to life of Myrna Mack Chang and that extended beyond the reasonable period foreseen by numeral 1 of Article 8 of the American Convention and that represent, per se, a violation of the rights to access to justice and with respect to the principles of due process and due guarantees foreseen by the same numeral 1º of Article 6 of the American Convention.

In the light of the question asked at the public hearing by one of the Court judges to the State agent about the scope of the acceptance of his liability for the facts charged in the application, he responded that it was not a case of acquiescence since, in the case, "there is not such a concept." The ambiguity in the statement of the acceptance of the State facts, made the Court to order the continuity of the probative process, whose result was, according to the judgment, an absolute proof of the circumstances leading to the death of Mrs. Myrna Mack Chang with a direct involvement of State agents, hindering of the investigation of the facts, legal ineffectiveness for the prosecution and punishment of the liable parties, with a resulting violation of Articles 4, 5, 8, 25, all pursuant to Article 1(1) of the American Convention on Human Rights.

II

In the public hearing on February 18, 2003, the Court heard the testimony of Lucrecia María Hernández Mack, daughter of the victim, who declared that "after the death of her mother, justice is a pursuit intrinsic to her family. She felt outraged after finding out that the State, that should protect them, killed her mother because it was not a member of the State who happened to kill her, but the murder was ordered by the Department of Presidential Security of the Chief of Staff of Guatemala, and her country, especially the courts of law, have not done anything to undertake a due and prompt judicial proceeding...; the little progress made in her mother's case has not been the result of the State good faith..., on the contrary, the State has done everything possible to hinder the case, since they murdered the police officer in charge of the investigation and pointed to Noel de Jesús Beteta as the perpetrator, several appeals and legal protections have been filed, thus going beyond the applicable deadlines to solve them, her family, the attorneys, and AVANCSO personnel and the Myrna Mack foundation have been victims of threats and intimidation."

As stated before, these facts: involvement of senior government officials as the murder abettors, a lack of effective and timely justice, impunity of one or some perpetrators, and with respect to all the abettors, were established during the

probative debate, and the statement by Lucrecia Hernández Mack that “the State, that should protect them, killed her” was supported as irrefutable truth.

On February 24, 2003, the Ministry of Foreign Affairs of Guatemala stated, in a brief addressed to the Court, the “true scope of the acceptance of Guatemala’s liability” in the Mack Chang case. In regards to the matter, he stated: “the order I gave (to the State agent), was to simply accept the facts set forth in the application and, in accordance with the general principle stated in Article 52 of the Rules of Procedure of the Court, inform to this court of law that Guatemala accepts unconditionally its international liability in the case,” to conclude that “under these special circumstances, I allow myself to request... the real intention of absolute acquiescence by the Government of Guatemala, to be on record in the present communication.”

III

The gravity of cases like this, where senior government officials charged as abettors, by express orders of physically eliminating a given person on ideological grounds, is not attenuated by internal conflicts, at a given moment, that might affect a country. There are elementary constitutional, or international law or humanitarian international law or *ius cogens*, rules proscribing, in absolute terms, extrajudicial death. There is not a justification for an arbitrary death, even less when State agents perpetrate it. Almost every country in the world has assumed in its political constitution, and through international treaties, the obligation to respect the right to life and the other fundamental rights of the human person and to create the legal mechanisms and necessary guarantees for complying with said obligation. It is easy to understand the feelings of pain and impotence of a person and his/her next of kin, due to the maximum damage by the State that was supposed to protect them. It is possible to understand the indignation of a daughter who relates her mother’s murder in the hands of senior State officials and who is afraid that the crime will not be punished as a result of abetting, tolerance, or inefficiency of the authorities of the State in charge of administering justice.

The State recognized the application facts and, particularly, the facts referred to by Lucrecia María Hernández Mack, when stating her “real intention of absolute acquiescence.” This acquiescence, stated very late after the evidence hearing, did not have the effect of concluding the process on the merits. However, it can be interpreted, beyond its court effects, as reparation for Myrna Mack Chang’s next of kin for the violation to her right to life and the direct violations of the rights due to hindering and obstruction of a proper administration of justice. Besides its interpretations as a reparation offered by the State, the acquiescence can become highly relevant as a purpose and guarantee that the fact will not be repeated.

Even though it is true that this is not the only case in the American continent of a violation of the right to life of a person by senior government officials, or due to several extermination policies, the peculiarity of this process is that it has involved a full acceptance of these facts by the State. It is suitable to repeat that this acceptance can be understood as part of a process of reconciliation and a real establishment of a law and guarantee system characteristic of a democracy. The Court has stated repeatedly that democracy increasingly needs a bigger recognition of human rights, and that the Rule of Law, democracy, and personal liberty are consubstantial, particularly, with the protection regime set forth in the Convention. . “In a democratic society –as stated by the Court- the rights and liberties of the

human person, his guarantees and the Rule of Law, represent a triad whose components can make sense and be defined as a function of the others.”

I consider that the State recognition that senior government officials planned, as abettors, the death of Myrna Mack Chang, can become especially relevant if this conduct, understood as means of reparation and a guarantee that the fact will not be repeated by representatives from the Executive Branch and, thus, State representatives, is equally assumed by other government Branches responsible for punishing violations of human rights motivating this process.

Only a State of justice and respect for human dignity shall guarantee peace. Only when States fully assume, facing the international community and the individual, their liability and offer the guarantees to preserve the rights of the human person, can facts as serious as the ones herein be avoided.

Alirio Abreu-Burelli
Judge

Manuel E. Ventura-Robles
Secretary