

**REASONED CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ TO
THE JUDGMENT IN *MACK CHANG V. GUATEMALA*
OF NOVEMBER 25, 2003**

I. THE CASE LAW OF THE INTER-AMERICAN COURT AND THE MACK CHANG CASE

1. Since it began to exercise its contentious jurisdiction, the Inter-American Court of Human Rights has had the opportunity to rule on violations of the right to life by extrajudicial executions committed by State agents. It is still a matter that this international Court has to consider, even though, in recent years, it has heard matters of a different nature that begin to outline a new jurisdictional trend with regard to which relevant judgments and significant advisory opinions have been delivered that establish the position of the inter-American jurisdiction on other rights, which are also embodied in the American Convention and even in other international treaties acceded to by the countries of our hemisphere, and which the Court is called upon to apply.

2. In all the cases mentioned above, using a case law developed over the course of four decades, this international Court has ruled on the right to life, the corresponding State obligations, the pertinent reparations, and among these, the obligation of the State to investigate, prosecute and convict those responsible. The latter constitutes what I have called the “obligation to provide criminal justice” (*cf.* in this respect, several studies included in my book, *La jurisdicción internacional. Derechos humanos y justicia penal*, Ed. Porrúa, Mexico, 2003, particularly, pages 202 and *ff.*, 258 and *ff.*, 315 and *ff.*, 354 and *ff.*), deeply rooted in that case law and inherent in the “rule of law”; in other words, the supremacy of law in a democratic society, with national and international impact. In this way, impunity, which is a powerful stimulus for violating human rights, as well as a flagrant injustice that harms the whole of society, is combated. The fight against impunity is evidently no less relevant or urgent than satisfaction of the pecuniary and non-pecuniary interests of the victim, and constitutes a reference point for the future development of the system to protect human rights in all countries.

3. The *Mack Chang* case, decided in the judgment to which this *separate concurring opinion* is attached, forms part of this traditional trend, although with its own characteristics. The State itself considers it a “paradigmatic case,” which forms part of the legacy of an internal conflict “in which there was no legal system, nor any efficient and effective system for the administration of justice (para. 68). The development of the American democracies and the emerging culture with regard to human rights must abolish for ever the use of violence that eliminates lives, attacks freedom, and affects the integrity of all individuals. When this objective is achieved, the Inter-American Court will be in a position to dedicate itself almost exclusively to other issues, which characterize a different phase, as the European Court of Human Rights does today in most cases.

4. Any violation of the rights and freedoms of an individual merits censure, but the violation of the principal right – the right to life – on whose recognition and protection depend the continued existence and effectiveness of all the other rights, is particularly deplorable. Unlawful deprivation of life reveals the persistence of old authoritarian patterns that are the testimony of somber times during which the essential juridical rights were disdained for the sake of the alleged needs of public

security and peace, which can never be a valid argument to disregard, suppress or reduce the basic rights of the individual. In the face of any manifestation of authoritarianism, it is necessary to reaffirm that the protection of human rights is – and has always been, as revealed by the writings of the Enlightenment, in Europe and in America – the goal to which political organization is directed and the reference point to verify both the State's ethical commitments and the legitimacy of the conduct of its agents.

5. Our Court has also examined and ruled on facts that affect access to justice; namely, the preservation of and respect for judicial guarantees and jurisdictional measures for the protection of the fundamental rights. This access implies both the ability and the possibility of having recourse to bodies that provide justice independently, impartially and competently, of formulating claims, contributing or requesting evidence and arguing in favor of interests and rights (procedural justice), and also of obtaining a final judgment that satisfies the substantive requirements of justice (substantive justice). Without the latter, justice would be sterile: the simple appearance of justice, an ineffective instrument that does not produce the result for which it was conceived. Consequently, both manifestations of access to justice must be emphasized: procedural and substantive, and all actions must be channeled so that both aspects can be achieved.

6. Access to justice, one of the outstanding issues of contemporary life, presumes the clarification of unlawful facts, the timely correction and reparation of the violations committed, the re-establishment of conditions of peace with justice, and the appeasement of the public conscience, troubled by the fact that the law has been broken, as a general control of conduct and the subjective rights recognized to individuals, and as a measure for all individuals to achieve their potential. This case, as others which have been heard by the Court, provides a dramatic example of the harm to which effective judicial protection is subjected, in conditions that also have singular characteristics.

II. ACTS OF ACCEPTANCE AND ACKNOWLEDGMENT BY THE STATE

7. Faced with the attribution of facts and the submission of the respective claims, through the exercise of the international procedural action on human rights, the defendant States may file objections and a defense or acknowledge such facts and claims through juridical acts that produce certain substantive and procedural effects. In addition to discontinuance, which is incumbent on the plaintiff in the proceeding, the norms of the inter-American jurisdiction establish the “acquiescence (of the defendant) to the claims of the party who has brought the case” (Article 52(2) of the Rules of Procedure of the Inter-American Court of Human Rights) and also stipulate “the existence of a friendly settlement, compromise, or any other occurrence likely to lead to a settlement of the dispute” (Article 53 of the same Rules of Procedure).

8. For the effects of the instant case and others that have been submitted or may be submitted to the Inter-American Court, it should be noted that the conduct of one party or the agreement of both does not necessarily bind the Court, which has a greater commitment to factual truth and the effective protection of human rights than to formal truth and the apparent protection of human rights. Indeed, the jurisdictional organ may order that consideration of a case should continue, “taking into account the responsibilities vested in it to protect human rights,” even though

facts have occurred that reveal, as regards their author, an intention to abate the proceeding and to settle the conflict (Article 54 of the Rules of Procedure).

9. In several cases processed in recent years, the States attributed with international responsibility, as a result of facts that violate the American Convention, have acknowledged these facts and the international responsibility arising from them. This attitude, which the Court has expressly assessed, must be emphasized to the extent that it reveals a constructive attitude and assumes, with objectivity and a helpful juridical attitude, the consequences that international law – and also domestic law – attribute to the unlawful conduct of the State agents or other persons who act with the agreement, sponsorship or tolerance of the State.

10. This laudable practice underscores the progress of democratic principles and the willingness to respect the rights of the people. The State that acquiesces or acknowledges the facts attributed to its agents, when that acquiescence or acknowledgement is justified, demarcates its ethical, juridical and political position from the deviations in which certain public servants incur. This timely demarcation has a high moral value and, frequently, has important preventive effects; it shows that the State does not accept the conduct of those who undermine its legal system – even when it must respond for it in international forums – and is not willing to fight legal battles that lack grounds and obstruct the true exercise of justice.

11. As I have indicated previously, the Rules of Procedure of the Inter-American Court provide certain grounds for considering acts of acquiescence or settlement during the course of the proceeding. On this basis, and taking into account the principles that regulate international human rights proceedings (the nature of the corresponding procedural acts, in relation to their characteristics and the juridical purpose of their authors, the evidence gathered in the proceeding, and the explanations requested from the parties), the Court must establish the nature of those acts of settlement or acquiescence and the scope that may and should be attributed to them in the interests of legal certainty and the final nature of the proceeding itself. The final position of the parties, from the perspective of their obligations, rights and interests depends on how the Court defines the foregoing. By proceeding in this way, the Court develops and interprets its norms, in accordance with the authority inherent in its jurisdictional function and, thereby, exercises the attribution of facts and the authority to interpret and apply assigned to it by the international treaty (Articles 33.b) and 62(1), as well as Article 1 of the Statute of the Inter-American Court of Human Rights).

12. Thus, the Inter-American Court is called on to advance in the jurisprudential examination of different acts of settlement or acts which have the effect of clarifying facts that were initially disputed, based on the declarations or acknowledgements of the State, or which permit litigations to be concluded by means of decisions that constitute alternatives to the typical judgments of declaration or conviction. As I have mentioned, the American Convention itself, as well as the norms deriving from it – in this respect, the corresponding indications in the Rules of Procedures of the Inter-American Commission and Court – consider solutions emanating from friendly settlement, discontinuance and acquiescence, to which can be added, in the sense mentioned above and without forgetting their natural characteristics, acknowledgements of the facts and judicial confessions that have occurred while some cases were being processed.

13. There is still no uniformity in the statements made by States about acts of this type that are part of the international proceeding, or how they classify them. At

times the term acquiescence is used. At other times, there is an allusions to the State's "institutional responsibility." In other cases, expressions such as the "acknowledgement of international responsibility," are invoked. Consequently, it is necessary to advance towards greater conceptual precision, which may involve new developments in the procedures of the parties and of the inter-American Court itself. There is also a need to establish a new practice in this respect: the precise indication of the facts that the State admits to and the claims to which it acquiesces, in the context of the acknowledgement of international responsibility and its consequences. This would go beyond the mere acknowledgement of international or institutional responsibility - I will return to this point below - which does not always clarify the defendant's intention and the scope that the latter attributes to it.

14. In my *concurring opinion* to the judgment of September 18, 2003, in *Bulacio v. Argentina*, I attempted to approach this matter, indicating that two procedural definitions may coincide in an acknowledgement of responsibility - I am not saying that they always or necessarily coincide, because this will depend on the intention of the act and the way in which it is stated - both with substantive consequences: confession and acquiescence. Acquiescence - according to Alcalá-Zamora - is "an act of regulation or waiver of rights": a waiver of the right to defense (*El allanamiento en el proceso penal*, EJEa, Buenos Aires, 1962, pp. 129 and ff.). "Confession is limited to *de facto* affirmations and acquiescence to the juridical claim" (*Proceso, autocomposición y autodefensa (Contribución al estudio de los fines del proceso)*, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 3ª ed., México, 1991, p. 96). Consequently, it will be necessary to examine the nature of the act of acknowledgement formulated by the State, in the context of the international proceeding and of the acts of the parties that occur within this.

15. The authentic scope of the statements made by some of the parties is not always clearly established, particularly those statements that, made by the State, may define the course of the proceeding and the content of the final decision. Obviously, I am not referring only to the scope that an external interpreter attributes to them, but to the scope that the organs that issue the statements wish to impart to them, which thereby commits the procedural position and substantive obligations of the State and, likewise, the defense and the substantive rights of the individuals. This is why other procedural parties are reticent to accept the statements of the State at face value and request the Court to establish the nature and scope of such statements. If the statement is not plain to the Court and to all the parties, the Court must examine it in light of different information - precedents, circumstances, clarifications, organ that issues it, etc. - and establish its juridical scope and consequences.

16. The recognition of institutional responsibility - as has been stated in various cases, including the *Maritza Urrutia* case, decided on November 27, 2003, during the same session in which the Court delivered judgment in the *Mack Chang* case - may only signify the acknowledgement that there is a continuity in the State's obligations, beyond the periodic changes in the public administration, or the acceptance that there were shortcomings in the exercise of a general function of protection or guarantee that the State has with regard to all persons subject to its jurisdiction. This does not necessarily mean acknowledgement of concrete and specific conducts - acts or omissions - of State agents that resulted in direct violations of rights and freedoms established in domestic law and in the international Convention, which would give rise both to a judgment by the Inter-American Court in relation to the State itself, and to individual prosecution and punishment by the domestic courts in

exercise of the “obligation to provide criminal justice” that the State has in accordance with its own legislation and with a guilty verdict from the international court.

17. The Inter-American Court is called upon to establish the truth, a factual and historical truth, which will then be framed in the legal truth that characterizes the inviolable judgment, and to adopt its decisions, based on the legal truth, taking into account the higher interest implied by the defense of human rights. If the Court is empowered to go beyond discontinuance, acquiescence or an agreement on reparations when it deems that this is pertinent for significant reasons, it can do so with all the more reason when the meaning and scope of a party’s statements are not sufficiently clear and when, consequently, the other parties request the jurisdictional organ to provide clarifications or explanations that allow the situation created by these statements to be defined. When undertaking this logical exercise in the performance of its jurisdictional attributes, the Court can assess dubious or insufficient statements, in its own terms, or relate them to other information provided to the proceeding, so as to combine everything in order to establish a sound basis for the adoption of its decisions.

III. ADMISSION, ACKNOWLEDGEMENT AND EVIDENCE OF THE FACTS

18. The State has made various statements, which it classifies as acknowledgement of international or institutional responsibility, international acknowledgement of institutional responsibility, “absolute acquiescence,” “plain [acknowledgement of] the facts set out in the application,” “acquiescence [...] to the claims of the petitioner,” “acknowledgment of the facts set forth in the application and unconditional acknowledgement [by the State of] its international responsibility (cf. Chap. VI of the judgment). I repeat that the State’s attitude is admirable when, by drawing attention to the existence of facts that violate human rights it attempts to bring them into the open – or it admits, to a greater or lesser degree, the pertinent reports of other international instances, such as the Inter-American Commission or entities of civil society, such as non-governmental organization – and accepts the adverse juridical consequences resulting from them, and states this position before international justice. In the Inter-American Court’s experience, there has been an increase in cases of acquiescence or acknowledgement of responsibility, which is an encouraging precedent.

19. Since, the application sometimes alludes to the acknowledgement of the facts, it is worth clarifying that this document of June 19, 2001, considers facts of two main types: those relating to the deprivation of the life of Myrna Mack Chang and those relating to the investigation of this fact and the punishment of those responsible. Regarding the former, it alludes expressly to a plan of the intelligence service; and, regarding the latter, it mentions the lack of a genuine and effective investigation within a reasonable lapse of time and *de facto* and *de jure* mechanisms that prevent adequate administration of justice (para. 209 of the application brief of the Inter-American Commission on Human Rights). These – as they appear reported in the application – would be the facts that the State acknowledges when it refers clearly to this procedural act.

20. Despite the emphatic statements of the State in several acts of the international proceeding, particularly those made or provided after the public hearing of February 19, 2003, had been held, the other parties to the proceeding expressed some reservations or doubts and asked the Court to establish their scope. This

request was reasonable if we bear in mind that, during the proceeding, various statements were made, which, interpreted in different ways, could also lead to different consequences. To sustain its final ruling, the Court must be certain of the position of the parties and thus, have a firm basis for establishing the corresponding conclusions and decisions. This need justifies the Court's agreement to continue the judicial proceeding and use different sources of information that will provide greater certainty to its final decisions.

21. I believe that the Inter-American Court should take into account – as indeed it did – the State's acquiescence or acknowledgement of facts, claims and international responsibility, particularly the most recent version that was offered by the Minister of Foreign Affairs on March 3, 2003. Nevertheless, even though this procedural act of the State, with evident pecuniary repercussions, could imply, if considered in isolation, the “unconditional [acceptance of] international responsibility in the Myrna Mack Chang case” (para. 109), and appear as “total and unconditional acquiescence by the defendant State” (para. 111), in the context of the proceeding and within the series of acts that occurred during the proceeding, it does not appear sufficient to sustain the final result of the litigation, without greater analysis. Accordingly, the Court considered other information from the proceeding that, associated with the [acquiescence] and pointing in the same general direction, allowed the final decision to have a firmer and more reliable basis.

22. In view of the foregoing, the Court has relied on the following four sources of information and decision: a) the State's affirmation, through the Minister of Foreign Affairs of Guatemala, in the above-mentioned communication of March 3, 2003, which that official handed to the President of the Inter-American Court at the seat of the Court; b) the probative elements that appear in the body of evidence introduced by the Inter-American Commission and the representatives of the victim's next of kin: testimony, reports and documents; c) the reports of a general nature, with specific references to this case, which were prepared at the end of the civil conflict in Guatemala, which was the context in which the unlawful deprivation of the life of Myrna Mack Chang took place (*Informe de the Commission para el Esclarecimiento Histórico* (CEH), and *Informe Proyecto Interdiocesano de Recuperación de la Memoria Histórica* (REMHI)), and d) the book on these events prepared by the current Minister of Foreign Affairs of Guatemala, before taking office, which appears in the case file, and in which certain patterns of behavior of specific authorities are described and direct reference is made to the *Mack Chang case* (cf. Edgar Gutiérrez, *Hacia un paradigma democrático del sistema de inteligencia en Guatemala*, Fundación Myrna Mack, Guatemala, 1999, particularly. pp. 21, 58 and ff., 81 n. 47).

23. These four sources of information, which coincide with regard to the death of Mrs. Mack Chang and other aspects of the case *sub judice*, or complement each other, allow us to affirm that the victim was unlawfully deprived of her life and that, in order to perpetrate this fact, there was an agreement between officials of the Presidential staff who planned the surveillance and execution of the Guatemala anthropologist, and that at least one person participated in the execution who has been prosecuted and convicted of the violation of Article 4 of the Convention, as described in the corresponding chapter. The combined examination of all the aforementioned elements of judgment supports these affirmations. The full acknowledgement of the facts made by the State's Minister of Foreign Affairs tallies with the information that appears in the other sources. It is in this respect that “the Court concludes that the international responsibility of the State has been established for violations of the American Convention in the instant case, and this

responsibility is aggravated by the circumstances in which the facts of the case occurred" (para. 114).

24. If each of these sources of information – particularly, the acquiescence – might, in the opinion of some courts, be sufficient to decide this case in the way in which the Inter-American Court has, the four, examined together, provide more weight to sustain the Court's decision about the facts of this case, whose specific gravity evidently results from the violation of the right to life, but also from the way in which this was planned, prepared, carried out, and concealed. All the characteristics of the assassination explain the obstruction of justice that, in itself and through the acts and omissions duly described in the judgment, violate the rights established in Articles 8 and 25 of the American Convention.

25. It is possible that, when hearing the *Myrna Mack Chang* case, the members of the Court, who took into consideration some of the material evidence that I have referred to above, opted to abide by these specific sources of information when voting on each of the operative paragraphs of the judgment. I believe that, what is more relevant, finally, is that the unanimous vote on the matters of greatest pertinence concerning the merits of the case reveals that all the members of the Court reached the same conclusions on the facts, their meaning and their characterization from the perspective of the applicable treaty norms, even though they formed this opinion and supported their vote using different ways to access the truth.

IV. RESTRICTIONS OR RESERVATIONS TO ACKNOWLEDGEMENT BY THE STATE

26. I believe it is also interesting to make some observations on the contradiction or at least the discrepancy that sometimes exists between certain declarations made by the State, through representatives who are qualified to issue them, and possible declarations by other organs with competence to decide on contentious matters under domestic legislation. From the perspective of domestic law, this responds to the principle of the separation of powers, which assigns each power specific attributes that the others cannot assume or substitute. Nonetheless, from the perspective of international law, this matter requires clarification of the State's international responsibility and of the resolutive attributes of an international court, which are incontestable – when this is established in the international norm that has been sovereignly accepted by the State party to a treaty, as indeed happens in light of the American Convention – and must be complied with by the State, owing to its treaty obligations.

27. For the effects of the American Convention and of the exercise of the contentious jurisdiction of the Inter-American Court, the State is considered integrally, as a whole. Accordingly, responsibility is global, it concerns the State as a whole and cannot be subject to the division of authority established in domestic law. At the international level, it is not possible to divide the State, to bind before the Court only one or some of its organs, to grant them representation of the State in the proceeding – without this representation affecting the whole State – and excluding other organs from this treaty regime of responsibility, leaving their actions outside the "treaty control" that involves the jurisdiction of the international court.

28. When the organ that represents the State in its international relations and whose acts bind the former at this level – generally the Head of State or the Minister

of Foreign Affairs, who act for themselves or by duly confirmed authority – make declarations, acknowledge facts, accept claims or put forward a defense, they do so in representation of the State itself, thus binding it before the international body. Hence, these acts of the State's intent cannot be conditioned to what national bodies may state, considering the way in which a case is processed before a specific national body under domestic legislation. This happens, for example, when the executive authority declares that the State, in representation of which it is acting, acknowledges facts that may entail criminal consequences, or acquiesces to claims set out in the application, which also involve domestic effects, but at the same time – on a subsequent occasion – reconsiders the scope of its declaration, even though this has been emphatic and decisive, and protects the ruling that the domestic judicial organ may deliver.

29. I wish to establish clearly the meaning of the observations that I am making. I am in no way disregarding the fact that the Inter-American Court is not a criminal court, and is not called on to rule on the individual criminal responsibility of those who, in the performance of public duties, violate human rights, incurring in conduct classified as an offense or crime. Establishing these individual responsibilities is a matter for the domestic criminal jurisdiction only – although this could eventually correspond to international criminal justice, in the appropriate circumstances – and, in this respect, the human rights Court cannot convict individuals. Nor am I suggesting that one power of the State can predetermine the conduct of the others in a democratic regime with separation of powers and distribution of functions. However, acknowledgement of facts by the State implies that the latter is admitting the truth of those facts and acquiring the obligation to accept the respective consequences, of both a criminal and any other nature.

30. This connection between the acknowledgement of the facts and the acquiescence of the State – assuming that it is formulated clearly and completely, without phrases that sow doubts or conditions that could lead to different conclusions and results – is perfectly clear, because (since acknowledgement and acquiescence have intervened) the Convention allows the Inter-American Court to begin to hear and decide the issue of reparations on the basis that it has been undisputedly established: that the violation claimed in the application has occurred; what this consisted in, and that it was carried out by State agents or other persons for whom the State must respond (Articles 63(1) of the Convention and 52(2) of the Rules of Procedure). Subsequently, it will be possible to order compliance with the obligation to provide criminal justice that concerns the State, and the latter will have to define, under its own legal system, which persons must respond individually for the criminal facts that have occurred and been acknowledged by the State in the international judicial forum.

31. If the State conditions or subordinates subsequent acts to the existence of certain facts – which is not the same as the issue of individual convictions for the latter – any acknowledgement of facts or acceptance of claims stated by the authority with the competence to manage international relations and represent the State in matters of this nature, even those formulated by the Head of State himself, will lack certainty, require confirmation, or be open to rectification by another national authority, through an act of domestic law which could contradict, modify or revoke it. This would sow absolute doubt with regard to compliance with the international commitments assumed when the State formally accedes to an international convention and accepts the juridical consequences deriving therefrom. In the terms of the Vienna Convention on the Law of Treaties, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty, to which it acceded freely.

32. The lack of certainty of the acknowledgement that I referred to above would lead to practical consequences that would tarnish the performance of the international jurisdictions – and, in any case, that of those related to the protection of human rights. Likewise, once the principles of legality and justiciability inherent in the international jurisdiction were “touched,” it would undermine the access of individuals to such jurisdictions and affect legal certainty, and it would also curb the prompt functioning of these instances, which, nowadays, are one of the principle bastions of the world order, and whose competent performance is of interest to the States themselves. International justice would be compromised, suspended or subordinated to specific domestic acts, which are predictable or unpredictable from the international, and even the national, perspective. If this were so, the international courts would have to systematically disregard acknowledgements and acquiescence made by the States, so as not to risk the effectiveness of their own rulings.

V. RESPONSIBILITY OF THE STATE AND OF ITS AGENTS

33. In the instant case, as I have said, the State’s acknowledgement of the facts refers to those facts included in the application submitted by the Inter-American Commission; moreover, the acquiescence to the claims contained in this application, which initiated the proceeding, covers all the facts, without any reservation. These include the participation of several persons in the violation committed under different juridical classifications described in criminal law: perpetrators, intellectual authors, accomplices, accessories. The existence of a complex criminal participation, with the corresponding different individual responsibilities may be inferred from the characteristics of the facts perpetrated, as well as from the probative elements gathered and assessed by the Court, and also from the broad acknowledgement made by the State.

34. It is not possible to concentrate “criminal responsibility” for homicide in the State, as this would continue to leave individual responsibilities unidentified and unpunished. The idea of a State crime, a dramatic and effective term from a public and political perspective, involving the existence of “conspiracy networks” within the formal power, may imply, in view of its very broad scope, that criminal participation is attributed to all those who are part of the State – and, indeed, constitute the State itself – a conclusion which is evidently excessive and entails the temptation to subordinate effective and specific individual criminal responsibility to a hypothetical and general State responsibility or, at least, to hide the former under cover of the latter. The consequences of this are foreseeable; sometimes it is proposed in good faith, but its results may be contrary to those desired.

35. As is always said, there is a State obligation to investigate facts that violate human rights, prosecute those who participate in them, deliver the corresponding convictions and carry out the respective punishments. This is the “obligation to provide criminal justice” which I referred to above and which leads to the system of reparations established in Article 63(1) of the Convention, according to the progressive interpretation of the Inter-American Court in a development which is one of the best contributions to its case law for the protection of human rights. For this criminal justice to be effective, it must be complete, not selective, and it must be implemented within a reasonable lapse of time. Otherwise, there will be absolute or relative impunity – and the latter is still impunity – which constitutes the best “safeguard” for the violation of human rights.

36. The judgment in the *Mack Chang* case deals with these issues. On the one hand, it is not satisfied by the prosecution and conviction of one of those responsible for the unlawful acts, when there are elements (including, as I said above, the State's acknowledgement of the facts) to suggest that they were perpetrated by several individuals. Evidently, it would not be the same if, owing to the characteristics of the case, it was probable and credible, that the authorship of the violations was confined to a single person. In the case to which this judgment refers, the Court has understood that there has been participation in facts that violate human rights, which constitutes criminal participation under domestic criminal law.

37. This criminal participation can include the forms of authorship included in one section of legal writings and is usually established in domestic legislation: immediate or mediate intellectual authorship or perpetration, and can also include forms of complicity, and even concealment by previous agreement between the participants. Thus, it is feasible that concealment is an autonomous offense, owing to agreement after the facts that constitute the crime, as classified in different criminal codes. This is how I understand the statements in the judgment that allude to "identify, prosecute and punish all the intellectual authors, perpetrators, and others responsible for the extrajudicial execution of Myrna Mack Chang, and for concealment of the extrajudicial execution and the other facts of the instant case, irrespective of the person who has already been punished for these facts" (para. 275). The exclusion from justice of one or some of those responsible, should there be several, would maintain impunity and leave the State's obligation to provide criminal justice unfulfilled, at least in part.

VI. DELAY IN JUSTICE. REASONABLE TIME

38. The excessive delay in providing justice is, in some ways, the denial of justice. "Justice delayed is justice denied," states an old and often invoked adage. In this context, the requirement to observe a reasonable lapse of time when settling disputes related to the issue of human rights has several aspects. The first refers to the time for developing a proceeding against any individual. Thus, the Court has indicated that "the principle of '*reasonable time*' to which Articles 7(5) and 8(1) of the Convention refer is to prevent accused persons from remaining in that situation for a protracted period and to ensure that the charge is promptly disposed of" (*Suárez Rosero case, Judgment of November 12, 1997, Series C No. 35, para. 70*).

39. In the premise described above, the requirements of the principle of reasonableness, applied to the time that a proceeding may take, do not cease, from the perspective of and with regard to human rights. There are at least two other cases which involve this principle. One of them is associated with the request for justice at the domestic level, prior to the recourse to international protection resulting from the possibility that the Inter-American Commission may admit a petition, even though the remedies under domestic law have not been exhausted previously, according to Article 46(1)a) of the Convention, when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies" (Article 46(2)c)). Here the rule of the "substantive defense" of the individual is stated, which is linked to the *pro homine* principle, characteristic of the human rights protection regime and which may be invoked both to understand the meaning of a norm and also to include it in the principle that justifies it, specifically, in order to rule on a contentious issue.

40. Another premise for the exercise of the principle of reasonable time, always in favor of the effective protection of human rights and the efficient implementation of the consequences of this protection, relates to the proceeding, in its broadest sense, that the State must undertake against those responsible for facts that violate fundamental rights, in order to comply with the much-cited obligation to provide criminal justice. The latter is framed within the access of the victim to the legal remedies established by the State. If this access is impeded, or conditioned to numerous or unattainable requirements, or if there is excessive delay, the norm ensuring that all persons have the right that the determination of their rights and obligations shall be made within a reasonable time is violated. Evidently, the final juridical situation of the victim and his successors, if applicable, may depend on the decision adopted by the State in the proceeding to prosecute the unlawful conduct.

41. The timeliness in deciding a matter, using the procedures established in the State's legal proceedings, must be examined from the perspective of different factors that may explain the delays that could arise, as noted in the case law of the European Court of Human Rights, which has been used by the Inter-American Court. The Court has established a principle that originates in European case law: complexity of the case, processing of the proceeding by the authorities, exercise of the right of defense, among other elements that merit consideration (cf. *Genie Lacayo case, Judgment of January 29, 1997* (Nicaragua). Series C, No. 30, para. 77, which invokes Eur Court H.R., *Motta judgement of 19 February 1991*, Series A, num. 195-A, para. 30, and *Ruiz Mateos v. Spain judgement of 23 June 1993*, Series A, No. 262, para. 30. Also, cf. *the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001*, Series C No. 79, para. 134, and *the Constitutional Court (Aguirre Roca, Rey Terry and Revoredo Marsano v. Peru), Judgment of January 31, 2001*, Series C No. 71, para. 843. Among the more recent cases, I should mention that the problem of reasonable time has also been considered in *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago, Judgment of June 21, 2002*, paras. 143 and ff.) and reiterated in recent judgments; observing the complexity of the case, the procedural activities of the interested party, and the conduct of the judicial authorities.

42. However, this protracted delay may, in itself, flagrantly violate the principle of reasonable time, irrespective of these indicative considerations. In one case, the Inter-American Court considered that five years would more than correspond to reasonable time (*Genie Lacayo case, Judgment of January 29, 1997*, Series C No. 30, para. 81) and, in another, it considered that a period of fifty months "far exceeds the 'reasonable time' contemplated in the American Convention" (*Suárez Rosero case, Judgment of November 12, 1997*, cit., Series C No. 35, para. 73). As I have already said, the principle of reasonableness, with its natural temporal references, encompasses not only the proceeding against any individual, but also the proceeding to comply with the obligation of criminal justice entailed by a judgment on reparations. In the instant case, the duration of the proceeding, with all its implications and different aspects, has been more than double these periods, without a final decision being pronounced. At "the time of this judgment, after more than 13 years, the criminal proceeding is underway and the remedy of cassation is pending a decision, so that the final judgment that will decide on and punish those responsible for the extrajudicial execution of Myrna Mack Chang has still not been rendered" (para. 272).

VII. "AGGRAVATED" RESPONSIBILITY

43. Paragraph 114 of the judgment, which I have quoted above, contains a reference to the “aggravation” of State responsibility, taking into account “the circumstances in which the facts occurred.” This phrase gives rise to a comment. In criminal law it is common to speaking of aggravating circumstances or, in more modern terminology, of criminal factors that imply or underscore a more serious conduct and, on the basis of the simple or general circumstance, define a special one. In both premises, the legislator reflects, in the criminal treatment of the facts and of the person responsible, their greater seriousness taking into account information such as the rights violated (in addition of the central right subject to protection: e.g. life), the link between the perpetrator and the victim, the means or way of execution, the causes or motives, the psychological connection, or purpose of the offender (Cf. López Bolado, Jorge D., *Los homicidios calificados*, Plus Ultra, Buenos Aires, 1975; and Levene (h), *El delito de homicidio*, Depalma, Buenos Aires, 1977, pp. 173 and ff.). In the case of aggravating circumstances, it is for the trial judge to apply the consequences established in law, and in the case of an aggravated criminal offense, the law itself establishes a more severe general punishment. Lastly, within this generic punishment, it is for the court to adapt the punishment, bearing in mind the act perpetrated and the guilt of the agent.

44. All the foregoing may be considered when examining the instant case, without forgetting, obviously, that the Inter-American Court does not operate in the sphere of criminal justice, which corresponds to the domestic jurisdiction. Therefore, my observations only serve to establish an illustrative analogy. Indeed, in this hypothesis, there is an objective aggravation of the facts, inasmuch as it is significant, in view of the elements of available information to which I have already referred, that this was not an isolated crime, the product of the design of one individual, but that there was an elaborate plan to deprive the victim of her life owing to her activities – social research and dissemination of the results, which entailed a critical vision of official programs – and that security agents and officials took part in the plan. This apparatus, which had important resources of power, placed itself at the service of actions that implied violation of the victim’s most relevant right, the right to life, to terminate the tasks that she was carrying out and warn other individuals of the consequences that similar work would entail, even though it was legal according to the norms in force when the facts occurred.

45. One notable aspect of the gravity of this case resides in the obstacles created to the due investigation of the facts and the criminal prosecution of those responsible. The judgment contains a detailed description of these obstacles and of the “labyrinth” represented by the still unfinished investigation of the crime, and also the consequences of this investigation for those who took part in it and attempted to clarify the events and identify the authors. In this respect, we should recall the reports of the witnesses whose statements appear in the file, such as Rember Aroldo Larios Tobar, former head of the Criminal Investigations Department of the Guatemalan National Police (para. 127.e), and Henry Francisco Monroy Andino, former criminal trial judge (para. 127.f). In the context of these problems and their effects on the life and security of those who intervened in the tasks of investigation and prosecution, I consider it relevant that the judgment has decided that the State should honor publicly the memory of José Miguel Mérica Escobar, the member of the police force who participated in the investigation into the homicide of Mrs. Mack Chang and was assassinated (para. 279).

46. The aggravated seriousness of the facts must certainly be taken into account when making the reproach that a judgment on human rights violations implies, as in the case of this final ruling. It will be necessary to weigh this in the decisions duly

adopted by the domestic criminal jurisdiction regarding sentences of imprisonment and also, if applicable, other punishments, such as: deprivation of rights or functions, disqualification, compensation, etc.

47. There remains the question of how this aggravated seriousness may affect the reparations decided by the Inter-American Court. In my opinion, it is perfectly possible that it influences acts of non-pecuniary compensation, such as publication of the judgment, expression of guilt and requirement of apology in official declarations, and commemoration of the memory of the victim. There are also the strictly patrimonial consequences – compensation for pecuniary and non-pecuniary damage, concepts that have their own importance and observe their own norms – that would arise if we tried to use that aggravated seriousness as a basis for establishing “punitive damages,” a concept that has not been included in the case law of this Court, because it corresponds more to the idea of a fine than to that of the reparation of damage and, in any case, it would be payable by the Treasury, which implies an additional burden for the taxpayer and also a reduction in the resources that should go towards social programs.

48. Among the observations arising from the conduct of any State obliged to guarantee conditions of public security and to recognize and protect scrupulously the rights of its citizens – both tasks inherent in the preservation of the rule of law in a democratic society – I believe that the Inter-American Court's indication that security agencies should be subject to the norms of the democratic constitutional order, international human rights treaties and international humanitarian law is particularly significant (para 284). Even the fight against extremely serious criminal behavior cannot serve as an argument for eroding the system of rights and guarantees built up by humanity over several centuries with infinite efforts and sacrifices.

49. Preservation of the rule of law must be ensured without infringing the principles and norms that characterize it. On this point the judgment of the Inter-American Court in the *Maritza Urrutia* case (concerning the problem of torture), which was rendered immediately after the judgment in the *Mack Chang* case, has been emphatic. In this matter, the Court asserted that the investigation and prosecution of the most serious crimes, whatever their nature, could not be invoked as justification for violating the human rights of the accused. The absolute prohibition of torture, in all its forms – physical and psychological – is part of international *jus cogens*.

VIII. THE VICTIM OF FACTS THAT VIOLATE HUMAN RIGHTS

50. The important judgment to which I add this *concurring opinion* again gives rise to an observation regarding the victim of a violation: the scope of this concept in view of the affected possessions and rights established in the American Convention – or in any other applicable instrument – and the implications as regards the relationship between the impairment of a right, the person who suffers it, and the measure in favor of the latter that this Court provides in its judgment. The protection of the victim – and, evidently, the prevention of violations of the human rights of all individuals – constitute the *desideratum* of the inter-American system and the *raison d'être* of the institutions that form part of it, such as the Inter-American Court. Thus, several judgments have examined the concept of victim, which then allows us to identify with suitable precision those who possess the right to the reparations that the Convention establishes, which are included, qualitatively and quantitatively, in the Court's judgments. I have dealt with the issue in another of my opinions (Cf.

Separate concurring opinion of Judge Sergio García Ramírez in ICourtHR, Bámaca Velásquez case, Judgment of November 25, 2000, Series C No. 70, 2001, pp. 171 and ff., paras. 2 to 5).

51. In law, the victim is the person who suffer injury to the juridical possession protected by a right or freedom with the necessary relevance to appear in the elevated category of “human or fundamental” rights. Article 63(1) of the Convention, which provides a framework for the Court’s decisions on reparations, which, in turn, are a prominent chapter of the system to protect human rights – without reparations, the latter would be deprived of practical effects – indicates that, if it finds that there has been a violation of a right or freedom, the Court “shall rule that the *injured party* [Sp. *lesionado*] be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the *injured party*” [Sp. *la parte lesionada*] (emphasis added).

52. As can be seen, the American Convention identifies the active subject of the violation as the “injured person” [Note: see the Spanish version above] or the “injured party”, that is, as a person (according to the term used in Article 1(1) of the Pact of San José) who suffers the injury (violation, infringement, reduction: in brief, an attack on, not merely the danger of the affecting) of a possession – due to the violation of a right or freedom established in the Convention – and, thus becomes a “party” in a litigation (I allude to party in the substantive sense and to litigation as a substantive datum prior to the proceeding, a measures that is part of it, following the “*Carneluttiana*” terminology), where the State and the injured person come face to face, even though, in the procedural dispute, the parties act in a formal sense which the Convention itself recognizes. In the terms of Article 63(1), the guarantee of the right or freedom violated corresponds to the *injured person* and the payment of the compensation – which, as the Court’s case law has reiterated, is one, but not the only type of reparation – to the *injured party*.

53. The Rules of Procedure of the Court, adopted in 2000 and in force today, define the “victim” and the “alleged victim.” Thus, the term victim refers to “the person whose rights have been violated, according to a judgment pronounced by the Court” (Article 2(31)), and alleged victim refers to “the person whose rights under the Convention are alleged to have been violated” (Article 2(30)). It is obvious that, according to these Rules of Procedure, the concepts of victim and alleged victim are the same as injured person or injured party, on the one hand, and alleged injured person or alleged injured party, on the other. Although the Convention does not use the term alleged, this provides a natural designation for the individual who has been indicated as a victim, while awaiting delivery of the decision that transforms this procedural and preliminary designation into a confirmed and final juridical classification. Thus, the relationship that I mentioned above between injured person and injured party, on the one hand, and compensation, on the other, is also established as regards victim or alleged victim and compensation.

54. However, the Rules of Procedure of 2000 (the fourth Rules of Procedure in the history of the Inter-American Court), which have expanded the role of individuals before the Court, bringing the substantive part and the procedural part increasingly closer – to the extent allowed within the procedural framework of the Pact of San José – has included references to the next of kin. This expression refers to the “immediate family, that is, the direct ascendants and descendants, siblings, spouses, or permanent companions, or those determined by the Court, if applicable” (who may be linked to the direct and immediate victim by a reasonably close relationship,

and by affection owing to being a member of the same household, which leads to them being treated with the same relevance and the same consequences as the other members of the “immediate family”).

IX. THE POSSESSOR OF THE RIGHT TO COMPENSATION

55. These clarifications, related, above all, to the procedural legitimization of those closest to the person who has endured the injury directly and immediately, do not exclude the possibility – widely explored and recognized in this international Court’s case law – that the next of kin or those closely connected may, in turn, become victims of human rights violations, if injuries of this nature are constituted in relation to them and, thus, the adequate and necessary conditions are met to receive the compensation corresponding to the injury they have suffered to their own possessions or rights.

56. The injury to a freedom or a right may occur directly, through the “blow” that the act or omission of the agent signified, immediately and autonomously, to the juridical possession of the subject (for example, death caused by a State agent), or indirectly, as a result of this conduct, which was not proposed to cause the harm that “indirectly resulted,” either because this is a notorious and necessary consequence of the act committed, or because it is part of the chain of cause and effect resulting from the violation, in the circumstances of a specific case (for example, the intense suffering of a mother owing to the abduction, torture, disappearance or death of her child). In this hypothesis, the harmful result stemming from the indirect effect was not wanted or produced immediately by the violation. In other words, it was not the goal sought by the State agent, nor the motive or reason for the conduct that violated the human rights, as is the deprivation of life, in the previous example.

57. However, once this indirect injury has occurred, health, safety, patrimony, etc. have already been affected and the corresponding right and principle listed in the American Convention has been violated. The person who is thus affected becomes a victim – planned or unexpected, chosen or eventual – of a violation and, accordingly, appears before the international proceeding and benefits from the judicial decisions on reparation of damage. At one remove in the group of subjects who arrive on the scene of international justice is the person who is not explicitly recognized as being the direct or indirect victim, but who suffers certain adverse consequences derived from the violation, and who has, indeed, been victimized by the violation committed. This is the case of those who endure pain, suffering and anguish as a result of the latter (*cf.* para 225 of the *Judgment*, which refers to the development made by the Inter-American Court’s judgments in the “*Street Children*” (*Villagrán Morales et al.*) and *Castillo Páez cases. Reparations*), and to whom some compensation is granted in reparation for non-pecuniary damage, owing to the suffering that the facts caused them. Hence, in one area of “case law development,” there is a category of persons who do not appear under the heading of direct victims and are just beginning to be classified as indirect victims, but who are owed reparation, because they have been prejudiced by the facts submitted to the Court’s consideration. In brief, all these subjects are encompassed in the concept of “Beneficiaries” (Chap. XIII of the *Judgment*) that the Court generally uses, which encompasses direct victims, indirect victims and other persons who are located on the narrow and elusive dividing line between the latter and third parties.

58. The issue to which I am now referring, arises more pointedly in the case of those who endure suffering, which may be very intense, owing to the aggression against another person. Thus, for example, the suffering of a mother owing to what

is done to her child; a suffering so natural and evident that it does not even need to be proved – as the case law of the Inter-American Court has maintained – contrary to the case of the suffering caused to other next of kin, the suffering of a mother is presumed *juris tantum*. If this is so, what substantive difference is there between the suffering caused to the direct victim of the action of the agent and the violation of the mental or moral integrity of the close next of kin, who suffers this as soon as the unlawful conduct of that agent occurs?

59. It is evident that, as I mentioned a few lines previously, we are faced with a fragile, elusive dividing line between those who are recognized as direct or indirect victims, and those who are not always classified as such, but benefit from the reparations decided by the Court. In some cases, this line seems clear; in others, it is particularly hazy. If a person is affected by the violation committed, should they not be considered a victim? – because they truly suffer from the fact that a protected possession is affected and a specific right established in the Convention is infringed – even though, technically, they are classified as an indirect victim? And if they are not victims, how should they be classified, and where does their right to receive some compensation arise from? I return to the example I gave in the preceding paragraph: the closest relative of the person who loses his life or suffers severe harm, endures great pain and suffering as a result of this and, consequently, his mental integrity (which is one of the possessions protected by Article 5(1) of the American Convention) is affected, even though the agent who perpetrated the violation did not propose to affect this integrity. Even so, through his unlawful conduct, the latter has caused this suffering to occur and, thus, has violated the mental integrity of the third person.

60. The fact that some compensation for the non-pecuniary damage caused to other persons is ordered, regardless of the non-pecuniary damage caused to the immediate and chosen victim, underscores that the former have a legal title that gives them a right to this compensation, a title that relates to the one possessed by those who are expressly considered as victims. The right to compensation arises from a presumption that is the same in both cases: they have suffering harm to their mental integrity, owing to an unlawful external conduct by a State agent, which violates the American Convention.

61. The protection system constructed by the Pact of San José makes no distinction between direct and indirect effects, nor does it take into account their mediate or immediate nature. There is a single source of the harm: the violation of a right; in this case, the right to mental integrity. The juridical effect for the State is the same: the obligation to repair the harm caused unlawfully. The decision of the Court is identical in both cases: the payment of a certain amount as compensation for non-pecuniary damage, to alleviate the pain caused. In view of the foregoing, I believe that the Court's approach is correct when examining this problem in the present case and deciding that "the next of kin of Myrna Mack Chang must be considered victims because the State has violated their mental and moral integrity" (para. 232 of the *judgment*).

62. It is true that reconsideration of these concepts may extend the universe of victims, but it is also true that many persons are affected by a fact that violates a right and suffer impairment of the juridical possessions that the Convention protects. If we review the case law of the Inter-American Court, we will see that there are a large number of reparations of a compensatory nature motivated by non-pecuniary damage caused immediately to the person who is first the alleged victim and, subsequently, the proven victim. There are also such reparations to subjects whose

injury and whose right are verified during the proceeding; and although they are not recognized as victims, they are recognized the characteristic consequences of being a victim: reparation.

X. FREEDOM OF EXPRESSION

63. I believe that, in addition to the violations established by the Inter-American Court, the *Myrna Mack Chang* case may entail an attack on the freedom of expression embodied in Article 13 of the American Convention on Human Rights, more precisely and relevantly than the *Maritza Urrutia* case, in which the Inter-American Commission proposed this type of violation. In the latter case, this international Court considered – and I share that decision – that the facts identified as violating Article 13 were more adequately encompassed in other concepts, such as “the right not to be compelled to be a witness against [one]self or to plead guilty” (Article 8(2)g)) and the prohibition to inflict degrading treatment (Article 5(2)) (para. 103 of the *Judgment in Maritza Urrutia v. Guatemala*, of November 27, 2003).

64. In the *Mack Chang* case, the reaction of the authorities that finally culled her life arose, according to the information in the case file, from the anthropologist's research and publications on the internal displacements of groups of the civilian population of her country. It was not verified that Myrna Mack had belonged to a rebel fighting group or had taken part in activities of resistance – possibly armed resistance – to the forces of public order. The factor that may have attracted the attention of the State agents who finally intervened in the deprivation of her life was the publication of the results of her research on this issue, which involved a serious questioning of specific Government policies and actions.

65. Indeed, in the chapter on proven facts, it is stated that Myrna Mack Chang, a professional anthropologist, who had obtained her postgraduate degree in England (para. 134.1), “studied the phenomenon of the internally displaced and the Guatemalan *Comunidades de Población en Resistencia* (CPR) during the civil war years.” She was a founding member of the Guatemalan Association for the Advancement of Social Sciences (AVANCSO), created “in order to conduct research into the causes and consequences of the displacements of the rural indigenous communities, the living conditions of the victims of this phenomenon, and Government policies for the displaced.” Based on her research, she concluded that “the principal cause of the displacements was the counterinsurgency program,” called “Government efforts to resolve these problems minimal, and criticized the Army's policy towards those displaced” (para. 134.2). The same chapter on the proven facts in this case states that “the extrajudicial execution of Myrna Mack Chang was politically motivated, owing to her research activities on the *Comunidades de Población en Resistencia* (CPR) and the respective policies of the Guatemalan Army. This situation led her to be considered a threat to national security and to the Guatemalan Government” (para. 134.7).

66. Evidently, I am not attempting to examine here the scientific or technical bases for her research work, nor the truth or error of her conclusions. This is entirely beyond the Court's assessment and my comments. What I must stress is that the victim had “freedom of thought and expression,” and that this right included “the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of [her] choice” (Article 13(1) of the Convention).

67. Article 13(2) of the Convention establishes the limits to this freedom: respect for the rights and reputation of others, or protection of national security, public order, or public health or morals, which could lead to subsequent responsibilities if they are affected unduly. Even assuming that Myrna Mack's publications had, in some way, represented infringements of these individual or collective assets or rights – which has not been shown – it is evident that the means to punish such excesses should be adapted to the provisions of the law. It is not necessary to weigh the difference between this possible juridical response and the *de facto* response which occurred.

68. A right or freedom is violated not only when its exercise is absolutely prevented using methods that make it materially impracticable, but also when the conditions are created that try to make it impossible to exercise it, or involve the possessors of the right or freedom in extreme situations that signify, in reality, impediments that cannot be overcome at all or only with difficulty. Access to justice is illusory – and the individual's judicial guarantees are violated – when the defense of the rights through legal proceedings is subject to charges or requirements that place it outside the reach of individuals (an issue that the Court will examine in the *Cantos* case), or when measures of intimidation are invoked that instill fear or terror in the potential petitioners, who therefore cease to exercise the rights that they nominally possess.

69. The attack on Myrna Mack Chang had the purpose – as can be seen from the file – of dissuading or punishing her conduct in relation to her research or publications; in other words, of violating the freedom of thought and expression that she nominally enjoyed under domestic legislation and the international norms that I have referred to. The acts of intimidation that the anthropologist Mack Chang endured before her death have been narrated by witnesses in this case, such as Clara Arenas Bianchi, an AVANCSO Board member (para. 126.b), Julio Edgar Cabrera Ovalle, bishop of Quiché (para. 127.a), and Helen Beatriz Mack Chang, the victim's sister (para. 127.d).

70. Furthermore, the repression that she endured also extends to the exercise of the freedom of expression of society as a whole, because its members are prevented from imparting their ideas for fear of suffering consequences such as those that occurred in this case, or are deprived of the possibility of receiving freely the information and ideas of those whose opinions differ from what is considered acceptable by the authorities.

XI. OTHER ISSUES

71. I believe that, in the future case law of the Inter-American Court, other issues may arise that appear in this judgment and in previous ones, or that they engender. For example, this *Judgment* reiterates the Court's position, followed systematically in numerous judgments, that the amounts it establishes to be delivered as compensation should be returned to the State when they are not claimed by the beneficiaries in a specific period of time, if this is possible. It is worthwhile exploring the possibility of these amounts being applied to other concepts linked to human rights, in accordance with the characteristics of the case referred to in the respective judgement and, to the relevant extent, the approach concerning application of resources to a socially useful end that is closely linked to the victims, which has been outlined in other judgments such as those in the *Aloeboetoe* (Suriname) and the *Mayagna Awas Tigni Community* (Nicaragua) cases. It may be considered – although

I am not affirming this at the present time – that this destination is more in keeping with the general regime of reparations and the protection of human rights than the simple return to the State of an amount that for a long time has been excluded, owing to the judgment, from regular public expenditure and was attributed, by the judgment, to a purpose linked to the protection of those rights.

72. It will also be interesting to examine some implications of the system of reparations in favor of the victims, since they should be able to enjoy the rights resulting from the unlawful act in the best conditions. In this respect, it is interesting to recall that the inter-American jurisdiction is complementary to the domestic jurisdiction, and only supplements it when the latter does not protect internationally recognized rights effectively. In other words, this jurisdiction intervenes to satisfy the right of individuals – among other related purposes of the greatest transcendence that I will not attempt to examine now – and should not, in any way, signify a reduction in the terms of the subjective rights and their substantive consequences. This idea is included in the norms of interpretation contained in Article 29 of the Convention. It may be seen, in particular, in subparagraph (b) of this article, which prohibits any interpretation of the Pact of San José that “restrict[s] the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party.”

73. In several judgments, the Inter-American Court has referred to national legislation and/or instances of domestic law in order to quantify the financial consequences of the violation committed. Obviously, in these cases, the Court has abstained from formulating a guilty verdict, leaving it to the domestic system to adopt the relevant consequences of the violation committed. To the contrary, it has established the guilty verdict clearly, when this has been pertinent, as corresponds to its jurisdictional obligation. Nevertheless, at the same time, it has recognized that some aspects of that decision may be defined more adequately under national law and by the domestic authorities, as has occurred in cases that involve labor compensation, commercial calculations, determination of possession or ownership, etc., although this obviously does not imply leaving the definition of essential points of the guilty verdict in the hands of third parties or waiving the authority to monitor compliance with its decisions, which is inherent to its jurisdictional mandate and without which it could not comply with the attributes and obligations assigned to it in Articles 33.b), 62(1), 63(1) and 65 of the Convention.

74. In other words, there are considerations of a practical nature, and even of fairness, that justify the possible and appropriate referral of certain aspects to domestic norms and instances, so that they may be implemented within the framework of the declaration of the guilty verdict previously formulated by the international Court. In this respect, the objective application of domestic law could possible improve the victim’s situation as regards pecuniary issues. In this case, is it pertinent that the international judgment should obstruct the injured party’s possibility of obtaining a more favorable result before domestic legal proceedings, if this is possible under national norms? If the answer to this question is negative, could it then be understood that the Court’s decision constitutes a “base” or “minimum limit” of compensation, which could be improved before the domestic instances, when there are grounds in domestic law to achieve this advantage? Is it not possible that the non-pecuniary reparations ordered by the Court may be expanded and improved when the State, by mutual agreement with the beneficiaries – and even without this agreement – determines this expansion or improvement? If so, why cannot the pecuniary reparations also be expanded and improved, should

this improvement be obtained at the domestic level, provided that it does not harm the base or limit established in the decision of this international Court?

75. As is its custom, in this judgment, the Inter-American Court has ordered that the amounts which the State must pay for compensation may not be affected by taxes or other charges. This provision, which is invariably included in judgments on reparations, has the legitimate and understandable purpose of preventing the Court's decision from being circumvented by a fiscal or other measure, and the victim or his next of kin, their representatives and legal assistants, being deprived of the compensation established by the Court. I believe that the concept of preserving the amount of the reparation that should reach the hands of the beneficiaries must be firmly maintained.

76. Considering this objective, which I fully share, but also the characteristics of the tax system – which the Court's decision does not question – I consider that, in many cases, it would be possible to accommodate this intention, without excluding the beneficiaries of the compensation from the national fiscal regime. It would be sufficient to avoid the net amount of the compensation to be paid by the State being reduced by taxes. This could be achieved – I mention this as an alternative worth considering – by other procedures than fiscal exclusion. For example, the State could pay a higher amount than the one allocated by the Court, so that, once the tax has been deducted, it will be identical to the amount established in the judgment. The beneficiary of the compensation could also be paid bonifications, as established by the national tax system. This would allow the Court's ruling to be complied with, on the one hand, and respect the domestic fiscal regime, on the other. What is not acceptable is the reduction of the compensation by a tax deduction, which is not compensated by another means in order to reimburse the net value established for the compensation.

77. In this respect, I have stated: "Strictly speaking, it is not a question of the beneficiary – the taxpayer in fiscal terms – remaining outside the State's tax system, but that the compensation owed should not be reduced by this concept. Therefore, it should be understood that the compensation is established in net terms. It would be for the State, if applicable, to order the exemption or to pay a higher amount, so that the amount of the tax could be deducted from this and the total amount of the compensation would remain the same" (*"Las reparaciones en el sistema interamericano de protección de los derechos humanos"*, in García Ramírez, *La jurisdicción internacional...*, cit., p. 308). The Court formulated some interesting considerations on this point in the *Suárez Rosero case*, even though, finally, it did not adopt the decision that could be inferred from them, but once again used the traditional formula for its decisions. When deciding that the amounts established for compensation should be paid "promptly and in full," it stated a pertinent general principle: "It is incumbent on the State to exhaust all measures to ensure prompt and effective fulfillment of this obligation, under the conditions and within the time limits established in th[e] judgment and, in particular, to adopt suitable measures to ensure that the legal deductions that [...] financial institutions charge on all monetary transactions shall not abridge the beneficiaries' right to receive the full amounts ordered for them." (ICourtHR, *Suárez Rosero case, Interpretation of the judgment on reparations (Art. 67 of the American Convention on Human Rights), Judgment of May 29, 1999, Series C No. 51, para. 45(2)*).

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary

