

The Case of Myrna Mack Chang: Overcoming Institutional Impunity in Guatemala

by David Baluarte and Erin Chlopak*

On February 20, 2003 the Inter-American Court of Human Rights (Inter-American Court or Court) concluded a three-day hearing regarding allegations that the Republic of Guatemala violated numerous provisions of the American Convention on Human Rights (American Convention) due to its role in the 1990 murder of Guatemalan anthropologist Myrna Mack Chang. Attorneys from the Inter-American Commission on Human Rights (Inter-American Commission or Commission), the Center for Justice and International Law (CEJIL), and Hogan & Hartson L.L.P. filed this case seeking a declaration of the responsibility of Guatemala and reparations for damages suffered by the victim's next of kin. The hearing was a major step in both the struggle for justice in the Mack case and the effort to expose the impunity enjoyed by state officials in Guatemala.



Myrna Mack Chang with her sister Helen and daughter Lucrecia.

Credit: The Myrna Mack Foundation

displaced individuals, generated international awareness of the extreme poverty and violence suffered by these populations and exposed the military's role in creating such conditions. The military, still the ruling authority in Guatemala despite the façade of a civilian government, quickly deemed Myrna an "internal enemy" and set the machinery of the EMP into motion.

On the evening of September 11, 1990, as Myrna prepared to leave AVANCSO for her home, she was accosted, brutally stabbed 27 times, and left in the street for dead. Since Myrna's murder, her sister, Helen Mack, has worked tirelessly to bring Myrna's killers and those responsible for planning her murder to justice. Helen has pursued remedies in both domestic and international fora in an effort to overcome Guatemala's recognized tradition of impunity for human rights violations.

Background: The Civil War in Guatemala

Throughout the 1970s and 1980s, the Guatemalan population was subjected to a "dirty war." The Guatemalan military used every means at its disposal to maintain its historic control over the country's power structure and rid the countryside of the Guatemalan National Revolutionary Unity (URNG), a leftist guerilla movement in opposition to the Guatemalan government. A "scorched earth" campaign waged throughout rural Guatemala left 440 villages totally destroyed, some 200,000 civilians dead or disappeared, and more than a million people displaced. The military's tactics, however, were not confined to the Guatemalan countryside. As early as the 1960s, semi-official death squads had become a common means to deal with civilian opposition leaders in Guatemala. During the 1980s, an intricate system for the surveillance and "disappearance" of such individuals had been established within the Ministry of Defense. The Estado Mayor Presidencial (EMP), a high-ranking military unit officially charged with the protection of the president and his family, was widely known to carry out these covert directives. The targets were named by the highest ranking military officials, and were systematically eliminated by groups of EMP officers. By the mid-1980s, the military deemed its campaign successful enough to permit the election of a civilian president, a gesture that many viewed as liberating Guatemalan society.

In 1986, Myrna Mack Chang, a highly regarded anthropologist, collaborated with several colleagues to found the Association for the Advancement of Social Sciences in Guatemala (AVANCSO). AVANCSO was a social science research facility conceived as a means to explore the impact of the country's decades-old civil war on Guatemalan society. Myrna conducted an in-depth study of "internally displaced" populations—Indigenous Peoples left without homes and denied the benefits of refugee status because they remained within Guatemala's national boundaries. The publication of Myrna's research, including testimonials of internally

Helen Mack's Search for Justice in the Guatemalan Courts

Helen's efforts to seek justice for her sister have spanned more than a decade. From the initial investigation into Myrna's murder to the ultimate conviction of two of the responsible parties, however, the Guatemalan government, acting on behalf of those accused of Myrna's murder, frequently refused to cooperate, and at times, actively obstructed the judicial process. These improprieties in Guatemala's criminal prosecution of the Mack case began with the initial investigation of Myrna's murder. No fingerprints were taken from the crime scene; investigators failed to obtain blood samples as well as a complete set of photographs of her wounds; and although fingernail samples were obtained, they were discarded before a laboratory technician could analyze them. In addition, investigators never examined the clothing Myrna was wearing when she was killed.

Perhaps most disturbing was the Guatemalan police's handling of a 60-page report completed by the detectives assigned to investigate Myrna's assassination. In this September 29, 1990 report, detectives concluded that Myrna's assassination was politically motivated, and they named Sergeant Major Specialist Noel de Jesús Beteta Álvarez as one of two individuals suspected in her killing. (The investigation failed to uncover the identity of the second suspect.) Rather than submitting this report to the courts, the police turned over a 13-page, abridged version, which lacked any mention of military involvement in Myrna's assassination. Additionally, this report replaced the investigators' characterization of the crime as "politically motivated" with a finding that the crime was simply a robbery. It was not until nearly ten months later that the existence of the original 60-page police report was disclosed in court through testimony offered by one of the detectives who had authored the report. One month after offering this testimony, while preparing to flee Guatemala in response to threats against his life, the detective was assassinated just outside of police headquarters. His killers remain unidentified.

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Despite the irregularities that characterized the investigation, on February 12, 1993, a Guatemalan trial court convicted Sergeant Major Specialist Noel de Jesús Beteta Álvarez, one of Myrna's assassins, and sentenced him to a 25-year prison term.

In addition to pursuing the prosecution of those responsible for carrying out Myrna's assassination, Helen Mack sought justice against the individuals alleged to have planned the murder: high ranking military officers in the EMP, including General Edgar Augusto Godoy Gaitán, Colonel Juan Valencia Osorio, and Colonel Juan Guillermo Oliva Carrera. Her efforts were frustrated, however, when the same court that convicted Beteta declined to permit the case against these "intellectual authors" to proceed. The court's refusal was improper in that it foreclosed proceedings before the suspects were indicted. In furtherance of its own impropriety, the court also placed the burden of identifying additional suspects in the case upon the Office of the Human Rights Ombudsmen, when the institutions actually responsible for making such determinations are the courts and the public prosecutors' office.

Also frustrating Helen's struggle to seek justice against the intellectual authors of Myrna's murder was the fact that her efforts were entirely unsupported by the public prosecutors working on the case. While Helen filed multiple appeals to keep the investigation open against both the second unnamed material author and the alleged intellectual authors, the public prosecutors joined only to investigate the second material author. Following the denial of these appeals, Helen filed a final appeal with the Guatemalan Supreme Court, which in turn overruled the lower court's decision and permitted the proceedings against the alleged intellectual authors to move forward.

Following this February 1994 holding, Helen pursued the prosecution of Valencia, Oliva, and Godoy, though her efforts were met with intense resistance and numerous challenges. In March of 1994, only one month after the Guatemalan Supreme Court permitted the case to proceed, the parties accused of planning Myrna's murder individually filed *amparo* petitions—extraordinary writs requesting the immediate protection of a jeopardized constitutional right—with the trial court, challenging the Supreme Court's holding. Although the trial court ultimately denied the petitions, it failed to make its decision until December 6, 1994, and further failed to give notification of its denials until March 9, 1995, three months later. In addition to postponing the proceedings, these delays violated the Guatemalan Code of Criminal Procedure, which mandates that courts give notification of their decisions within one day of the date on which the decision is reached.

In late March of 1995, an additional complication emerged. The Mack case was transferred by the Supreme Court from a civil trial court to a military tribunal, despite the international customary practice and international precedent requiring human rights violations to be prosecuted in civil rather than military courts. Helen filed multiple challenges to the transfer. In spite of Helen's efforts, the case was not returned to a civil court until July of 1996, when the Guatemalan legislature passed a law eliminating the jurisdiction of "special military tribunals." This resulted in the transfer of all cases pending in military courts to civil courts, including the Mack case. Despite what appeared to be a conclusive resolution of this issue, the following months were characterized by judicial



Credit: Erin Chibput

Counsel for Guatemala at the hearing before the Inter-American Court of Human Rights.

efforts to avoid exercising jurisdiction over the Mack case. In light of the clarity and simplicity of the new law, such efforts seem to have stemmed from fear among the judges of the ramifications of being associated with the Mack case. Once again, Helen Mack's extraordinary efforts brought a final resolution to this jurisdictional issue, and by the end of 1996, the case was able to proceed.

In the midst of these numerous setbacks was yet another complication. The July 1996 law dissolving Guatemala's "special military tribunals" also instituted changes in Guatemala's Code of Criminal Procedure. These changes resulted in a dilemma: the proceedings that had taken place prior to July 1996 had been conducted in accordance with provisions that had been nullified by the new law. Therefore, the court was faced with the question of how to conduct the remaining proceedings and how to treat those proceedings conducted in accordance with provisions that no longer existed.

In November of 1997, more than a year after the new law was passed, the Guatemalan Constitutional Court ordered that the Mack case be prosecuted under the new Code of Criminal Procedure. In so holding, the Court vacated all proceedings against the alleged intellectual authors conducted under the repealed code of criminal procedure, including those proceedings that generated evidence in compliance with the new law. This result served to delay the proceedings even further.

The last major legal complications in the Mack case arose out of the 1996 enactment of the National Reconciliation Law. The result of a peace settlement between the Guatemalan government and the URNG, this law facilitated the URNG's re-incorporation into Guatemalan civil society by granting amnesty to persons who committed political crimes during the country's internal conflict. In January 1997, the alleged intellectual authors of Myrna Mack's assassination applied for immunity under the new law, asserting that the crimes with which they were charged were "political" crimes falling within the boundaries of the provision. Upon the denial of their applications for immunity, the alleged intellectual authors filed numerous appeals and *amparos*, while simultaneously reapplying for amnesty with a different court. Despite the fact that their initial applications had already been denied by an equally competent court, the new court agreed to consider the applications. Ultimately, the new court denied the applications for amnesty, but in light of the fact that amnesty

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applications had already been filed with another court, the proper response would have been to decline consideration of the applications outright. Because this unjustified consideration of repeated applications for immunity was not concluded until four months after the new applications were filed, it further compounded the delays already hindering the proceedings and wasted the time of all parties involved.

Finally, in addition to the numerous dilemmas that characterized the judicial proceedings against the alleged intellectual authors of Myrna's assassination, Helen's efforts were further hampered by extra-judicial obstacles. Beyond the detective who was assassinated outside of police headquarters, a number of witnesses, as well as one of the judges involved with the case, were intimidated to such an extent that they chose to go into exile.

On January 29, 1998, Godoy, Valencia, and Oliva finally were ordered to stand trial for planning and ordering the assassination of Myrna Mack. Throughout these proceedings, the defendants continued to abuse their right to file *amparos*, seeking the extraordinary relief on multiple occasions while failing to exhaust alternative measures, as required before such writs are filed. The defendants' excessive filing of *amparos* further hampered the expediency of the proceedings. In addition to the defendants' efforts to delay the proceedings, other representatives of the Guatemalan state also obstructed the judicial process by failing to comply with multiple discovery requests made by Helen Mack.

On March 3, 2000, Guatemala acknowledged institutional responsibility for Myrna's murder and for the delay of justice in the Mack case. Two-and-a-half years later, on October 3, 2002, a Guatemalan civil court convicted Juan Valencia for ordering the assassination of Myrna Mack, sentencing him to 30 years in prison. Valencia's superiors, Godoy and Oliva, both were acquitted due to the court's finding that there was insufficient evidence of their direct involvement in the planning of Myrna's assassination. Helen's appeal of these acquittals is pending.

Petition to the Inter-American Commission on Human Rights

Almost immediately after Myrna's murder, Helen Mack, as the representative of Myrna's next of kin, began to seek the involvement of the Inter-American Commission on Human Rights in order that they might oversee the domestic criminal investigation and trial. The Guatemalan Human Rights Commission, a national human rights commission, presented a petition against the State of Guatemala to the Inter-American Commission on September 12, 1990, denouncing Myrna's murder. Five days later, the Inter-American Commission opened case number 10.636.

On March 5, 1996, after carefully observing the domestic investigation and judicial proceedings, the Commission declared the Mack case admissible in accordance with Articles 46, 47, and 48 of the American Convention. Petitioners and Guatemala subsequently filed a series of allegations regarding the merits of the case, which the Commission took under review. In accordance with Article 48(f) of the American Convention, the Commission held hearings with the goal of mediating a friendly settlement between the parties. During those hearings, the Guatemalan state acknowledged institutional responsibility for the extra-judicial killing of Myrna Mack, a gesture that led to the signing of a compromise agreement on March 3, 2000.

This compromise agreement embodied a number of significant steps toward justice. In acknowledging international responsibility, Guatemala agreed to reinstate the case against the alleged intellectual authors and ensure that the proceedings could progress without further delay. As a means to ensure Guatemala's compliance, the compromise agreement also included a formal request to the Inter-American Commission to assign representatives in Guatemala with the mandate to oversee the proceedings and verify respect for due process and judicial guarantees.

The verifiers presented their first and second reports on August 23, 2000 and October 5, 2000, respectively, expressing their belief that the Guatemalan state was not serious about advancing the prosecution of the intellectual authors nor was it doing everything within its power to ensure fairness in the proceedings. As a result, Helen desisted in her efforts to reach a friendly settlement.

On March 8, 2001, pursuant to Article 50 of the American Convention, the Inter-American Commission approved report No. 39/01 (Report), in which the Commission detailed its findings on the Guatemalan proceedings in the Mack case. The Commission found that the Guatemalan state had deprived Myrna Mack of her right to life, in violation of Article 4 of the American Convention. The Commission concluded that Myrna's murder resulted from a military operation planned and executed by officials in the EMP. The first step of the operation involved singling out Myrna because of her professional work, the second was to kill her, and the third was to cover up the identities of the material and intellectual authors, ensuring their impunity. Secondly, the Report concluded that the Guatemalan state had not done everything within its power to investigate the crime sufficiently so as to facilitate the prosecution of those responsible within a reasonable period. The report also noted that the state tolerated interference with the proper administration of justice, and in as much, violated the rights to a fair trial and judicial protection under Articles 8 and 25 of the American Convention, respectively.

The Inter-American Commission also reported that the state had a responsibility to investigate extra-judicial killings with the goal of fully prosecuting all those responsible, and that Guatemala did not fulfill this responsibility. In using state actors to perpetrate Myrna Mack's extra-judicial killing and shielding those responsible from prosecution, Guatemala violated its obligation under Article 1(1) to assure respect for all of the rights and freedoms enumerated in the American Convention.

Finally, the Report declared that, under international law, Guatemala's acknowledgment of institutional responsibility was legally valid, and required the state to redress the damages caused to Myrna Mack's next of kin. The Report emphasized that more than a year had passed since Guatemala acknowledged responsibility and it had made no genuine effort to penetrate the shield of impunity that protected the intellectual authors of Myrna's murder.

Based on these findings the Inter-American Commission made certain recommendations, asking that the state of Guatemala conduct a thorough and impartial investigation with the goal of bringing those responsible to justice; adopt measures to assure that Myrna's next of kin receive adequate reparations for the damages they suffered; remove all obstacles preventing the case from going forward; and dismantle the EMP as soon as possible, in compliance with the 1996

Peace Accords. The Inter-American Commission forwarded the Report to Guatemala on March 19, 2001, and Guatemala responded by revoking its March 2000 admission of institutional responsibility for the death of Myrna Mack and denying central facts of the case. The Commission determined that Guatemala failed to demonstrate genuine intent to comply with the recommendations and referred the case to the jurisdiction of the Inter-American Court on June 14, 2001.

On July 26, 2001, the Inter-American Commission filed an official petition in the Inter-American Court against the state of Guatemala regarding the Mack case. Two months later, Guatemala filed its response in the form of preliminary objections. In these objections, Guatemala once again retracted its earlier admission of institutional responsibility, stating that the Commission had misunderstood this earlier gesture to mean that the state itself was responsible for the murder. Guatemala claimed that because domestic remedies had not been exhausted, the Inter-American Court did not have jurisdiction over the case. In addition, Guatemala argued that the state could not be responsible for the murder of Myrna Mack, a crime that had been committed by individuals who were being prosecuted for their unlawful acts.

On November 29, 2001, the Inter-American Commission filed its response to Guatemala's preliminary objections. The Commission invoked Article 46(2), which provides that the exhaustion of domestic remedies requirement does not apply when the necessary remedies either do not exist, are ineffective, or present unjustifiably long delays. The Commission made its decision on admissibility after observing that domestic efforts to obtain justice were thwarted by an incomplete investigation, unjustifiably long delays in the judicial proceedings, intimidation of witnesses and judges, and the withholding of discoverable evidence. The Commission found that the conviction of one of the three alleged intellectual authors, which had occurred since the Commission filed its petition with the Court, did not change the fact that Guatemala failed to comply with basic requirements of ensuring justice, as set forth in the American Convention. In light of the Commission's determination that domestic remedies were effectively exhausted, the Inter-American Court had jurisdiction over the case to determine whether Guatemala violated international law in enabling the assassination of Myrna Mack and ensuring impunity for those responsible.

Proceedings before the Inter-American Court of Human Rights

From February 18-20, 2003, the Inter-American Court heard oral arguments and testimony regarding the merits of the Myrna Mack case. On the first day of the hearing, both sides gave their opening statements, after which representatives of the Guatemalan government sat passively, declining to cross-examine the petitioners' first four witnesses. Among those who testified were Myrna's daughter, Lucrecia Hernández Mack, who offered a dramatic account of the pain she has suffered as a result of her mother's death, and Myrna's sister, Helen Mack, who discussed the Guatemalan state's institu-

tional responsibility for Myrna's assassination, as well as the legal and extra-legal delays that have prolonged the domestic judicial proceedings for over 12 years.

The following day, before the petitioners examined their remaining nine witnesses, representatives of the state of Guatemala withdrew from the proceedings, stating their refusal to be present during testimony that discredited the Guatemalan government. This was the first time in the history of the Inter-American Court that a state withdrew from ongoing proceedings. Nevertheless, following the Court's own procedural rules, the hearing continued in the state's absence. Witnesses offered testimony regarding the flawed investigation into Myrna's assassination; the institutional involvement of Guatemalan intelligence agencies, particularly the EMP, in ordering and carrying out political assassinations; the pronounced threat that Myrna's work posed to the Guatemalan government; the extensive delays that have characterized the domestic criminal proceedings; and the psychological injuries suffered by Myrna's family as a result of her brutal murder and the obstacles they have encountered in their efforts to obtain justice on Myrna's behalf.

On the final day of the international proceedings, both petitioners and a representative of Guatemala returned to present

closing arguments. Following a summation of the barriers to justice that plagued the domestic proceedings in the Mack case, petitioners asked the Court to award reparations in the form of two scholarships—one for a law student and the other for an anthropology student—in Myrna's honor, and an order that a memorial to Myrna be erected in Guatemala. Petitioners further asked the Court to award monetary reparations for the pain they have suffered as a result of their loss, as well as for the pain Myrna suffered at the time she was killed. Finally, petitioners implored the Court to order the Guatemalan government to dismantle the EMP and take additional affirmative steps to ensure that human rights violators no longer enjoy impunity.

In a very brief closing argument, the representative of the Guatemalan state noted that the domestic proceedings in the Mack case were ongoing and that the Inter-American Court should not act in a manner that would interfere with Guatemala's pursuit of justice in its own courts. The state's representative also discussed the political importance of moving forward, urging the Inter-American Court not to be swayed by the emotionally charged testimony of the petitioners' witnesses. The Inter-American Court is expected to render its decision in the Mack case between the summer and fall of 2003.

The Significance of the Mack Case

The Mack case demonstrates the fundamental inability of Guatemalan political and legal institutions to protect the human rights of the Guatemalan people and provide swift justice when those rights are violated. The case also illustrates Guatemala's ongoing tradition of assuring impunity for individuals who, acting on behalf of the state, violate domestic and international human rights laws. More broadly, the Mack case is emblematic of the type of litigation that comes before

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As war with Iraq demonstrates, the usefulness of the Optional Protocol is undermined when rogue states are at issue. Iraqi law and policies controvert the standards enumerated in the Optional Protocol and conflict with a developing international consensus opposed to the recruitment and deployment of children under 18. Because Iraq is not obligated to abide by the Optional Protocol, a concerted campaign of international pressure may, therefore, be the most effective tool for protecting Iraqi children.

Conclusion

The development of international norms and standards concerning the involvement of children in armed conflict is significant. In particular, the widespread acceptance of the Optional Protocol is cause for optimism. Precarious peace processes, protracted conflicts, and the threat of new conflicts nonetheless demand a vigilant and concerted commitment from the international community. Such conflicts also illustrate the shortcomings of the Optional Protocol. Buttressed by mechanisms for implementing, reporting, and monitoring, as well as a more explicit declaration concerning voluntary recruitment, the Optional Protocol could be employed more effectively to protect children affected by armed conflict. International condemnation of the use of child soldiers warrants a strengthened Optional Protocol with a capacity for comprehensive protection of children from conflict. Yet given the Optional Protocol's limitations, ending the deplorable practice of child soldiers requires a multi-faceted approach. Such an approach should include application of internal and international pressure, reduction of the risk of

child recruitment, implementation of demobilization and rehabilitation programming, and prosecution of those who recruit and deploy child soldiers. ☹

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*** This article was drafted in anticipation of the war in Iraq and does not take into account the recent events in the region.*



the Inter-American Court every year. It exemplifies the extent to which human rights abuses occur in the Americas and evidences the potential for the inter-American system to play a definitive role in removing the shield of impunity for those who plan and carry out such abuses.

A decision in favor of Guatemala would set a precedent that limits the extent to which the Inter-American Court can exercise its jurisdiction to evaluate the efficacy of domestic systems of justice in addressing violations of fundamental human rights.

Indeed, the convictions of one of the individuals suspected of carrying out Myrna's assassination and one of the three accused of planning the crime were important triumphs in Helen Mack's endeavor to seek justice on her sister's behalf. In light of such achievements, the Court could choose to construe strictly the requirement of exhausting domestic remedies and refuse to find the state in violation of the Convention where it had made progress in the pursuit of justice.

If the Inter-American Court decides the case in favor of the petitioners, the decision would add force to the existing jurisprudence that recognizes the Court's jurisdiction over

cases pending in domestic fora when such domestic proceedings have been unreasonably delayed or ineffectively prosecuted. Specifically, this decision would establish the precedent that although prosecution and conviction of some state actors responsible for planning or executing human rights violations are important steps toward fulfilling a state's international legal duties, they are insufficient when others who shared responsibility for such violations continue to enjoy impunity. Finally, such a decision would underscore states' institutional responsibility for state actors who are involved, at all levels, in planning or carrying out human rights violations. ☹

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