Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Efrain Bamaca Velasquez v. Guatemala
Doc. Type:	Judgment (Merits)
Decided by:	President: Antonio A. Cancado Trindade Vice President: Maximo Pacheco Gomez; Judges: Hernan Salgado Pesantes; Alirio Abreu Burelli; Sergio Garcia Ramirez; Carlos Vicente de Roux Rengifo Judge Oliver Jackman abstained from hearing this case, because he had taken part in several stages of the case while it was being processed before the Inter-American Commission on Human Rights, when he was a member of the Commission.
Dated:	25 November 2000
Citation:	Bamaca Velasquez v. Guatemala, Judgment (IACtHR, 25 Nov. 2000)
Represented by:	APPLICANT: the Center for Justice and International Law

In the Bámaca Velásquez Case,

the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”), pursuant to articles 29 and 55 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure”) delivers the following judgment in the instant case.

I. INTRODUCTION OF THE CASE

1. On August 30, 1996, pursuant to articles 50 and 51 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) the Inter-American Commission on Human Rights (hereinafter “the Commission” or the Inter-American Commission”) submitted an application to the Court against the Republic of Guatemala (hereinafter “the State” or “Guatemala”), originating from petition No. 11.129, received by the Secretariat of the Commission.

2. The Commission stated that the purpose of the application was for the Court to decide whether the State had violated the following rights of Efraín Bámaca Velásquez:

Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 7 (Right to Personal Liberty), Article 8 (Right to a Fair Trial), Article 13 (Freedom of Thought and Expression), Article 25 (Right to Judicial Protection) and Article 1 (Obligation to Respect Rights), all of the American Convention, and also Articles 1, 2 and 6 of

the Inter-American Convention to Prevent and Punish Torture and Article 3 common to the Geneva Conventions.

The Commission also requested the Court to call on the State to identify and punish those responsible for the violations mentioned above, to adopt the "necessary reforms to the training programs and regulations of the Guatemalan armed forces so that military operations are conducted in conformity with the laws and customs applicable to internal conflicts", and to compensate the next of kin of the victim for the violation of the said rights, in conformity with Article 63(1) of the Convention. In its final arguments, the Commission also requested the Court to declare that Article 8 of the Inter-American Convention to Prevent and Punish Torture had been violated.

II. COMPETENCE OF THE COURT

3. The Court is competent to hear this case. Guatemala has been a State Party to the Convention since May 25, 1978, accepted the obligatory jurisdiction of the Court on March 9, 1987, and ratified the Inter-American Convention to Prevent and Punish Torture on January 29, 1987.

III. PROCEDURE BEFORE THE COMMISSION

4. The Inter-American Commission opened case No. 11.129 as the result of a complaint filed by the petitioners on March 5, 1993, regarding a request for precautionary measures, based on the detention and mistreatment inflicted on [Efraín] Bámaca [Velásquez] and other combatants of the URNG [Guatemalan National Revolutionary Unit (hereinafter “the URNG”)]”. This request was repeated in a communication of April 6 the same year.

5. On March 17, 1993, the petitioners sent a memorandum on the exhaustion of domestic remedies. Two days later, they forwarded the Commission information on the rejection of the petition for habeas corpus filed before the Supreme Court of Justice in favor of Bámaca Velásquez and other URNG combatants. On August 24 and October 4, 1993, the petitioners sent the Commission further information on the case. On October 5, 1993, the Commission granted the State 30 days in which to submit its observations on all the documents that had been forwarded to it.

6. On March 31, 1993, the Commission officially opened the case based on the complaint made by the petitioners. On June 10, July 19 and August 19, 1993, Guatemala requested extensions for providing information on the case. On October 12, 1993, the State submitted the information requested.

7. On October 4, 1993, the Commission held a public hearing so that Guatemala could present information on the precautionary measures. On October 15, 1993, the Commission reiterated to Guatemala that it should adopt precautionary measures in favor of the persons named in its communication. On December 15, 1993, the State declared that, in this case, the precautionary measures were "unnecessary and not in order because there were no prisoners of war or clandestine detention centers in Guatemala.”

8. On January 27, 1994, during a public hearing, various documents were received, including the petitioners' reply. The latter was forwarded to the State on November 14, 1994.

9. The Commission held various special hearings to receive the testimony of persons related to the case. Santiago Cabrera López appeared on November 3, 1994, and June 6, 1995. Nery Ángel Urízar García made a statement on September 7 and 8, 1995. However, the witness did not appear at a hearing programmed for the same purpose on November 29, 1995.

10. On November 8, 1994, the Commission requested the State to provide information on domestic investigations relating to the case. On November 18, 1994, the State replied to this request by sending information that had appeared in the press and, on the following December 12, information on the actions taken. The petitioners forwarded their observations on this information on February 9, 1995.

11. On December 19, 1994, the State sent its answer in the case, while, following an extension, the petitioners submitted their observations on February 9, 1995. The State added to its reply a public report and a press communiqué, forwarded on March 13, 1995, and the petitioners responded to this information on August 3, 1995.

12. On June 27, 1995, the Commission received a new request for precautionary measures, this time in favor of Julio E. Arango Escobar, who was acting as the special prosecutor in the Bámaca Velásquez Case and had been the victim of an alleged attack owing to his connection with the case. On July 21 that year, the State responded to this request. No further proceedings took place in this respect, because Arango Escobar resigned from office.

13. On December 20, 1995, the Commission informed the parties that the Bámaca Velásquez Case would be processed independently from that of the other URNG combatants. In January 1996, the petitioners sent the Commission a copy of the documents of the Guatemalan court proceedings in the Bámaca Velásquez Case.

14. On January 17, 1996, the Commission received a new request for the adoption of precautionary measures in favor of the persons who “were connected with the investigation and prosecution of the Bámaca [Velásquez] Case”. The persons for whom protection was requested were Lesbia Pevalan, Rodolfo Azmitia, Jennifer Harbury and José E. Pertierra. This request arose owing to the alleged attack against Pertierra, which occurred on January 5, 1996. On February 27, 1996, the State sent a report on the precautionary measures that had been adopted.

15. On February 16, 1996, the State sent its report on the Bámaca Velásquez Case.

16. On March 7, 1996, during its 91st session, the Commission approved Report No. 7/96, the operative part of which determined as follows:

1. That, in the lights of the information and observations that have been presented […,] the State of Guatemala has violated the human rights to life, to humane treatment, to personal

liberty, to a fair trial and to judicial protection embodied in Articles 4, 5, 7, 8 and 25 of the American Convention and has failed to comply with the obligation established in Article 1.

In addition, it recommended to Guatemala that

a. It accept responsibility for the disappearance, torture and extrajudicial execution of Efraín Bámaca Velásquez.
b. It conduct a prompt, impartial and effective investigation into the facts denounced in order to record in detail, in a duly authenticated, official report, the specific circumstances in which the crimes against Mr. Bámaca [Velásquez] occurred and the responsibility for the violations committed, so as to inform the wife of Mr. Bámaca [Velásquez], Jennifer Harbury, and the other members of his family about his fate and the whereabouts of his remains.
c. It adopt the necessary measures to submit those responsible for the violations to competent judicial proceedings and punish all those responsible for violating human rights in this case.
d. It adopt the necessary reforms of the training programs and regulations of the Guatemalan armed forces so that they conduct military operations in conformity with the laws and customs applicable to internal armed conflicts.
e. It compensate the violation of the above-mentioned rights, including payment of an adequate compensation to the wife of Mr. Bámaca [Velásquez], Jennifer Harbury, and to the other members of his family.

Lastly, the Commission decided

3. To transmit this report to the Government of Guatemala and grant it a period of 60 days to put its recommendations into effect. The 60-day period shall commence on the date of the transmittal of this report, during which time the Government shall not be authorized to publish it, pursuant to the provisions of Article 50 of the American Convention.
4. To submit this case to the Inter-American Court of Human Rights, pursuant to the provisions of Article 51 of the American Convention, if the Government has not implemented the Commission's recommendations within the period of 60 days following the transmittal of this document.

17. The Commission forwarded this report to the State on April 5, 1996, with the request that, within a period of 60 days, it should provide information on the measures adopted to resolve the situation denounced. Although it requested this period to be extended, the State did not submit the required information.

IV. PROCEDURE BEFORE THE COURT

18. In accordance with the decision adopted during its 91st session (supra 16), the Commission filed the application with the Inter-American Court on August 30, 1996 (supra 1). The Court summarizes the facts set out in the application as follows:

a. Efraín Bámaca Velásquez, known as “Comandante Everardo”, formed part of the Revolutionary Organization of the People in Arms (hereinafter "ORPA"), one of the guerrilla groups that made up the URNG; Bámaca Velásquez led this group's Luis Ixmatá Front.
b. Efraín Bámaca Velásquez disappeared on March 12, 1992, after an encounter between the Army and the guerrilla in the village of Montúfar, near Nuevo San Carlos, Retalhuleu, in the western part of Guatemala.
c. Bámaca Velásquez was alive when the Guatemalan armed forces took him prisoner, and “they imprisoned him secretly in several military installations, where they tortured and eventually executed him.”
d. Moreover, the State incurred in denial of justice and concealment, “[by failing to] provide any legal protection or compensation for the crimes perpetrated against Efraín Bámaca [Velásquez] and to adequately investigate his disappearance and death, punishing those responsible.”

19. The Inter-American Commission appointed Carlos Ayala Corao and Claudio Grossman as its delegates before the Court, David J. Padilla and Denise Gilman as advisors, and José E. Pertierra as assistant. In a note of April 7, 1997, the Commission also appointed Viviana Krsticevic, Marcela Matamoros and Francisco Cox as assistants (infra 42). The last two later resigned as assistants in the case.

20. In a note of October 1, 1996, the Court notified the State of the application and its annexes, after these had been examined by the President of the Court (hereinafter "the President").

21. In a communication received by the Court of October 22, 1996, the State appointed Julio Gándara Valenzuela as its agent for the case. On April 15, 1998, and April 7, August 7 and November 13, 2000, the State appointed as its agent, in substitution of the previously named agent, Guillermo Argueta Villagrán, José Briz Gutiérrez, Enrique Barascout and Jorge Mario García Laguardia, respectively.

22. On October 31, 1996, the State filed its brief with preliminary objections, owing to the alleged failure to exhaust remedies under domestic law.

23. On January 6, 1997, the State presented its answer to the application in which it stated that “it recognize[d] its international human rights responsibility in this case, since it had not been possible, up until this moment, for the competent instances, to identify the persons or person criminally responsible for the unlawful acts that were the subject of the application”. Furthermore, it requested that “it should be considered that the international human rights responsibility of the Government of Guatemala has been recognized with regard to the facts outlined under numeral II of the application”. Moreover, Guatemala requested a period of six months in order to reach an agreement on reparations with the Inter-American Commission, after the heirs had been determined, in accordance with the domestic law of Guatemala. Should no agreement be reached, it requested the Court to open the reparations stage. Lastly, it advised that “[t]his recognition [did] not imply that domestic remedies had been exhausted, since the case [was still] open under the Guatemalan legal system.”

24. On January 20, 1997, the State sent a note clarifying the document answering the application as follows:

[t]he Government of the Republic of Guatemala accepts the facts set out in numeral II of the application in the case of Efraín Bámaca Velásquez, inasmuch as it has still not been possible to identify the persons or person criminally responsible for the unlawful acts against Mr. Bámaca [Velásquez] and, thus, clarify his disappearance, with the reservation as regards the Commission's statement in numeral II, subparagraph 2, because, it has not been possible to confirm the circumstances of the disappearance of Mr. Bámaca [Velásquez] under the domestic proceeding.

25. On January 28, 1997, the Commission submitted its observations and affirmed that, since the State had recognized its international responsibility with regard to "its duty to 'guarantee' (prevent, investigate and punish)", this point was not in dispute and, it was necessary to proceed to the reparations stage in that regard. It also requested clarification as to whether the State had withdrawn the preliminary objection that it had filed.

26. In a note of January 28, 1997, the Court requested the State to forward its observations to the Commission's communication (supra 25) as soon as possible. On April 7, 1997, the Commission again requested the Court to clarify whether the State had withdrawn the preliminary objection that it had filed. On April 16, 1997, the State declared that it had recognized "its international responsibility and, therefore, it should be understood that the preliminary objected that it had filed was withdrawn". In an Order of April 16, 1997, the Court deemed "the preliminary objection lodged by the State of Guatemala to have been withdrawn [and ordered] to continue the processing of the merits of the case."

27. In an Order of February 5, 1997, the Court considered that "[f]rom its examination of Guatemalan briefs, [the Court cannot] conclude that the events indicated in the petition have been accepted and, therefore, the case must continue to be heard."

Therefore, the Court decided:

1. To take note of the briefs presented by the Government of the Republic of Guatemala on January 6 and 20, 1997.
2. To continue with the processing of the case.

28. On March 6, 1998, the Commission presented the names of the witnesses and the expert witness who would declare before the Court. Likewise, it requested that "additional evidence be admitted, in accordance with Article 43 of the Rules of Procedure of the Court [because …], when the application in the present case was filed, [there was] a serious impediment to the presentation of this documentary and testimonial evidence". In this brief, the Commission requested that Ulises Noé Anzueto, Marco A. Carías Monzón, Salvador Rubio, Mario E. Ovando, Sergio V. Orozco Orozco, Edwin M. Lemus Vásquez, Héctor René Pérez, Mary Granfield, Mario Sosa Orellana, Michael Charney, Edmund Mullet and Marylin McAfee should be eliminated from the list of witnesses; and that, should any of the other witnesses be unable to appear to give their testimony, they should be substituted by others. Furthermore, it requested

that Otoniel de la Roca Mendoza, Julio Cintrón Gálvez, Acisclo Valladares, Alberto Gómez, Jesús Efraín Aguirre Loarca (known as Major Aguirre), Gregorio Ávila, José Víctor Cordero Cardona and Ismael Salvatierra Arroyo should be called as new witnesses. It also requested that documentation consisting of two declarations sworn before a Notary on February 22, 1998, by Pedro Tartón Jutzuy and Otoniel de la Roca Mendoza, should be admitted as new evidence.

29. In an Order of April 2, 1998, the President invited the Inter-American Commission and the State to a public hearing to be held at the Court, commencing on June 16, 1998, in order to receive the declarations of the witnesses and the expert witnesses proposed by the Commission. The parties were informed that they could present their final oral arguments on the merits of the case immediately after this evidence had been received.

30. On May 15, 1998, the Commission advised that the witness, Otoniel de la Roca Mendoza, was in the United States of America arranging his migratory status, and that "[i]f, for legal reasons, he was unable to travel to San José, Costa Rica, for the public hearing, the Commission [would], at the appropriate time, request that a delegation of the Court be commissioned to take his declaration in the United States", or that the exhibition of a videotape with his testimony should be authorized.

31. On June 11, 1998, the Commission reiterated the possibility that the witness, de la Roca Mendoza, might not be able to attend the public hearing on the merits of the case, and enclosed a copy of a videotape containing the testimony that this witness had provided before the Commission on February 23, 1998. On April 25, 1998, the Commission also forwarded a copy of the report of the Inter-Diocesan Recovery of the Historical Memory Project prepared by the Archbishop of Guatemala's Human Rights Office (hereinafter "the REMHI Report"), and requested that it should be considered supervening evidence in the case. The same day, the Secretariat of the Court (hereinafter "the Secretariat"), following the Court's instructions, forwarded these documents to the State and granted it until June 15, 1998, to present its observations with regard to their admission as evidence. When this period had expired, the State indicated that the videotape with the declaration of de la Roca Mendoza should not be shown, because it would be against the provisions of Articles 41 and 47 of the Rules of Procedure. With regard to the REMHI Report, it indicated that the State "did not object to its incorporation as evidence in this proceeding [...] provided that it is a complete, original version". On June 16, 1998, the Court issued an Order rejecting the Commission's request to show the videotape with the declaration of Otoniel de la Roca Mendoza.

32. On June 9, 1998, following the Court's instructions, the Secretariat requested the Commission and the State to provide "any information they had about the appearance before the Court of the military officers or Acisclo Valladares Molina" in order to be able to locate and notify them. In a note of June 10, 1998, the Commission indicated that it did not have any information about the State officials cited as witnesses. It also stated that the said witnesses should be presented by the State.

33. On June 12, 1998, the State indicated that it had not been notified about a convocation of witnesses, "a fact which [could] not be inferred from the [O]rder of the President of the Court, of April 2, 1998, which exclusively convened the representatives of the Government and the

Commission". It also reiterated "its willingness to facilitate the execution of the summons". Lastly, it indicated that Valladares Molina and Arango Escobar were no longer State officials.

34. On June 12, 1998, the Commission advised that the prosecutor assigned to investigate the Bámaca Velásquez Case in Guatemala, Shilvia Anabella Jerez Romero, had been assassinated on May 20 that year. On July 3, 1998, the State indicated that the facts communicated by the Commission were not related to the case sub judice.

35. On June 16, 17 and 18, 1998, the Court held a public hearing on the merits of the case and, according to the Order issued by the Court, the same day, it received the testimony of the witnesses and the expert witness proposed by the Commission on the facts that are the subject of the application. The Court also heard the final oral arguments of the parties on the merits of the case.

There appeared before the Court:

For the State of Guatemala:

Guillermo Argueta Villagrán, Agent
Alejandro Sánchez Garrido, Advisor; and
Dennis Alonzo Mazariegos, Advisor.

For the Inter-American Commission on Human Rights:

Claudio Grossman, Delegate
Denise Gilman, Advisor, and
Viviana Krsticevic, Assistant.

Witnesses proposed by the Commission:

Santiago Cabrera López
Jennifer Harbury
Julio Arango Escobar
James Harrington
Francis Farenthall
Fernando Moscoso Moller, and
Patricia Davis.

Expert witness proposed by the Commission:

Helen Mack.

Although they had been summoned by the Court, the following witnesses did not appear to declare:

Acisclo Valladares Molina

Federico Reyes López
Stefan Schmidt
Nery Ángel Urízar García
Robert Torricelli
Otoniel de la Roca Mendoza
Julio Cintrón Gálvez
Julio Roberto Alpírez
Mario Ernesto Sosa Orellana
Julio Alberto Soto Bilbao
Rolando Edeberto Barahona
Margarito Sarceño Medrano
Simeón Cum Chutá
Alberto Gómez
"Major" Aguirre
Gregorio Ávila
José Víctor Cordero Cardona, and
Ismael Salvatierra Arroyo.

36. On June 17, 1998, the Commission presented a note from the witness, Robert Torricelli, indicating that he was unable to be present at the public hearing and providing information about the facts of the case.

37. The same day, the Commission requested the Court to require the State to present the following witnesses: Acisclo Valladares Molina, Julio Cintrón Gálvez, Julio Roberto Alpírez, Mario Ernesto Sosa Orellana, Julio Alberto Soto Bilbao, Rolando Edeberto Barahona, Margarito Sarceño Medrano, Simeón Cum Chutá, Alberto Gómez, Major Aguirre, Gregorio Ávila, José Víctor Cordero Cardona and Ismael Salvatierra Arroyo. It also indicated that "it had always made it clear that [the Commission] requested the [presentation] of these witnesses" by the State. It added that, from the Order of the President of April 2, 1998, and from Article 24 of the Rules of Procedure, it can be inferred that "the State has an affirmative responsibility to notify all the witnesses summoned who are under its jurisdiction, and also to facilitate the execution of the summons" by the Court. Lastly, it advised that the presence of the above-mentioned witnesses was "extremely important for the examination of the case". On July 3, 1998, the State declared that, with regard to this note, "the Court [...], in plenary, during the preliminary hearing (sic) convened on June 16, 1998, heard the arguments of the Commission and the State."

38. The same day, the Commission presented documents related to the facts of the case from various United States Government agencies. In an Order of June 19, 1998, the Court decided not to admit these documents, as they were time-barred.

39. On June 30, 1998, the Secretariat, on the Court's instructions, requested the Commission and the State to present any information they had no later than July 15, 1998 that would help locate the witnesses mentioned in the Commission's communication of June 17, 1998. On July 7, 1998, the Commission advised that it had no information for locating these witnesses.

40. On June 30, 1998, the Court requested the State to transmit some documents attached to the application, in accordance with Article 44 of the Rules of Procedure. On July 30, 1998, the State forwarded these documents.

41. In a note of July 3, 1998, the State reiterated its point of view about the witnesses proposed by the Commission (supra 33).

42. On July 31, 1998, the petitioners sent a power of attorney dated June 22, 1998, in favor of the Center for Justice and International Law (hereinafter "CEJIL"). On August 3, 1998, the Commission sent copy of a power of attorney granted by the petitioners to CEJIL, represented by Viviana Krsticevic, on June 19, 1998. On August 21, 1998, the President of the Court requested the Commission to provide certain clarifications about the presentation of the said powers of attorney. In a communication of August 27, 1998, the Commission indicated that the power of attorney of June 22, 1998, replaced that of June 19. On September 9, 1998, the State indicated that, at this stage of the proceeding, the persons named in the power of attorney are not a party, in accordance with the procedure, and that, in any case, the power of attorney had not been granted in accordance with the provisions of Guatemalan legislation, so that "it had the duty to object to the use of legal instruments created in violation of the laws in force in the country."

43. On August 29, 1998, the Court summoned the following witnesses to a public hearing at the seat of the Court on the following November 22: Acisclo Valladares Molina, Julio Cintrón Gálvez, Julio Roberto Alpírez, Mario Ernesto Sosa Orellana, Julio Alberto Soto Bilbao, Rolando Edeberto Barahona, Margarito Sarceño Medrano, Simeón Cum Chutá, Alberto Gómez, Major Aguirre, Gregorio Ávila, José Víctor Cordero Cardona and Ismael Salvatierra Arroyo. The Court requested the State to notify the persons summoned by this Order and instructed the Secretariat that, as soon as it received the addresses and information on how to locate the witnesses, it should send these to the Commission, so that the latter could comply with Article 45 of the Court's Rules of Procedure.

44. On September 1, 1998, the Court convened a public hearing to be held in Washington D.C., United States of America, on October 15, 1998, in order to hear the witnesses, Nery Ángel Urízar García and Otoniel de la Roca Mendoza. The Court commissioned three of its members to take the testimony.

45. On September 30, 1998, the Commission advised that it had notified the summons to the witness, Otoniel de la Roca Mendoza; however, it had not been able to summon Urízar García as it had been unable to find him and, consequently, it reiterated the need to listen to his testimony on videotape. Moreover, it emphasized that the State should have summoned the witnesses who were State officials and "who did not appear in [the] public hearing [in June] and who [...] have had five months to consider and evaluate the public evidence of the other witnesses, most of which had been published in the press, before giving their own evidence."

46. On September 30, 1998, the State sent the addresses of the witnesses who had been summoned (supra 43).

47. On October 2, 1998, the Secretariat requested the State to provide information, before October 30 that year, regarding notification of the Order of August 29, 1998, and to facilitate the appearance before the Court of the witnesses who were State officials at the time of the alleged facts. Likewise, it called on the Commission to provide any information that it had on the witness, Gregorio Ávila, and also about the steps taken towards locating him and complying with the provisions of Article 45 of the Rules of Procedure of the Court. On October 8, 1998, the Commission indicated that "it had no additional information that [would] help locate the witness."

48. On October 15, 1998, a public hearing was held in Washington D.C., United States, for which the Court commissioned the following judges:

Judge Hernán Salgado Pesantes, President
Judge Antônio A. Cançado Trindade, Vice-President; and
Judge Alirio Abreu Burelli.

There appeared before them:

For the State of Guatemala:

Guillermo Argueta Villagrán, Agent
Marta Altolaguirre Larraondo, Advisor; and
Dennis Alonzo Mazariegos, Advisor.

For the Inter-American Commission on Human Rights:

Claudio Grossman, Delegate
Denise Gilman, Advisor
Elizabeth Abi-Mershed, Advisor
Viviana Krsticevic, Assistant; and
Raquel Aldana-Pindell, Assistant.

Witness proposed by the Commission:

Otoniel de la Roca Mendoza.

Although the Court had summoned him as a witness, Nery Ángel Urízar García, also proposed by the Commission, did not appear.

49. During the public hearing (supra 48), the Inter-American Commission presented a copy of the identity document of Cristóbal Che Pérez (infra 91.C).

50. On October 26, 1998, the Secretariat sent the State the summonses for the witnesses convened by the Court for the following November 22. On October 30, 1998, the State sent the records of the notification of the said witnesses, except for those of Julio Roberto Alpírez and Gregorio Ávila. On November 19, 1998, the State sent the record of the notification of Alpírez.

51. On October 30, 1998, the Commission presented the address of Gregorio Ávila. On November 2, 1998, the Secretariat sent the State the address and the summons for Ávila so that it could follow the same steps as in the previous cases. On November 9, 1998, the State indicated that it had tried to locate and notify Gregorio Ávila, but this had not been possible. The Secretariat requested the Commission to send any additional information about the identity of this witness.

52. On October 30, 1998, Acisclo Valladares Molina informed the Court of his willingness to attend the public hearing for which he had been summoned (supra 43).

53. On November 5 and 18, 1998, Cintrón Gálvez, a witness summoned in this proceeding, stated his position about his participation in the public hearing of the following November 22, and also about the case in general. On November 23, 1998, the Secretariat informed Cintrón Gálvez that the inter-American system did not provide for the participation of third parties.

54. On November 22 and 23, 1998, a public hearing on the merits of this case was held at the seat of the Court, when the testimonies offered by the Commission were received and the final oral arguments of the parties were heard.

There appeared before the Court:

For the State of Guatemala:

Guillermo Argueta Villagrán, Agent
Marta Altolaguirre Larraondo, Advisor
Alejandro Sánchez Garrido, Advisor; and
Dennis Alonzo Mazariegos; Advisor

For the Inter-American Commission on Human Rights:

David Padilla, Deputy Executive Secretary
Denise Gilman, Advisor
Viviana Krsticevic, Assistant; and
Raquel Aldana-Pindell, Assistant

Witnesses proposed by the Commission:

Mario Ernesto Sosa Orellana
Acisclo Valladares Molina
Ismael Salvatierra Arroyo
Luis Alberto Gómez Guillermo
Jesús Efraín Aguirre Loarca
Simeón Cum Chutá; and
Julio Alberto Soto Bilbao.

Although they had been summoned by the Court, the following witnesses, proposed by the Commission, did not appear to give their statements:

Rolando Edeberto Barahona
Margarito Sarceño Medrano
Julio Cintrón Gálvez
Julio Roberto Alpírez
Gregorio Ávila; and
José Víctor Cordero Cardona.

55. During the public hearing held on November 22, 1998, the State presented a copy of a certificate issued by the Civil Registry of Nuevo San Carlos, Department of Retalhuleu, on October 26, 1998, and copy of a letter of November 20, 1998, signed by Julio Roberto Alpírez.

56. On December 4, 1998, the State offered as evidence the documents mentioned by four of the witnesses during the public hearing of November 22 and 23, 1998. On December 11, 1998, the Secretariat informed the State that some of the documents offered were illegible or incomplete. On January 26, 1999, the Secretariat again requested the missing documents. On February 1 and March 18, 1999, the State sent some of the missing documents. On February 3 and March 23, 1999, the Secretariat indicated to Guatemala that some of the documentation offered was missing. At the time this judgment was issued, the State had not sent any communication in this regard.

57. On December 4, 1998, the Commission stated that the documents contributed by Guatemala at the public hearing of November 22, 1998 (supra 54), were not truly supervening, and that they should have been submitted with the answer to the application; at the same time it pointed out a series of anomalies in these documents.

58. With regard to the last point, on December 10, 1998, the President informed the Commission that, during the public hearing, it had been explained that "any evidence ha[d] to be submitted through the appropriate channels; and, the documents offered had not been delivered to the Secretariat of the Court on that occasion". Moreover, the Commission was informed that, before any document sent by the State was included, it would be forwarded to the Commission so that it could make the pertinent observations. On January 12, 1999, the Commission reiterated the objection set out in its brief of December 4 with regard to the presentation of new evidence, based on the provisions of Article 43 of the Rules of Procedure, and stated that some of the documents presented were certifications made by one of the witnesses, who had not appeared at the public hearings to which he had been summoned

59. On December 21, 1998, the Commission sent two press cuttings on declarations by agents of the State, "in which it was indicated that Mrs. Harbury had requested Guatemala to compensate her with a considerable sum of money."

60. On March 24, 1999, the Commission requested the admission as supervening evidence of the final report of the Commission for the Historical Clarification of the human rights violations and violent acts that have caused suffering to the Guatemalan People (hereinafter "the

Commission for Historical Clarification"), entitled "Guatemala, Memory of Silence" and presented a copy of illustrative case No. 81 in this report.

61. On May 20, 1999, the Commission provided information about an incident involving José León Bámaca Hernández, the alleged victim's father.

62. On August 20, 1999, the Present granted a period of one month, from reception of the transcripts of the public hearings held in this case, for presentation of the final arguments. On August 27 that year, the Commission requested, on the one hand, an extension of one more month for the presentation of its final arguments and, on the other, that the Court should determine the validity of the evidence offered by the State after the statutory time limit had elapsed, with a view to preparing those arguments. On August 30, 1999, the President granted the extension requested until the following October 22. On October 6, 1999, the President indicated that "the Court will evaluate the evidence presented by the parties after the statutory time limit had elapsed when deliberating and adopting the judgment on the merits of this case."

63. On October 22, 1999, the Commission and the State presented their final arguments in the case.

64. On June 27, 2000, the International Commission of Jurists presented an amicus curiae on the right to the truth of the families of victims of forced disappearance.

V. URGENT AND PROVISIONAL MEASURES

65. On June 24, 1998, the Inter-American Commission requested the Court to adopt provisional measures, under the provisions of Article 63(2) of the American Convention and Article 25 of the Rules of Procedure, in favor of Santiago Cabrera López, who had provided testimony in the public hearing on the merits of the case (supra 35). As grounds for its request, it informed the Court that

Cabrera gave testimony [before the Inter-American Court] on facts that clearly involved the responsibility of specific State agents in human rights violations. The State agents involved in these facts have not been prosecuted and are not in prison. Also, they did not appear before the Court although they had been summoned by this body. This situation shows that they act with a freedom that compromises the safety of the said witness. [...] Cabrera lives in Guatemala and immediately after the hearings of the Court returned to his home in that country. [...] Cabrera has requested the Commission to ask the Court to protect his life and personal safety.

66. In an Order of June 30, 1998, the President of the Court called on the State to adopt all necessary measures to ensure the personal safety of Santiago Cabrera López, "so that the Court may examine the pertinence of the provisional measures requested by the Commission."

67. On August 21, 1998, the State presented to the Court the report requested in the Order of the President. In this brief, Guatemala stated that it had adopted measures to find Cabrera López and provide him with security in compliance with the said Order.

68. In a brief of August 25, 1998, the Commission requested the Court to expand the measures adopted in this case in order to provide protection also to Alfonso Cabrera Viagres, María Victoria López, Blanca Cabrera, Carmelinda Cabrera, Teresa Aguilar Cabrera, Olga Maldonado and Carlos Alfonso Cabrera.

69. In an Order of August 29, 1998, the Court adopted provisional measures, ratified the Order of the President of June 30 that year, and requested the State to maintain the necessary measures to protect the life and personal safety of Santiago Cabrera López and to adopt the necessary measures for the protection of Alfonso Cabrera Viagres, María Victoria López, Blanca Cabrera, Carmelinda Cabrera, Teresa Aguilar Cabrera, Olga Maldonado and Carlos Alfonso Cabrera. Furthermore, it called on Guatemala to investigate the facts and to report on the provisional measures it had taken every two months, and on the Inter-American Commission to forward its observations on these reports, within six weeks of receiving them.

70. When this judgment was pronounced, the State and the Inter-American Commission had presented their reports and their observations on these reports, respectively, in accordance with the Order of the Court of August 29, 1998. These provisional measures will be maintained while it is shown that the circumstances of extreme gravity and urgency that justified their adoption persist.

VI. DOMESTIC PROCEEDINGS

71. In continuation, the Court believes it necessary to refer to some domestic proceedings, the examination of which may help clarify the facts of the instant case (infra 121m).

72. On March 13, 1992, a corpse was removed from near the Ixcucua River and an autopsy was performed. The same day, in the presence of the Magistrate of Retalhuleu and of Captain Sosa Orellana, the body was “transferred to the morgue of the general cemetery of the city of Retalhuleu”. The Magistrate of Retalhuleu opened file No. 395-92 and examined the body that had been found. The description detailed features similar to those of Bámaca Velásquez. However, the autopsy that had been performed provided details of the dead man that did not coincide with either the physical characteristics of Efraín Bámaca Velásquez or with the cause of his death [FN2].

[FN2] Cf. Transcript of the reports of the Magistrate and the autopsy, which appear in case file No. 395-92, given to Jennifer Harbury on August 23, 1993, Annex 4; testimony of Patricia Davis, given to the Court on August 24, 1993, Annex 5; testimony of Nery Ángel Urízar García, given to the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; final report of the Ombudsman in the special pre-trial investigation procedure, December 9, 1994, Annex 16; letter of May 11, 1992, from Ramiro de León Carpio, Ombudsman, to Villagrán Muñoz; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Jennifer Harbury, given to the Court on June 16, 1998; and testimony of Julio Arango Escobar, given to the Court on June 17, 1998.

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73. Through investigations conducted in 1992, Ramiro de León Carpio, at that time Ombudsman, discovered that the remains of Bámaca Velásquez might be buried in an XX grave in Retalhuleu. On May 20, 1992, the Second Criminal Trial Judge of Retalhuleu ordered the exhumation of the said body. However, the procedure was cancelled owing to the intervention of the Attorney General, Acisclo Valladares Molina, who arrived at the site accompanied by about 20 members of the armed forces and questioned the legality of the exhumation [FN3].

[FN3] Cf. Final report of the Ombudsman en the special pre-trial investigation procedure, December 9, 1994, Annex 16; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of James Harrington, given to the Court on June 17, 1998; testimony of Francis Farenthall, given to the Court on June 17, 1998; testimony of Acisclo Valladares, given to the Court on November 22, 1998; and letter of May 11, 1992 from Ramiro de León Carpio, Ombudsman, to Francisco Villagrán Muñoz.

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74. On April 24, 1992, the URNG sent a note to the Ombudsman, informing him that the member of the guerrilla who had been killed in combat and buried in the Retalhuleu cemetery was not Efraín Bámaca Velásquez. In this note, it assured that Bámaca Velásquez had been captured alive, detained clandestinely and tortured to obtain information. On May 11, 1992, the Ombudsman replied to the URNG, providing a detailed description of the body that had been buried in Retalhuleu, which coincided with the characteristics of Bámaca Velásquez [FN4].

[FN4] Cf. Note of April 24, 1992 from the URNG to the Ombudsman; note of May 11, 1992, from the Ombudsman to the URNG; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; and testimony of Jennifer Harbury, given to the Court on June 16, 1998.

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75. Based on the statements of the witness, Santiago Cabrera López, the Guatemalan Human Rights Commission and Jennifer Harbury filed a petition for habeas corpus in favor of Bámaca Velásquez against the President of the Republic, in his capacity as Commander in Chief of the Army, and the Minister of National Defense, on February 22, 1993. On the following February 25 and 26, in file No. 14/93, the Supreme Court of Justice declared that this was without merit because the victim had not been found, and "immediately order[ed] the appropriate investigation, and that all relevant information should be officially forwarded to a competent court". On March 11, 1993, the President of the Supreme Court of Justice indicated that "current mechanisms for habeas corpus procedures are inadequate for conducting an effective investigation under petitions for habeas corpus", and suggested that there was a need "to undertake a thorough reform of justice in Guatemala." [FN5]

[FN5] Cf. Decisions of the Supreme Court of Justice of February 25 and 26, 1993, in file No. 14/93, Annex 23; letter of March 11, 1993, from Juan José Rodil Peralta, President of the Supreme Court of Justice, to the members of the Board of the Guatemalan Human Rights Commission, Annex 24; and testimony of Jennifer Harbury, given to the Court on June 16, 1998.

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76. On August 17, 1993, the Second Criminal Trial Court Judge of Retalhuleu again ordered an exhumation to be held to determine whether the body removed from the banks of the Ixcucua River on March 13, 1992, (infra 86 and 93.C.b) was that of Bámaca Velásquez. The corpse exhumed on August 17, 1993, coincided with the description in the report of the autopsy performed in March 1992, but not with the physical characteristics of Bámaca Velásquez [FN6].

[FN6] Cf. Transcript of the reports of the Magistrate and the autopsy that appear in case file No. 395-92, given to Jennifer Harbury on August 23, 1993, Annex 4; testimony of Patricia Davis, of August 24, 1993, Annex 5; judicial record of the exhumation at Retalhuleu, August 17, 1993, Annex 6; report of the forensic expert, Michael Charney, to the Second Criminal Trial Court of Retalhuleu, August 18, 1993, Annex 7; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Fernando Moscoso, given to the Court on June 17, 1998; and testimony of Patricia Davis, given to the Court on June 18, 1998.

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77. Based on a complaint by Jennifer Harbury, the Office of the Ombudsman opened file GUA 12-93/DI in January 1994; and in this it placed her testimony together with that of Santiago Cabrera López and Jaime Adalberto Agustín Recinos, the last two on videotape [FN7].

[FN7] Cf. Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16.

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78. On June 1, 1994, the Attorney General filed a petition for habeas corpus in favor of Efraín Bámaca Velásquez against the President of the Republic, the Minister of the Interior, the Minister of Defense, the Director General of the National Police Force and Guatemalan police and military authorities [FN8]. On September 1, 1994, the Supreme Court of Justice declared the petition for habeas corpus without merit (infra 80) because, on the one hand, the Ministry of Defense, the Directorate of the National Police Force and the Directorate of the Treasury Police advised that "they had not received any judicial order for the detention of [Efraín Bámaca Velásquez]" and, on the other, visits to public prisons, military posts and substations of the National Police Force had yielded negative results [FN9].

[FN8] Cf. Decision of September 1, 1994, of the Supreme Court of Justice, in file No. 82/94, Annex 25; complaint presented before the Public Ministry on October 21, 1994, by the Attorney

General, Acisclo Valladares Molina, Annex 27; and Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51.
[FN9] Cf. Decision of September 1, 1994 of the Supreme Court of Justice in file No. 82/94, Annex 25; complaint submitted to the Public Ministry by the Attorney General, Acisclo Valladares Molina, on October 21, 1994, Annex 27; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; and testimony of Acisclo Valladares Molina, given to the Court on November 22, 1998.
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79. On October 27, 1994, as a result of Jennifer Harbury's hunger strike (infra 93.C.b), the President of the Republic announced that a new investigation would be conducted to discover the whereabouts of Bámaca Velásquez and appointed the Permanent Representative of Guatemala to the Organization of American States (hereinafter "OAS") to head a special committee that would be in charge of this [FN10].

[FN10] Cf. Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; and letter of March 13, 1995, from the Government to the Inter-American Commission.
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80. On October 31, 1994, the Attorney General submitted a complaint before the Prosecutor General and the Public Ministry to initiate a criminal action on the disappearance of Bámaca Velásquez. On the same day, the Prosecutor General filed a petition for habeas corpus in the name of Efraín Bámaca Velásquez and 38 other persons who had allegedly been detained clandestinely. On November 2 that year, the Supreme Court of Justice appointed the Second Judge of the Criminal, Narco-activity and Crimes against the Environment Trial Court of Coatepeque, Quetzaltenango, to head the corresponding investigation. In the context of this investigation, Harbury testified before the said court the following day [FN11]. The same day, the prosecutor informed Jennifer Harbury that the following day, a body that it was believed, corresponded to Bámaca Velásquez would be exhumed. On November 4, 1994, the exhumation was postponed until the following November 10. That day, two young men who had died from shots in the head were exhumed; they did not correspond to the remains of Bámaca Velásquez [FN12].

[FN11] Cf. Complaint submitted to the Public Ministry by the Attorney General, Acisclo Valladares Molina, on October 21, 1994, Annex 27; decision of the Supreme Court of Justice of Guatemala of November 2, 1994, Annex 28; statement by Jennifer Harbury, submitted to the Inter-American Commission on December 20, 1995, Annex 46; official record of the interview with Jennifer Harbury of November 3, 1994, in the Public Ministry, Annex 47; questions for the interview with the Attorney General, Acisclo Valladares Molina, October 31, 1994, Annex 48; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Acisclo Valladares, given to the Court on November 22, 1998; and letter of March 13, 1995, from the Government to the Inter-American Commission.

[FN12] Cf. Statement by Jennifer Harbury, submitted to the Inter-American Commission on December 20, 1995, Annex 46; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; and testimony of Fernando Moscoso Moller, given to the Court on June 17, 1998.

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81. Since the petition for habeas corpus presented by the Attorney General had been declared without merit on June 1, 1994 (supra 78), on October 30, 1994, the said Attorney General requested the Supreme Court of Justice to order a special pre-trial investigation procedure - a procedure introduced with the reform of the Criminal Procedural Code. On November 8, 1994, the Supreme Court of Justice ordered the Ombudsman to open the special pre-trial investigation procedure in order to establish the whereabouts of Efraín Bámaca Velásquez [FN13]. On December 2, 5, 6 and 7, 1994, in the course of procedure No. I-94, the members of the armed forces who were allegedly connected to the death Bámaca Velásquez were questioned, and they declared that they knew nothing about the facts [FN14]. In his report of December 9, 1994, the Ombudsman established that, except for one or two who were on duty at Santa Ana Berlín, most of the members of the armed forces who had been questioned were serving in Military Zone No. 18 in San Marcos at the time of the facts, that none of them knew Efraín Bámaca Velásquez, and that none of them took part in an armed encounter on the day of the facts. According to this report, during the investigation, inspections, random visits and inquiries were carried out "without prior warning, simultaneously and unexpectedly" in military and police centers. However, the whereabouts of Bámaca Velásquez could not be established, nor was it possible "to determine whether he is alive or dead at this time," [FN15]. On March 16, 1995, when the procedure had been completed, the Supreme Court of Justice forwarded the case file to the Office of the Prosecutor General so that "it could continue with the investigations." [FN16]

[FN13] Cf. Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Acisclo Valladares Molina, given to the Court on November 22, 1998; Report of the Commission for Historical Clarification Tome VII; and letter of March 13, 1995, from the Government to the Inter-American Commission.

[FN14] Cf. Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; testimony of Mario Ernesto Sosa Orellana given to the Court on November 22, 1998; and letter of March 13, 1995, from the Government to the Inter-American Commission.

[FN15] Cf. Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; letter of March 13, 1995, from the Government to the Inter-American Commission; and Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51.

[FN16] Cf. Letter of March 13, 1995, from the Government to the Inter-American Commission; and decision of the Public Ministry of March 23, 1995, Annex 29.

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82. On November 29, 1994, the Attorney General commenced an action for jactitation against Jennifer Harbury. Under this procedure, the latter was given 15 days to make the corresponding complaint or, to the contrary, cease to hold the armed forces responsible for a determined conduct. On December 2, 1994, the Court prohibited Jennifer Harbury from leaving Guatemala for the duration of the proceeding; this prohibition was lifted 10 days later [FN17]. On January 26, 1995, the Sixth Civil Trial Court declared itself incompetent in the action for jactitation, because this legal figure only applies to cases of disputes relating to property [FN18].

[FN17] Cf. Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Acisclo Valladares, given to the Court on November 22, 1998; and letter of the Government to the Inter-American Commission of March 13, 1995.

[FN18] Cf. Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; letter of March 13, 1995, from the Government to the Inter-American Commission; testimony of Jennifer Harbury, given to the Court on June 16, 1998; and testimony of Acisclo Valladares, given to the Court on November 22, 1998.

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83. On March 29, 1995, the President of the Republic, Ramiro de León Carpio, declared that, when he assumed the Presidency, Bámaca Velásquez was already dead and that he was not illegally imprisoned or detained [FN19].

[FN19] Cf. Report on the press conference of Ramiro de León Carpio of March 29, 1995, Annex 42.

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84. On March 23, 1995, the Office of the Prosecutor General incorporated various statements made during proceeding No. I-94 (supra 81), under proceeding No. 2566-94, which was being processed before the First Criminal, Narco-Activity and Crimes against the Environment Trial Court of Guatemala. On March 28, 1995, this Court declared itself incompetent because the proceeding related to crimes or common misdemeanors committed by members of the armed forces, and forwarded the file to the Retalhuleu Military Trial Court [FN20].

[FN20] Cf. Decision of the Public Ministry of March 23, 1995, Annex 29; decision of the Criminal, Narco-activity and Crimes against the Environment Trial Court of Guatemala of March 28, 1995, Annex 30; and Report of the Commission for Historical Clarification, Tome VII.

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85. On April 5 and 10, 1995, the Retalhuleu Military Trial Court dismissed the case opened against 13 members of the armed forces, because it considered that statements made in the testimony of Santiago Cabrera López about the crimes of “illegal detention, homicide, assassination, light injuries, serious injuries, very serious injuries, coercion, threats, crimes

against the obligations of humanity, abuse of authority and abuse against individuals", to the detriment of Bámaca Velásquez, had not been proved [FN21]. The representative of the Public Ministry filed a complaint appeal against the Retalhuleu Military Trial Court. On July 17, 1995, the Eleventh Chamber of the Appeals Court of Retalhuleu convened in Court Martial, declared that the Military Trial Court Judge "had committed a substantial error, violating essential formalities of the proceeding", invalidated the statements of Julio Roberto Alpírez, Julio Alberto Soto Bilbao and Ulises Noé Anzueto Girón, and annulled the notifications of the decisions pronounced in the proceeding [FN22]. On November 22, 1995, the same Eleventh Chamber of the Appeals Court of Retalhuleu convened in Court Martial revoked the decision of the Retalhuleu Military Trial Court because "the necessary juridical presumptions that would justify the dismissal that was granted d[id] not exist, and also the examination of the crimes under investigation [...] had not been concluded"; it therefore returned the case file to the said Court [FN23].

[FN21] Cf. Decision of April 10, 1995, of the Military Trial Court of Retalhuleu, Annex 52; decision of April 5, 1995, of the Military Trial Court of Retalhuleu, Annex 53; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Simeón Cum Chutá, given to the Court on November 23, 1998; and testimony of Julio Alberto Soto Bilbao, given to the Court on November 23, 1998.

[FN22] Cf. Decision of July 17, 1995, of the Eleventh Chamber of the Appeals Court of Retalhuleu, convened in Court Martial, Annex 54.

[FN23] Cf. Decisions of November 22, 1995 del Eleventh Chamber of the Appeals Court of Retalhuleu, convened in Court Martial, Annex 55.

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86. In June that year, the Retalhuleu Military Trial Court, contradicting the statements made by the forensic experts, and presuming that the corpse found on the banks of the Ixcucua River corresponded to Bámaca Velásquez, ordered the latter's death to be officially recorded in the Registry Office of the Municipality of Nuevo San Carlos, Retalhuleu [FN24].

[FN24] Cf. Death certificate of Efraín Bámaca Velásquez; and Report of the Commission for Historical Clarification, Tome VII.

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87. On December 5, 1995, the Military Trial Court declared that the case was without merit and decreed the corresponding simple liberty of the members of the armed forces under investigation, based on the same arguments that had been established previously (supra 86) and adding that the death of Bámaca Velásquez had been recorded in the Registry Office [FN25].

[FN25] Cf. Decisions of the Military Trial Court of Retalhuleu of December 5, 1995, Annex 56.

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88. On May 7, 1995, Julio Arango Escobar was appointed special prosecutor in the Bámaca Velásquez Case. At that time, a stay of proceedings had been pronounced for the members of the armed forces who were allegedly involved. The special prosecutor appealed the stay of proceedings before the Retalhuleu Appeals Chamber and was able to have it annulled. Furthermore, he tried to have Jennifer Harbury included as private prosecutor in the proceeding, but was unsuccessful [FN26]. In June 1995, the United States Government provided Arango Escobar with information indicating that the remains of Bámaca Velásquez were buried in the military detachment of Las Cabañas, in the village of La Montañita, Municipality of Tecún Umán, Department of San Marcos. Based on this information, the special prosecutor took the necessary steps to conduct an exhumation [FN27]. At the beginning of June 1995, the Second Judge of the Criminal, Narco-activity and Crimes against the Environment Trial Court of Coatepeque, Quetzaltenango, authorized the exhumation in Las Cabañas [FN28]. On June 13, 1995, on being informed of the measure that was planned, the Commander in charge of the Las Cabañas military detachment declared that his superiors had not give him permission to authorize it [FN29]. The following day, the legal representative of the Ministry of Defense stated that some of the legal requirements for conducting the exhumation procedure had not been fulfilled and also, that the Bámaca Velásquez Case had to be transferred to the jurisdiction of the Commission for Historical Clarification, in accordance with declarations of the President of the Republic [FN30]. On June 19, 1995, as a result of the appeal filed by Colonel Julio Roberto Alpírez, the Second Criminal, Narco-Activity and Crimes against the Environment Trial Court of Coatepeque, Quetzaltenango, suspended the exhumation that was going to be conducted in Las Cabañas until the appeals court had made a decision [FN31].

[FN26] Cf. Testimony of Julio Arango Escobar of June 17, 1998; and newspaper article, “El fiscal Arango Escobar se retira del caso Bámaca Velásquez”, Prensa Libre, June 27, 1995, Annex 31.

[FN27] Cf. Testimony of Jennifer Harbury of June 16, 1998; and testimony of Julio Arango Escobar, given to the Court on June 17, 1998.

[FN28] Cf. Newspaper article, “Frustrado nuevo intento para exhumar cadáver de Bámaca Velásquez”, Prensa Libre, July 7, 1995, Annex 41; and testimony of Julio Arango Escobar, given to the Court on June 17, 1998.

[FN29] Cf. Forensic Anthropology Team. Preliminary Report. Forensic studies in the investigation proceedings on the Efraín Bámaca Velásquez Case, Annex 40; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Julio Arango Escobar, given to the Court on June 17, 1998; and testimony of Fernando Moscoso Moller, given to the Court on June 17, 1998.

[FN30] Cf. Newspaper article, “Exhumation of Bámaca Velásquez suspended due to insufficient time”, NOTIMEX, June 16, 1995, Annex 39; Forensic Anthropology Team. Preliminary Report. Forensic studies in the investigation proceedings of the Efraín Bámaca Velásquez Case, Annex 40; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Julio Arango Escobar, given to the Court on June 17, 1998; and testimony of Fernando Moscoso Moller, given to the Court on June 17, 1998.

[FN31] Cf. Decision of June 19, 1995, of the Second Criminal, Narco-Activity and Crimes against the Environment Trial Court, Annex 37; newspaper article, “Frustrado nuevo intento para

exhumar cadáver de Bámaca Velásquez", Prensa Libre, July 7, 1995, Annex 41; and testimony of Julio Arango Escobar, given to the Court on June 17, 1998.

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89. Between May and August 1995, Arango Escobar received pressure and threats and attempts were made on his life because he was acting as special prosecutor in the Bámaca Velásquez Case. In particular, he was followed, fired at in his workplace and received telephone threats. On August 2, 1995, Arango Escobar resigned from the position of special prosecutor in the case [FN32].

[FN32] Cf. Newspaper article, "El fiscal Arango Escobar se retira del caso Bámaca Velásquez", Prensa Libre, June 27, 1995, Annex 31; Report of the Ombudsman of June 27, 1995, Annex 32; bulletin of the Guatemalan Human Rights Commission of June 24, 1995, Annex 33; newspaper article, "Arango se excusa de seguir caso Bámaca Velásquez", El Gráfico, August 2, 1995, Annex 34; testimony of Julio Arango Escobar, given to the Court on June 17, 1998; and Report of the Commission for Historical Clarification, Tome VII.

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90. In February 1998, the new special prosecutor for the case, Shilvia Anabella Jerez Romero, requested that an exhumation procedure be conducted in the Las Cabañas military detachment. However, this procedure was not carried out [FN33].

[FN33] Cf. Testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Julio Arango Escobar, given to the Court on June 17, 1998; and testimony of Fernando Moscoso Moller, given to the Court on June 17, 1998.

VII. EVIDENCE

A) DOCUMENTARY EVIDENCE

91. The Commission presented documentation on:

a) the practice of the detention and use of former guerrillas by the Guatemalan Army [FN34];
b) the detention, torture and extrajudicial disappearance of Bámaca Velásquez [FN35];
c) the autopsy and the exhumations conducted in the Bámaca Velásquez Case in Guatemala [FN36];
d) the petitions for habeas corpus filed in favor of Bámaca Velásquez [FN37];
e) the other judicial proceedings conducted to determine the whereabouts of Bámaca Velásquez, and also those responsible for the facts [FN38];
f) the marriage of Efraín Bámaca Velásquez and Jennifer Harbury, the proceedings to obtain its recognition and the process of jactitation [FN39];

g) the steps taken by Jennifer Harbury to determine the whereabouts of Bámaca Velásquez [FN40];
h) the representation [FN41] of Jennifer Harbury and the next of kin of Bámaca Velásquez in the proceeding before the inter-American system;
i) the declarations on compensation made by Jennifer Harbury [FN42]; and
j) the alleged attacks and threats against various persons connected with the Bámaca Velásquez Case [FN43].

[FN34] Cf. Testimonies of Santiago Cabrera López, given to the Inter-American Commission on Human Rights and to the Office of the Guatemalan Prosecutor General, Annexes 1, 2 and 3; Watson, F. Alexander, "U.S. Policy Toward Guatemala: The Cases of Michael Devine and Efraín Bámaca." Statement before the Senate Select Committee on Intelligence Washington, D.C., April 5, 1995. Published in U.S. State Department Dispatch. Vol. 6, No. 6, April 17, 1995, Annex 8; testimony of Nery Ángel Urízar García, given to the Inter-American Commission on Human Rights on September 8, 1995, and recorded on videotape, Annex 9; testimony of Nery Ángel Urízar García, given to the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; supplementary statement by Nery Ángel Urízar García to the special prosecutor, Julio Eduardo Arango Escobar, Public Ministry, May 24, 1995, Annex 12; Report of the U.S. Department of Defense, November 1994, Annex 15; statement sworn before a Notary with the testimony of Pedro Tartón Jutzuy "Arnulfo", of February 23, 1998; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo", of February 24, 1998; testimony of Otoniel de la Roca Mendoza, to the Inter-American Commission on Human Rights, on February 23, 1998, and recorded on videotape; Report of the Commission for Historical Clarification, Tome VII; and letter of the U.S. Senator, Robert Torricelli, of June 17, 1998.

[FN35] Cf. Testimonies of Santiago Cabrera López given to Inter-American Commission on Human Rights and to the Office of the Guatemalan Prosecutor General, Annexes 1, 2 and 3; Watson, F. Alexander, "U.S. Policy Toward Guatemala: The Cases of Michael Devine and Efraín Bámaca". Statement before the Senate Select Committee on Intelligence Washington, D.C., April 5, 1995. Published in U.S. State Department Dispatch. Vol. 6, No. 6, April 17, 1995, Annex 8; testimony of Nery Ángel Urízar García, given to the Inter-American Commission on Human Rights on September 8, 1995, and recorded on videotape, Annex 9; testimony of Nery Ángel Urízar García, given to the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; supplementary statement by Nery Ángel Urízar García given to the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 24, 1995, Annex 12; transcript of the State Department daily information meeting, by Christine Shelly, Federal News Service, of November 14, 1994, Annex 13; cable of the U.S. Central Intelligence Agency (hereinafter "CIA") to the U.S. State Department of March 18, 1992, Annex 14; report of the U.S. Department of Defense, November 1994, Annex 15; Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; letter from Representative Robert Torricelli to President William Clinton, of March 22, 1995, Annex 17; CIA report of January 25, 1995, Annex 18; United States intelligence information of January 1995 presented in response to a request under the U.S. Freedom of Information Act, Annex 35; letter of May 23, 1995 from Anne W. Patterson, Deputy Under-Secretary of the U.S. State Department to Jennifer Harbury, Annex 38; report on the press

conference of Ramiro de León Carpio of March 29, 1995, Annex 42; document of the U.S. Department of Defense, July 1995, Annex 44; CIA report of March 7, 1995, Comments of the Guatemalan Ministry of Defense, Annex 50; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; statement sworn before a Notary with the testimony of Pedro Tartón Jutzuy "Arnulfo", of February 23, 1998; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo", of February 24, 1998; testimony of Otoniel de la Roca Mendoza to the Inter-American Commission on Human Rights on February 23, 1998, recorded on videotape; Report of the Commission for Historical Clarification, Tome VII; REMHI Report Tome II; letter from the U.S. Senator, Robert Torricelli, of June 17, 1998; and letter of May 11, 1992, from Ramiro de León Carpio, Ombudsman, to Francisco Villagrán Muñoz.

[FN36] Cf. Transcripts of the reports of the Magistrate and the autopsy that appear in case file No. 395-92 given to Jennifer Harbury on August 23, 1993, Annex 4; written testimony of Patricia Davis of August 24, 1993, Annex 5; judicial record of the exhumation in Retalhuleu on August 17, 1993, Annex 6; report of the forensic expert, Michael Charney, to the Second Criminal Trial Court of Retalhuleu, August 18, 1993, Annex 7; Watson, F. Alexander, "U.S. Policy Toward Guatemala: The Cases of Michael Devine and Efraín Bámaca". Statement before the Senate Select Committee on Intelligence Washington, D.C., April 5, 1995. Published in U.S. State Department Dispatch. Vol. 6, No. 6, April 17, 1995, Annex 8; testimony of Nery Ángel Urízar García to the Inter-American Commission on Human Rights of September 8, 1995, recorded on videotape, Annex 9; testimony of Nery Ángel Urízar García given to the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; identity document of Cristóbal Che Pérez, Annex 11; supplementary statement by Nery Ángel Urízar García given to the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 24, 1995, Annex 12; Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; memorandum by Alexander F. Watson of the U.S. State Department of November 4, 1994, Annex 26; decision of the Second Criminal Narco-Activity and Crimes against the Environment Trial Court, Annex 37; newspaper article, "Exhumation of Bámaca Suspended Due to insufficient time", NOTIMEX, June 16, 1995, Annex 39; Forensic Anthropology Team. Preliminary Report. Forensic studies in the investigation proceedings on the Efraín Bámaca Velásquez Case, Annex 40; Newspaper article, "Frustrado nuevo intento para exhumar cadáver de Bámaca", Prensa Libre, July 7, 1995, Annex 41; statement by Jennifer Harbury to the Inter-American Commission on December 20, 1995, Annex 46; record of interview of Jennifer Harbury of November 3, 1994, in the Public Ministry, Annex 47; CIA report of March 7, 1995; comments of the Guatemalan Ministry of Defense, Annex 50; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; and Report of the Commission for Historical Clarification, Tome VII.

[FN37] Cf. Decisions of February 25 and 26, 1993 of the Supreme Court of Justice in file No. 14/93, Annex 23; letter of March 11, 1993, from Juan José Rodil Peralta, President of the Supreme Court of Justice, to the members of the Board of the Guatemalan Human Rights Commission Annex 24; and decision of September 1, 1994, of the Supreme Court of Justice in file No. 82/94, Annex 25.

[FN38] Cf. Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; Decision of August 11, 1993, of the Second Trial Court of Retalhuleu, Annex 21; decision of February 28, 1995 of the Second Trial Court of Retalhuleu,

Annex 22; complaint presented before the Public Ministry on October 21, 1994, by the Attorney General, Acisclo Valladares Molina, Annex 27; decision of the Supreme Court of Justice of Guatemala of November 2, 1994, Annex 28; decision of the Public Ministry of March 23, 1995, Annex 29; decision of the Criminal, Narco-activity and Crimes against the Environment Trial Court of Guatemala of March 28, 1995, Annex 30; U.S. intelligence information of January 1995, presented in response to a request under the U.S. Freedom of Information Act, Annex 35; Newspaper article, "Abogado de Harbury se reunió ayer con diplomáticos and testigo en la OEA", Prensa Libre, October 4, 1994, Annex 45; statement by Jennifer Harbury to the Inter-American Commission, on December 20, 1995, Annex 46; questions for Jennifer Harbury in the interview with the Attorney General, Acisclo Valladares Molina, October 31, 1994, Annex 48; decisions of April 6 and 10, 1995, of the Military Trial Court of Retalhuleu, Annex 52; decision of April 5, 1995, of the Military Trial Court of Retalhuleu, Annex 53; decision of July 17, 1995, of the Eleventh Chamber of the Appeals Court of Retalhuleu, convened in Court Martial, Annex 54; decisions of November 22, 1995, of the Eleventh Chamber of the Appeals Court of Retalhuleu, convened in Court Martial, Annex 55; and decisions of the Military Trial Court of Retalhuleu of December 5, 1995, Annex 56.

[FN39] Cf. Declaration and record of marriage in Travis Country, Texas, United States of America, on June 22, 1993, Annex 19; judgment of May 23, 1996, of the Second Trial Court of San Marcos, issued as an amparo tribunal, Annex 20; decision of August 11, 1993, of the Second Trial Court of Retalhuleu, Annex 21; decision of February 28, 1995, of the Second Trial Court of Retalhuleu, Annex 22; record of the interview with Jennifer Harbury of November 3, 1994, in the Public Ministry, Annex 47; CIA report of March 7, 1995, comments of the Guatemalan Ministry of Defense, Annex 50; and Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51.

[FN40] Cf. Watson, F. Alexander, "U.S. Policy Toward Guatemala: The Cases of Michael Devine and Efraín Bámaca". Statement before the Senate Select Committee on Intelligence Washington, D.C., April 5, 1995. Published in U.S. State Department Dispatch. Vol. 6, No. 6, April 17, 1995, Annex 8; memorandum by Alexander F. Watson of the U.S. State Department of November 4, 1994, Annex 26; letter of May 23, 1995, from Anne W. Patterson, Deputy Under-Secretary of the U.S. State Department to Jennifer Harbury, Annex 38; report on the press conference of Ramiro de León Carpio of March 29, 1995, Annex 42; Newspaper article, "Abogado de Harbury se reunió ayer con diplomáticos and testigo en la OEA", Prensa Libre, October 4, 1994, Annex 45; statement by Jennifer Harbury to the Inter-American Commission on December 20, 1995, Annex 46; questions for Jennifer Harbury in the interview with the Attorney General, Acisclo Valladares Molina, October 31, 1994, Annex 48; Newspaper article, "La batalla pacífica de la esposa del guerrillero", October 30, 1994, Annex 49; and CIA report of March 7, 1995, Comments of the Guatemalan Ministry of Defense, Annex 50.

[FN41] Cf. Statement sworn before a Notary on September 9, 1996, by Carmen Camey, Human Rights Commission, appointing José E. Pertierra as her representative; Statement sworn before a Notary by Jennifer Harbury; letter of March 2, 1997, from Jennifer Harbury; special power of attorney by which the next of kin of Bámaca Velásquez appointed CEJIL as their representative, granted on June 22, 1998.

[FN42] Cf. Statement sworn before a Notary with by Jennifer Harbury on December 23, 1997; newspaper article, "Caso Bámaca Velásquez: Declaran más militares", November 24, 1998, Última Hora newspaper; newspaper article, "Hoy declaró otro militar en caso Efraín Bámaca Velásquez" (no source); newspaper article, "Harbury pide US $ 25 millones por el caso Bámaca

Velásquez", June 5, 1998, Última Hora newspaper; and document about the visit of April 25, 1999.
[FN43] Cf. Newspaper article, "El fiscal Arango Escobar se retira del caso Bámaca Velásquez", Prensa Libre, June 27, 1995, Annex 31; Report of the Ombudsman of June 27, 1995, Annex 32; bulletin of the Guatemalan Human Rights Commission of June 24, 1995, Annex 33; newspaper article, "Arango se excusa de seguir caso Bámaca Velásquez", El Gráfico, August 2, 1995, Annex 34; newspaper article, "Car Bomb Explodes Outside Lawyer's home in District", Washington Post, January 6, 1996, Annex 36; newspaper article, "El Fiscal General eleva recurso de amparo contra el Presidente", Siglo Veintiuno, November 10, 1995, Annex 43; and note of the Inter-American Commission of June 12, 1998.

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92. The State presented documents on:

a) the death of Bámaca Velásquez [FN44];
b) the activities of the Quetzal Task Force in the southwestern region of Guatemala at the beginning of 1992 [FN45];
c) the presence, in 1992, of the Army officer, Luis Alberto Gómez Guillermo, in a commando course in Colombia [FN46] and the Army officer, Jesús Efraín Aguirre Loarca, in the United States [FN47];
d) Nery Ángel Urízar García and his criminal record [FN48]; and
e) Otoniel de la Roca Mendoza and his criminal record [FN49].

[FN44] Cf. Death certificate of Efraín Bámaca Velásquez.
[FN45] Cf. Photocopy of official letter No. 229/G-3-92 of July 13, 1992, with fragmentary Order No. 008/G-3-92 attached; two photocopies of telegrams dated July 21 and 27, 1992; photocopy of official letter No. 245/G-3-92; and photocopy of telegram of August 7, 1992.
[FN46] Cf. Certificate of successful completion of a commando course, issued by the Army of the Republic of Colombia on November 24, 1992; certificate of successful completion of a commando course, issued by the School of Arms and Services, Colombia, on November 24, 1992; two photocopies of official passport No. 32205, registration No. 0547; photocopy of official passport 23918, registration No. 3219; and photocopy of official passport 1326315, registration No. 21251.
[FN47] Cf. Medical certificate of October 28, 1998; letter signed by Patricia Chalupsky, of June 4, 1992; letter signed by Dr. Gary M. Gartsman of June 8, 1992; medical records of Jesús Aguirre of March 18, 1992; and physical examination of Jesús Aguirre of March 18, 1992.
[FN48] Cf. Affidavit of May 24, 1995, related to the deposition of Cleonice Dique Carnicelli, the widow of Thomae; affidavit of May 26, 1995, related to the deposition of Walter Aroldo Barrios Reyes; affidavit of May 30, 1995, related to the deposition of Julian Socop Cuyuch; affidavit of May 30, 1995, related to the deposition of Edgar René Muñoz Cifuentes; affidavit of May 30, 1995, related to the deposition of Francisco Ortíz Sánchez; affidavit of May 30, 1995, related to the deposition of María Macaria Cotón; affidavit of May 30, 1995, related to the deposition of Belfina Judith Fajardo; and copy of the expansion of the statement of April 15,

1996, by Anastasia López Calvo before the district prosecutor, Shilvia Anabella Jerez de Herrera.
[FN49] Cf. Certificate of criminal record of Otoniel de la Roca Mendoza of November 20, 1998; and certificate of military enrolment of Otoniel de la Roca Mendoza of November 16, 1998.

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93. In the public hearings on June 16 to 18, October 15, and November 22 and 23, 1998, the Court received the report of the expert witness and the statements of the witnesses proposed by the Inter-American Commission. These statements are summarized below.

B) EXPERT EVIDENCE

a) Expert testimony of Helen Mack, Guatemalan business administrator, on the administration of justice in Guatemala.

In Guatemala, justice is "slow, inefficient, it is corrupt, fearful" and partial, particularly when those with any political power are prosecuted. In particular, as a result of the internal conflict that Guatemala has experienced over the last three decades, the judicial system underwent a profound crisis, especially from 1992 to 1996, particularly with regard to human rights, and this resulted in a weak Judiciary, which allowed the Executive Branch to commit abuses.
As a result of corruption and the fear of those who apply justice to "act against Army officers who still have considerable political power", 99.9% of cases of human rights violations go unpunished. Impunity also exists because many of the violations entail the surrender of information that is classified as a State secret by the Ministry of Defense although, according to the Criminal Procedural Code, it is the judge who should make this classification; because the evidence is adulterated or disappears, and due to abuse in filing appeals within the judicial proceedings.
"Military intelligence" has used slander as a strategy to obstruct the exercise of justice, by diminishing the credibility of the victims of human rights violations and intimidating those in charge of the criminal prosecution. The most recent example was the crime of Monsignor Gerardi, which she interprets as a clear message that "any […] person is vulnerable when conducting a lawsuit in the area of human rights". For example, in the instant case, an effort was made to discredit Jennifer Harbury by not recognizing her marriage to Bámaca Velásquez. Moreover, depending on the case, the Guatemalan press does not publish information on judicial proceedings, because the journalists may expose themselves to threats.
In Guatemala, the remedy of habeas corpus exists to guarantee the liberty and physical safety of an individual; however, in cases of human rights violations, "it is rarely successful" and often depends on the pressure that the plaintiff is able to apply.
There is a special pre-trial investigation procedure, which is applied when the remedy of habeas corpus has been exhausted; this consists of the Supreme Court of Justice designating the Ombudsman or some human rights organization or person to conduct the investigation. However, this procedure "has not had positive results", as it is very bureaucratic.
In Guatemala, there was a practice of forced disappearances that generally culminated in the death of those who disappeared, to give the impression that there were no political prisoners.

The Constitution of the Republic and the Military Code establish a military system of justice. After 1996, the legal system was reformed so that crimes and misdemeanors committed by members of the armed forces were heard by civil tribunals. The criminal proceedings processed before the military system of justice prior to this reform were neither impartial nor effective. Ordinary justice imposes very few sentences for human rights violations and, of those imposed, none have been against any high-ranking member of the armed forces or Government official. The only exception has been the case of Michael Devine.

The Bámaca Velásquez Case is just one more example of impunity in the Guatemalan administration of justice. In this case, not only those responsible have not been found, but also the remains of Bámaca Velásquez have not been located, because "the bodies were changed."

As a result of the Peace Agreements, a Commission to Strengthen Justice was formed, composed of individuals from different sectors of society. In her opinion, the Commission has carried out positive work in areas such as judicial independence that will have results in the medium- or long-term, because, currently, there are "still some shortcomings that do not allow us [to have] an independent Judiciary". The following are some of the problems that existed in the Guatemalan system of justice: the judges, who in some cases were not qualified, were appointed for short periods; those who heard human rights cases were threatened; and access to justice was very expensive, which resulted in the exclusion of the poor. Currently, prosecutors and judges are still afraid of involving Army officers in human rights cases, due to what "could happen to them personally or to their families". It is necessary "to dismantle a complete parallel authority [because while] the Army continues to be present [in the] political authority, it will be difficult to make progress."

Those who present complaints or appear as witnesses in cases that involve State agents do not receive the necessary protection. Moreover, human rights activists have been seen as people who were "linked to the guerrilla movement" and "protectors of criminals" and have been harassed.

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C) TESTIMONIAL EVIDENCE

a. Testimony of Santiago Cabrera López, former URNG combatant

He was connected with the guerrilla group known as ORPA, part of URNG, since May 22, 1989. Among other reasons, he joined this group due to "the absence of justice in [his] country, the lack of education [and] health."

He was a combatant in the Luis Ixmatá military front, which was headed by Bámaca Velásquez, who was known as Comandante Everardo. He operated in the area of the Department of San Marcos during one year and ten months, until he was detained on March 8, 1991.

He met Jennifer Harbury in 1990 in the guerrilla camp.

One year after he had been captured by the Army, when he had won its confidence, he received payment for services provided to Army "military intelligence", G-2. He did not take advantage of the National Reconciliation Law.

He was captured by seven or eight "military intelligence" agents from the Department of San Marcos, and "[t]hey ordered him to stop, when he was carrying a quintal of rice and they beat [him] severely". Anastasia López Calvo, known as "Karina", was captured with him and they

were both taken in a pick-up truck to the military detachment of Santo Domingo, Municipality of San Pablo, Department of San Marcos.
When they reached the detachment, they were taken to a room, where his “hands were tied to the wall above him and one of the men who captured [him] began to beat [him] with a large brick”. When they had finished torturing him, they asked for information on his camp and the combatants. He was able to identify two of the Army officers who tortured him.
Subsequently, they were transferred to the military detachment of the community of El Porvenir, Municipality of San Pablo, Department of San Marcos There, they were put in another room where they were interrogated and received death threats. During the night, they were taken to a basement in the detachment, where they were kept for two days, after which the interrogation continued.
Approximately 10 days later, he was transferred to Military Zone No. 18 in San Marcos, where the torture and interrogation continued. Here, he could see how the Army captured and killed civilians. They obliged those they detained to memorize texts so that they could appear in public and declare that they had given themselves up to the Army voluntarily, in order to conceal the military practice of using former guerrillas to obtain information that was relevant for “military intelligence”, by torturing them.
He was kept in shackles for about six months; during this time the Army took him out dressed in uniform like a soldier to carry out tasks such as “identifying combatants [...] or those who sympathized with the guerrilla”. After six month, the treatment he received changed and his restrictions at the base were reduced. During all the time that he was detained he was never taken before a judge or an authority with any formal charge against him.
In February 1992, he was obliged to take part in a unit known as the Quetzal Task Force which was initially set up at the military bases of San Juan de Loarca in the Municipality of Tumbador, San Marcos, and then transferred to Santa Ana Berlín, in Coatepeque, Quetzaltenango; its aim was “to make an end to all the guerrilla forces”. The commander of this task force was Ismael Segura Abularach, and Colonel Julio Roberto Alpírez also took part in it. There he met other guerrilla combatants who had been captured, among them, one known as Bayardo (Otoniel de la Roca Mendoza).
On March 12, 1992, the third battalion of Military Zone No. 18 in San Marcos captured Bámaca Velásquez, in Montúfar in the Municipality of Nuevo San Carlos, Retalhuleu. He was able to see him in an office of the detachment in Santa Ana Berlín de Coatepeque, where he was kept tied up. “Captain Laco”, Major Mario Ernesto Sosa Orellana and “Captain Soto” were with him. The latter tried to obtain all possible information about the guerrilla from Bámaca Velásquez. The day following the capture of Bámaca Velásquez, the witness was sent to talk to him to tell him to collaborate, or otherwise he would be tortured. On that occasion, he spoke to Bámaca Velásquez alone, and the latter asked the witness, if he was able to escape, to say that he [Bámaca Velásquez] had been captured alive and was in Santa Ana Berlín.
He saw Bámaca Velásquez on many occasions during the approximately one month that his detention in Santa Ana Berlín lasted. In June 1992, he heard Major Mario Sosa Orellana say that “Comandante Everardo had escaped from the capital, but that [...] he had once again been captured and shot because he had tried to escape”. However, in July, he saw Bámaca Velásquez in Military Zone No. 18 once again, together with Colonel Julio Roberto Alpírez and Major Sosa Orellana, who told the other detainees that “they could not communicate with him”. He helped to collect some medical equipment that was for Bámaca Velásquez and kept guard on the room where he was kept. Colonel Alpírez told him off for being in that place. On another occasion, he

saw Bámaca Velásquez "lying half-naked on a bed, with his eyes bandaged and an arm and leg bandaged" and with his face swollen. Beside him was what appeared to be an oxygen cylinder.
On about July 22, 1992, he saw Bámaca Velásquez for the last time in Military Zone No. 18 in San Marcos. On that occasion, the Army was preparing a military operation in the "El Porvenir" detachment; to this end, they recorded a guerrilla radio communication and sent it to him so that he could give it to Bámaca Velásquez for the latter to disclose what the guerilla were saying in the communication. Later, he heard from Anastasia López Calvo that, during July, Bámaca Velásquez was at the Quetzaltenango military base No. 1715 and that his treatment had been different there, because "they made him do the cleaning where he was and he was not tied up during the day."
After having been detained for one year and ten months, and having obtained the confidence of the members of the armed forces sufficiently, the witness used a license to leave with Simeón Cum Chutá and Martín Pérez Cabrera to spend Christmas with his family, and took advantage of this opportunity to escape.

b. Testimony of Jennifer Harbury, United States lawyer and writer.

She began to learn about the human rights violations suffered by the Guatemalan peasants at the beginning of the 1980s, while working as a lawyer near the border between Mexico and Texas. As a result of the massacres that were occurring, she decided to visit Guatemala to try to help more directly. There, she began to work with victims of torture and people who were trying to leave the country, among them, people involved with the guerrilla groups. For safety reasons, she returned to her home in Texas in 1986, and decided to write a book on the situation in Guatemala. To this end, she visited secret URNG clinics, where those who had been injured were treated and gathered testimonies for her book. She sympathized with the URNG, but she did not become a guerrilla.
In order to conduct the interviews for her book, she spent 30 days with the Luis Ixmatá Front, which was led by Efraín Bámaca Velásquez, known as Comandante Everardo, where she also met Santiago Cabrera López. The former protected her there and arranged the interviews. When she left, they wrote to each other and, starting in 1991, they began a close relationship while peace talks regarding the indigenous people were being held in Mexico City. Afterwards, they both went to Texas, where they were legally united "by a type of marriage that is very similar to a common law marriage". Bámaca Velásquez subsequently returned to Guatemala.
In mid-March 1992, she went to Mexico D.F., where she met with members of ORPA, who told her that Bámaca Velásquez had disappeared after an armed encounter near Nuevo San Carlos. The day after the events, the Guatemalan press had informed that the Army had found a corpse dressed in an olive green uniform there.
According to the information she was given, following his capture, Bámaca Velásquez was initially detained at the Santa Ana Berlín detachment, then transferred to Guatemala City and then to Quetzaltenango and, finally, in July 1992, he was in San Marcos. According to information from the US State Department, Bámaca Velásquez was still alive in May 1993, together with 350 other prisoners.
She spoke by telephone with Ramiro de León Carpio, then Guatemalan Ombudsman, who later informed her in a letter that a corpse had been found on March 13, 1992, which was subsequently buried in Retalhuleu as XX; according to the letter, the description of the corpse coincided with that of Bámaca Velásquez. However, in view of the lack of information received

from the G-2, they doubted that Bámaca Velásquez had died. Therefore, de León Carpio officially requested that the body buried in Retalhuleu should be exhumed.

The exhumation was conducted in May 1992, in the presence of the international observers Francis Farenthall, James Harrington, Tony Quale, and the witness. Also present were the local judge, the coroner from the human rights office, Leonel Gómez, the forensic photographer, the administrator of the cemetery and two excavators.While they were opening the grave, 25 armed police arrived; they made those present kneel and said “we are also here as observers”. The procedure then continued and when they were about to raise the body, the Attorney General, Acisclo Valladares, arrived in a helicopter, shouting that they had to halt the exhumation; after which they could not continue with the procedure. Valladares stated that, among the reasons for preventing the procedure, it had not been approved by his office, it could not be conducted owing to the presence of foreigners and, in order to proceed, it was necessary for someone from the URNG to be present to identify the corpse. In view of the discussion, the Attorney General indicated that the exhumation was not cancelled, but merely postponed for security reasons and to facilitate the formalities.

Subsequently, she learned that her husband was still alive at that time, and that he was being tortured; Attorney General Valladares also had this information. The procedure was cancelled due to pressure from the Army, as de León Carpio himself later said.

In order to allow matters to calm down, she traveled to Mexico where she talked to Santiago Cabrera López, who told her about the Guatemalan Army's practice of separating certain prisoners and not killing them immediately, but rather torturing them in order to “break them psychologically” and later forcing them to work for the Army as informers. Cabrera also told her that he had seen Bámaca Velásquez with signs of torture in two military detachments.

She then returned to Guatemala to continue with the exhumation formalities and, to this end, she engaged a United States forensic expert, met with the Guatemalan forensic team and produced a certificate of her civil status, in which she appeared as married. She traveled to Retalhuleu to continue examining the files and learned that both de León Carpio and the local judge had received death threats.

In the case file, she found information on the removal by the Magistrate of a corpse dressed in the URNG uniform from the Ixcucua River on March 13, 1992, , and was surprised by the fact that the report was so detailed that it stated that the body did not have any moles or scars. This description, which did not correspond to the body of Bámaca Velásquez, made her doubt the truth of the report.

The information contained in the Magistrate's file was totally different from the report of the autopsy performed on corpse XX by the coroner's office in Retalhuleu, because the physical appearance, age, height and cause of death were different. Based on this information, she concluded that Bámaca Velásquez had been captured alive and then transferred to a military base in order to torture him and oblige him to provide information. She also became convinced that the Army had invented a “deception” to cover up the situation, by burying a person that they killed near the river, but sending the URNG the description of Comandante Everardo, and that the Attorney General knew that Bámaca Velásquez was not in the grave when he cancelled the exhumation in Retalhuleu.

In August 1993, the exhumation in Retalhuleu was finally carried out in the presence of Patricia Davis, the judge, the administrator of the cemetery, “people from the Health Department”, an official from the Office of the Attorney General, members of the press, the Guatemalan forensic team, the forensic expert Dr. Charney, members of the Peace Brigade, the expert who had

performed the first autopsy on the body in 1992 and a numerous group of unknown individuals. A helicopter flew over the site and it was necessary to examine two other corpses that were buried, because the graves were very close together. When they found the corresponding corpse, examinations were carried out to determine its identify and the forensic experts arrived at the conclusion that it was not Efraín Bámaca Velásquez. Following the exhumation, she contacted the United States Embassy and the Guatemalan Ministry of Defense, but did not obtain any information on the whereabouts of her husband.

Faced with the negative attitude of the Guatemalan authorities, she decided to begin a hunger strike in front of a military installations, which continued for seven days.

On returning to Washington D.C., there was considerable interest in her case in the highest political circles, and she even traveled to Geneva in 1994 to meet with Mónica Pinto, the United Nations Special Rapporteur on Human Rights for Guatemala; all of which generated "considerable international pressure."

In January 1994, discussions with the Guatemalan Minister of Defense, General Mario Enríquez, were reinitiated for six months. He told her that they had never held her husband, but that they would start a search in the zone. She also had meetings with several members of the armed forces who declared that it was "a very tragic misunderstanding (sic), but they ha[d] never held him". Furthermore, she met with the Head of the National Police Force, Mr. Cifuentes, who expressed great interest in investigating the case, but feared the action of the armed forces, to the extent that he resigned from his position. In June that year, doors began to close.

She feared for her husband's life owing to the signature of the Peace Agreements, because she considered that the armed forces would not need any further information from him. She went to the offices of the Organization of American States (OAS) and then to the United Nations, but the Army maintained "a position of international defiance". In these circumstances, during the first week of October 1994, she began another hunger strike in front of the National Palace, which lasted 32 days; she was ready to continue this until she died and, as a consequence, her heart and kidneys were damaged and she had problems with her sight.

The Army threatened her and those who accompanied her. Later, together with Richard Nuccio, an official of the US State Department in Guatemala, they began to investigate the case, but with little success. On the thirtieth day of her hunger strike, Army authorities asked her to attend an exhumation in Coatepeque the following day; she went, although she knew that it would be inconclusive. The aim of the armed forces was to weaken her even more, so that they could take her to hospital and thus end the hunger strike. At a certain moment, the CBS program, "60 Minutes" announced that the United States Embassy in Guatemala had not given Jennifer Harbury information on the capture of Bámaca Velásquez, despite the existence of a CIA report. Two days later, the Embassy issued a statement indicating that, according to the US Government's intelligence information, Bámaca Velásquez had been captured by the Army and kept prisoner in secret for an indefinite time. The publication of this information caused her to cease her hunger strike.

A criminal proceeding was started on the initiative of the Attorney General, a special pre-trial investigation procedure was initiated by the Ombudsman and an Investigation Committee was appointed at the request of the President of the Republic. The latter was ineffective and, as a result of the first two proceedings, she had to respond to questioning during her 32-day hunger strike.

She began a lawsuit before the United States authorities based on the Freedom of Information Act, which allowed her to obtain documents and files with information on the case.

She started a third hunger strike on March 12, 1995, which lasted 12 days, until a United States senator, Robert Torricelli, told her that her husband had been executed on the orders of Colonel Julio Roberto Alpírez, after having been held prisoner by the Army. She later obtained a copy of the State Department and CIA files containing information that Bámaca Velásquez (Comandante Everardo) had been captured and "was clandestinely detained" and being tortured by members of the G-2, in order to "maximize his intelligence value". She obtained documents indicating that Julio Alberto Soto Bilbao, Mario Ernesto Sosa Orellana and Julio Roberto Alpírez were those responsible for the abuses. She also acquired a statement by Acisclo Valladares, which established that Bámaca Velásquez had given false information to the Army, which had led it into an ambush, and that was why he had been executed.

The documents that she obtained from US agencies contained information on clandestine prisons in Guatemala, where different types of torture were used in order to make prisoners work as informers for the G-2. These documents established that there were between 340 and 360 former ORPA combatants under the control of the Army. Another file contained three theories about the fate of Bámaca Velásquez: that he was buried under the Las Cabañas military base; that he had been taken up in a helicopter and thrown into the sea and, finally, that he had been taken to the capital, tortured for a long time, and then strangled and "cut into pieces."

In her opinion, it was impossible that Efraín Bámaca Velásquez would have given himself up voluntarily to the Army, and this opinion was reinforced in view of the torture to which he had been submitted.

She used Guatemalan legal recourses to find her husband. Her first action was to file a petition for habeas corpus in February 1993; she had not done so previously because she believed that her husband was dead. This petition did not achieve any results; however, as a consequence, she obtained a note from the President of the Supreme Court of Justice, which said that this recourse was inadequate for conducting an effective investigation.

When she was able to see the file of the investigation being conducted in Retalhuleu, she observed that it was a small file, without photographs or evidence from the scene of the crime, and with contradictory descriptions of the body buried as XX in 1992.

Owing to the steps taken by the US senator, Robert Torricelli, Julio Arango was appointed special prosecutor for the case. Among the actions that the latter took was an interview with Santiago Cabrera López, and also with a member of the G-2, Nery Ángel Urízar García, who stated that the Retalhuleu corpse was that of Cristóbal Che Pérez, a young soldier who was killed to simulate that he was Bámaca Velásquez. A proceedings was also initiated under the military justice system against several of the members of the armed forces mentioned by Cabrera, including Colonel Alpírez.

Based on an action for jactitation filed by Acisclo Valladares, the Guatemalan authorities issued a writ of ne exeat against her in order to prevent her from leaving the country. In 1997, Valladares also filed another action for jactitation when she was about to declare before the Commission for Historical Clarification.

She received information from the United States Ambassador about the possibility that Bámaca Velásquez was buried in a military based called Las Cabañas. Accordingly, in 1995, they visited the site and then began measures to conduct an exhumation. However this was cancelled by the prosecutor Ramsés Cuestas, who subsequently changed his position and said that the procedure would be delayed, but not cancelled. On the day that it was to take place, a soldier, accompanied by Julio Cintrón Gálvez, told her that "they [could] not enter" the installations, firstly because

the prosecutor, Arango, had been "impugned", and secondly, owing to the presence of the witness.
That night they returned to the hotel and heard that the President of Guatemalan himself had ordered the exhumation to proceed. The following day, they tried to obtain an authorization from the Magistrate of Tecún Umán, but he "had gone into hiding", for fear of collaborating with the procedure, so that his assistant had to intervene.
On the same occasion, the prosecutor, Ramsés Cuestas, told them that they only had permission to excavate for one day when, according to their calculations, they needed a month to measure and prepare the site. Finally, it was impossible to conduct the exhumation requested, because the life of the prosecutor Arango was in danger, and he resigned from his position in September 1995.
Subsequently, she again tried to have an exhumation conducted in Las Cabañas, this time with the new prosecutor, Shilvia Jerez, but, once again, this was not possible. The new prosecutor was assassinated in May 1998.
The authorities stated that they would "continue to obstruct any exhumation procedure in Las Cabañas [...] until they receive[d] an amnesty through the peace talks."
While seeking justice in Guatemala, the witness and her supporters were threatened and attacked, and there was also a campaign to slander them. Among the groups that supported her and were threatened, were the Mutual Support Group and the Inter-American Commission on Human Rights. A bomb exploded in the building of the Polytechnic School, during her first hunger strike. A US Government agency told her that there were "clear messages [coming from the] network of contacts in Guatemala, which [affirmed that they had] heard […] senior members of the armed forces planning […] to pay someone" to assassinate her. In January, a bomb exploded in the car of her lawyer, José E. Pertierra, in Washington D.C. The witness, Otoniel de la Roca, was also harassed and threatened.
She had debts of US$35,000.00 as a result of continuing with the case, but she had never thought of filing a civil suit for damages, because she was seeking justice and for the remains of Efraín Bámaca Velásquez to be returned to her. Should she receive compensation as a result of the proceeding before the Inter-American Court, she would like all of it to be given to the next of kin of Bámaca Velásquez.
There was "a total obstruction" of the investigation of this case in Guatemala and no one has been found responsible. The criminal action that is being processed in Retalhuleu is still open.

c. Testimony of Julio Arango Escobar, former special prosecutor for the Bámaca Velásquez Case, Guatemalan lawyer, Guatemalan Ombudsman.

On May 7, 1995, he was appointed special prosecutor for the investigation of the Bámaca Velásquez Case. When the investigation started, the files were in the Office of the Military Judge of the Department of Retalhuleu and, under the military system of justice, a final stay of proceedings had been pronounced in favor of 12 members of the armed forces. He appealed this before the Retalhuleu Appeals Chamber and had it declared unfounded, so that the case was reactivated. Despite this, none of the officers were convicted.
A proceeding was underway in the Retalhuleu departmental court, to discover the whereabouts of Bámaca Velásquez, which was "more or less filed". One of the steps he took was to try and have Jennifer Harbury included as an accuser in the proceeding, because the Public Ministry

"had requested her separation, as she was a foreigner"; however, the tribunals rejected his petition.

During the investigation of the case, Nery Ángel Urízar García, a member of "military intelligence", came forward spontaneously, and described the capture of Bámaca Velásquez. Urízar told him that, once Bámaca Velásquez had been identified, the body of Cristóbal Che Pérez, a member of the Army and a friend of Urízar was brought to the city of Mazatenango; "they had disfigured his face [and] dressed him in the green uniform", to pass him off as Bámaca Velásquez.

Urízar said that Pérez had "a deformity in his right hand which was very apparent", and this appeared in the autopsy performed on the corpse that had supposedly been removed from the site of the encounter and then buried as XX. This document was in the Forensic Department and had been incorporated into the proceeding before the Retalhuleu tribunals. He then explained that the autopsy performed in Retalhuleu contained a description of a corpse that did not correspond in any way to the characteristics of Bámaca Velásquez.

He interviewed Santiago Cabrera in Washington D.C., and the latter described the military detachments where he had seen Bámaca Velásquez, where and how he had been tortured, and the occasion "when they put him in a helicopter and nothing more was ever heard about him."

He obtained a document from the US State Department, which said that the body of Bámaca Velásquez was buried in the Las Cabañas detachment. With this information, he went there to conduct an exhumation. On the second day of his visit to this detachment, he encountered a great many people, who manifested against his presence there. Despite this, preparations for the procedure continued. However, the following day, they met Julio Cintrón Gálvez, Leopoldo Guerra and Julio Contreras, lawyers for the Army, who told them that they could not conduct the exhumation owing to the objection filed against him, because of the presence of Jennifer Harbury and because Ramiro de León Carpio, the President of Guatemala, "had decided that the Bámaca [Velásquez] Case should be transferred to the Commission for Historical Clarification". They also questioned the presence in the procedure of members of the United Nations mission in Guatemala.

He obtained an authorization from the Tecún Umán court to conduct the procedure. The following day, they began excavating, but the Prosecutor General informed him that only one day's work was authorized. In view of the impossibility of conducting the exhumation in one day, he decided to suspend the procedure.

At the third attempt to conduct the exhumation, he found that an appeal against the exhumation order, filed by the Army's lawyers, had been admitted, and he challenged it. On July 20, 1995, he was separated from the investigation. This was due to his refusal to lessen its intensity. He added that he was annoyed because "instead of supporting [him], the prosecutors requested that [he] should be separated [...] from the case."

No exhumation has been conducted at the Las Cabañas base and the proceedings in the Bámaca Velásquez Case have been filed.

While he was acting as special prosecutor, he was threatened, harassed and attempts were made on his life. Due to this, he presented a complaint to the Ombudsman and he also obtained a precautionary measure in his favor through the Inter-American Commission (supra 12).

The Guatemalan judicial system is totally ineffective and it is not possible "to have access to a simple and effective recourse, with full guarantees of due process, in the case of the forced disappearance of Efraín Bámaca [Velásquez]". In Guatemala, no guerrilla has been submitted to

justice and condemned for his terrorist activity; in other words, there are no political prisoners in the country.
He was concerned that he had given testimony before the Court, because "one cannot tell what may happen [in Guatemala]."

d. Testimony of James Harrington, US lawyer, Director of the Texas Civil Rights Project, and university professor

He traveled to Guatemala in order to accompany Jennifer Harbury to an exhumation procedure in Retalhuleu, on May 20, 1992. The purpose of this procedure was to verify whether the body buried in that place was really that of Efraín Bámaca Velásquez.
On arriving in Guatemala City, those who accompanied Harbury met with the Ombudsman, who appointed a coroner and a photographer to accompany them during the procedure. Many security measures surrounded the meeting and the Ombudsman was very nervous.
In the cemetery on May 20, 1992, were the judge who was going to direct the exhumation, a representative of the church, Francis Farenthall, Jennifer Harbury and himself.
When the excavation was commencing, a caravan of approximately 8 to 12 military vehicles arrived at the cemetery. About 20 armed soldiers surrounded the site that was being excavated and one of them told the judge that he must halt the exhumation. Despite this, the judge and the coroner did not cede and the judge gave the order to continue the procedure, indicating "that he had the authority and that the procedure would continue."
The excavation continued and they were able to find the plastic bag with the body. Just as they were extracting the bag, the Attorney General, Acisclo Valladares, arrived in a helicopter, accompanied by a photographer and one or two soldiers, shouting that the exhumation should be halted. Owing to this order, there was a heated discussion between the judge and the Attorney General.
Among the reasons that the Attorney General mentioned for canceling the exhumation were that: there was no one who could identify the body; in order to conduct the procedure, a member of the family should be present; it could not be conducted in the presence of foreigners; and someone from the guerrilla should be present. The Attorney General treated the judge very badly, to the point where the latter decided to obey him. The Attorney General said that the procedure would be conducted at a later date.
It would not have been possible to carry out this procedure, even if all the conditions mentioned by the Attorney General had been fulfilled, because it was cancelled for "political reasons."
When the procedure was cancelled, those present were filmed and photographed and their names were listed. On his return to the town, the forensic photographer, who was an official of the Office of the Ombudsman, informed his chief of what had occurred.
When they returned to the capital, two of those who accompanied Jennifer Harbury went to the airport and Harbury and one other person received protection from the Office of the Ombudsman.

e. Testimony of Francis Farenthall, US lawyer, former Texas legislator, human rights and refugee rights activist

In May 1992, Jennifer Harbury asked her to attend the exhumation of a body in the Retalhuleu cemetery, in Guatemala. During the trip to Guatemala, Harbury told her that the body sought was that of her husband.
Prior to the exhumation procedure, they held a meeting with Ramiro de León Carpio, Guatemalan Ombudsman. There was a certain unexpected tension during the meeting, demonstrated by the fact that the meeting was not held in his office, but in a public building in Guatemala City, and that special security measures were taken, such as keeping the doors locked.
Subsequently, the same night, she, Jennifer Harbury and James Harrington again met with de León Carpio and, on that occasion, the latter gave them details of the trip to Retalhuleu and informed them that a forensic expert, representing the Office of the Ombudsman, and a photographer would accompany them during the procedure.
On reaching the cemetery, they found a few people there, including the excavators and a person who had joined them when they arrived at the town. When they began the excavation, the atmosphere was peaceful; however, subsequently, a significant number of policemen or soldiers arrived and a large group of photographers who accompanied the authorities began to take photographs of the scene and those present; she considered that this was a form of intimidation.
Despite the military presence, the excavation continued and they managed to find a bag containing a body. At that moment they heard noises and the Guatemalan Attorney General appeared, shouting that they must halt the excavation. The Attorney General appeared to be angry and his attitude was inflexible.
The exhumation did not continue and a heated discussion started, which increased the tension, and, above all, caused her to fear for the safety of Jennifer Harbury.
When they left the cemetery, they went to an office in a nearby town, and the judge or the forensic expert who accompanied them asked them not to move from there, because it was a place where they would be protected.
Later, they returned to Guatemala City and Harbury called someone in Mexico City, and this person told them that they should not leave the hotel and that they should leave the country as soon as possible

f. Testimony of José Fernando Moscoso Moller, Guatemalan archaelogist, member of the Guatemalan Forensic Anthropology Team

He has carried out historical and forensic anthropological investigations at the request of the Guatemalan authorities since 1992, and has worked internationally with such organizations as the United Nations in Bosnia and Herzegovina and with the Commission for Historical Clarification of the Republic of Haiti. His expertise is the analysis of bones from the human skeleton, in other words, when there is no longer any soft tissue.
A forensic anthropological investigation has three basic aims: to identify a person by his osseous remains, in particular to determine sex, height, age, diseases and dental characteristics; to establish the cause of death and, lastly, to establish how this happened.
As a member of the Guatemalan Forensic Anthropology Team, he had conducted an exhumation in Retalhuleu, in August 1993, in order “to establish whether the person buried as XX on March 13, 1992, and who had died the day before, supposedly in an armed encounter, was Efraín Bámaca [Velásquez].”
As more than a year had elapsed between the time that Bámaca Velásquez allegedly died and the moment when the exhumation in Retalhuleu was conducted, it was not possible to perform an

autopsy on the corpse, but rather an anthropological study, with the characteristics described above.

Jennifer Harbury, the Retalhuleu coroner, several members of the Guatemalan Forensic Anthropology Team, journalists, various authorities and observers were present at this procedure. The Retalhuleu coroner was the person in charge of identifying the area where the body to be exhumed could be, because it was he who had performed the autopsy in 1992.

Initially, the grave where the corpse was buried could not be located precisely and, consequently, it was first necessary to extract two other bodies, because they were in an area where the XX were buried very near to each other. When they were able to find the corpse on which the 1992 autopsy had been performed, they examined it to establish its identity, seeking characteristics similar to those of Bámaca Velásquez, principally his dental work and age.

On examining the skeleton that was recovered, it was found that, among other elements, it did not have prognathism, or separation of the upper and lower median incisors. To the contrary, it had "some metallic crowns" on both upper median incisors. Moreover, on analyzing the characteristics of the skeleton, using the Todd method, it was determined that it corresponded to an individual of between 18 and 22 years of age, and not 34 as Bámaca Velásquez had been.

Based on the information collected, the members of the Guatemalan Forensic Anthropology Team reached the conclusion that the corpse examined "[did] not correspond to the skeleton of Mr. Bámaca [Velásquez]", owing to the differences in the dental record and the age. Dr. Michael Charney, who was present during the exhumation in Retalhuleu, reached the same conclusion.

He had access to the report of the first autopsy performed on corpse XX by the Retalhuleu coroner, which indicated that the cranium presented a compression or had been crushed; a very deep and strong laceration caused by a rope; injuries to the left shoulder made with a dagger-like object; an injury from a bullet in the right thoracic area, which affected the right kidney and the liver; bruising from blows to the thorax, and marks on the ankles, a sign that the person's feet had been tied. These details showed that the person on whom the autopsy was performed did not die in combat, but that the traumatisms described could correspond to forms of violence or torture inflicted before death.

It was not possible to have photographs of the autopsy, because "many departmental forensic offices do not have the resources to make this type of analysis". In general terms, the forensic medical analysis is fairly detailed, but "other types of analysis which would have completed the information" were missing.

During the exhumation, the environment was "rather tense". There were vehicles without license plates at the entry to the cemetery and unidentified individuals taking photographs of those who were conducting the procedure.

He was present at another exhumation carried out in Coatepeque, on November 10, 1994, in order to establish whether the corpse in a grave was that of Bámaca Velásquez. On that occasion, Dr. William Hagland, from the US organization, Physicians for Human Rights, the Coatepeque coroner, local authorities of the National Police Force, members of the Guatemalan Forensic Anthropology Team, some journalists and observers, and Jennifer Harbury, who was "in the middle of a hunger strike", were present.

After comparing the dental record and determining the height and age of the corpses, it was concluded that neither of the two bodies found at Coatepeque was that of Efraín Bámaca Velásquez.

As a member of the Guatemalan Forensic Anthropology Team, he took part in another exhumation attempt related to the Bámaca Velásquez Case, in a military detachment known as

La Montañita or Las Cabañas. There had been an attempt to conduct this procedure in 1995, at the request of the Office of the Prosecutor of the Public Ministry, but “it could not be carried out”, because lawyers, representing the Guatemalan Army arrived, and they considered that the requirements for this procedure had not been fulfilled.
They tried to conduct the procedure a second time, in the presence of the special prosecutor, Julio Arango, and after one day's work, the Army's lawyers once again suspended it, because they considered that the necessary requirements had not been fulfilled. In a preliminary study, the Guatemalan Forensic Anthropology Team established that approximately four weeks would be required to carry out the archaeological phase of the study.
They made another exhumation attempt in Las Cabañas with “the new prosecutor” who had been assigned to the case, but when the order was given to initiate the excavations, they were prevented from continuing by the appearance of an Army officer who ordered the procedure to be halted, “because something [...] in the documents was considered not in order”. The following day, the prosecutor obtained other documents from the judge and, once again, the Army's lawyers found that the requirements had not been fulfilled, so that they could not continue. The prosecutor who accompanied them was Shilvia Jerez, who died, riddled with bullets, in 1998.
Two members of his organization, Andrés Kauffman and Federico Reyes López, were threatened and this was denounced before the corresponding authorities at the appropriate time. Subsequently, these threats caused the Inter-American Commission to grant him precautionary measures.
He is not a URNG sympathizer.

g. Testimony of Patricia Davis, US lawyer, former member of the Guatemalan Human Rights Commission

She accompanied Jennifer Harbury to an exhumation in Retalhuleu on August 17, 1993, as an international human rights observer and witness. She arrived in Guatemala on July 24 that year in order to help Harbury with the various procedures and, at the same time, seek support for the principle that war prisoners should receive humane treatment and be kept in places to which the public has access.
At that time, Harbury told her that she feared that the publicity surrounding the search for her husband and the preparations for the exhumation could result in the death of Bámaca Velásquez, should he still be detained. Even so, she still hoped to see him again alive.
During the week preceding the exhumation, she accompanied Harbury to the Magistrate in order to organize the procedure. She also had the opportunity to review the case file about the finding of a body in the Ixcucua River, which corresponded to the description of the body that Ramiro de León Carpio gave in a letter he sent to the URNG, except for the fact that the body did not have any scars. She also examined the report of the original autopsy performed 24 hours after the facts and confirmed that the report had information that did not correspond to the description in the previous document.
She was surprised to find these reports because, as Harbury had told her, when the URNG requested documentation about the body, it was told that there was none. The report contained information on the fingerprints and the conclusion that death had been due to strangling.
The environment was tense during the exhumation in Retalhuleu on August 17, 1993. The day before the procedure, she noted that they were being followed and that the forensic team was questioned by five policemen when it was outside the Second Criminal Trial Court of

Retalhuleu. The day of the exhumation, when they were in the cemetery, a helicopter flew over the site every ten minutes exactly. Also, there were at least two people among the photographers who were asked to leave, because they were not carrying appropriate credentials. Furthermore, there were a great many people around who they could not identify, and this made them fearful. On different occasions, Jennifer Harbury was pushed towards the grave and had to struggle to return to the place where she had been. There was constant pressure during the procedure.
It was not possible to identify the body of Bámaca Velásquez, and this did not surprise Jennifer Harbury, owing to the information that she had seen in the autopsy report.
Harbury began a hunger strike in the Central Park of Guatemala City, in order to save the life of Bámaca Velásquez; she was ready to die during the hunger strike. This lasted for approximately 33 days, after which Jennifer Harbury suffered various physical problems, which almost caused her to fall into a coma.
This whole process caused pain and anxiety to Harbury and knowing what had happened to Bámaca Velásquez would have helped alleviate her suffering.

h. Testimony of Otoniel de la Roca Mendoza, former FAR guerrilla.

At the beginning of 1980, he joined the Rebel Armed Forces (FAR) of the Santos Salazar Front, a group that was part of the URNG, owing to the repression that the Government had unleashed against the people of Guatemala.
He was a member of that organization until September 10, 1988, the date of which he was captured by four members of the Army, who tied him up and beat him. Then they took him in a pick-up truck to Military Zone No. 1316 in Retalhuleu, where he was kept naked in a one meter-square room until he was interrogated one hour later.
The interrogation was carried out by members of the Army's “intelligence” service, among them, Nery Ángel Urízar García and Captain Guzmán, who asked him about the structure of the URNG and the location of the Santos Salazar Front; he answered that he knew nothing. Consequently, they hung him from the roof with his hands tied and began to beat him with a baseball bat. Then, they placed him face downwards and put a hood with herbicide on him. Subsequently, they submerged him in a tank of water, and then laid him out on the floor and stood on him. Captain Guzmán ordered him to answer the questions, threatening him with death. They also used wires, which they connected to an electric socket and began to place the uncovered ends on different part of his wet, naked body, which made him faint, because he was so weak.
The following day, he woke up very ill and in the afternoon they sat him in a chair and told him “today, you are going to talk, because today you are going to die” and, faced with his refusal to give them any answers, they again hit him with a baseball bat.
The following day more people came to the room where he was and one of them said “yes, this is Bayardo”. Later, the same man came up to him, identified him by his name and by his guerrilla alias and asked him to identify members of the Front in some photographs. Subsequently, he discovered that this person was known by the alias Jorge and that he was a member of the Army who had infiltrated a rebel organization.
The members of the Army asked him about his family and, when they did not obtain an answer about where they were, they brought in one of his brother-in-laws, who was also detained, and beat him to obtain the information; but, finally, it was the witness himself who told them where they were. A month later, his two children of 3 and 5 years of age and his mother-in-law, with

six children, were captured in Retalhuleu and sent to Military Zone No. 1316, where they were kept in the infirmary for nearly two months.

When he realized that there were people in the Army who knew him, and to protect his safety and that of his family, he could no longer hide what he knew of the Front and was obliged to collaborate and provide information about the members of the Front and its structure to the Army. However, on two occasions he was taken to a base in Mazatenango and there was gunfire, the members of the Army therefore thought that he was leading them into an ambush. During the time he remained at this base, he slept in a room with members of the G-2, and was always tied up and with a man beside him.

At the beginning of November 1988, he was transferred with about 18 recently captured members of FAR to the installations of the Infantry Military Police in Military Zone No. 6 in the capital, where he remained for a week. The other prisoners had received the same treatment as the witness. In this base, members of the Army told them that they would be granted an amnesty. Later, they were obliged to appear before the press and say that they were members of the guerrilla who had deserted from FAR and that they had presented themselves voluntarily to Military Zone No. 1316. The members of the Army told him that he should refrain from talking about his capture and about the beatings he had suffered and that he should remember that his family was detained. Even the journalist present worked for the Army.

"The Army placed the people who had been presented to the press in different places, under supervision, and they had to present themselves two or three times a week to the nearest zone". He was transferred and placed in Military Zone No. 12, in Santa Lucía Cotzumalguapa, Escuintla. There he remained collaborating with members of the G-2, identifying people from the villages, and they always kept him tied up. After four months, they allowed him to circulate freely within the military zone, but they prevented him from leaving that place.

At the end of 1989, he was transferred to Military Zone No. 6 in the capital, to work with a command attached to the Army Staff, known as the "Death Squadron". His collaboration continued to consist in identifying guerrilla collaborators.

He knew Efraín Bámaca Velásquez under the alias Everardo, owing to an offensive at the Santa Ana Berlín outpost, where a Task Force was formed in 1992 to combat the Luis Ixmatá Front. While he was collaborating with the command at the Santa Ana Berlín base, under the orders of Captain Alberto Gómez Guillermo, who belonged to the command from the capital, he went to the town of Nuevo San Carlos in Retalhuleu and, on his way to the outpost, saw how the vehicle in which Captain Gómez Guillermo was riding approached the door of the room where they slept, and a prisoner was put in one of the rooms, dressed in olive green and shoeless, in the presence of Captain Gómez Guillermo and members of the San Marcos G-2. The latter called some former URNG combatants who were prisoners and took them to the room so that they could identify the person who had just been captured. In particular, he mentioned Santiago Cabrera López, known as Carlos, and a woman with the alias Karina (Anastasia López Calvo). The former identified the prisoner as Comandante Everardo. Subsequently, he discovered, from former ORPA combatants who had been captured and through the newspapers, that his name was Efraín Bámaca Velásquez.

Later he saw Bámaca Velásquez every day for two or three weeks and even took him food on two occasions, on the orders of Captain Gómez. Although Bámaca Velásquez was watched, on these two occasions, the witness was able to tell him that he was also a prisoner and that what "he [Bámaca Velásquez was] suffering, [had also] been done to [him]."

He knew that Bámaca Velásquez was interrogated almost every night, because his bedroom was next to the place where he was questioned and he heard how he did not reply and was therefore beaten. Among those who interrogated Bámaca Velásquez, he identified a Specialist from the command named Gregorio Ávila, "another Specialist from the zone of San Marcos called Chutá", another from the Guatemala City command called Erineo Ortiz, Captain Gómez Guillermo, and officers Aguirre and Sosa Orellana; the last two sometimes took part in the interrogation. Bámaca Velásquez remained at the Santa Ana Berlín base for between two and three weeks and was then transferred to Military Zone No. 6, to the installations known as La Isla (the Island), in Guatemala City.

Each time members of the Army took him to different places to collaborate in identifying people, the members of the command repeated to him: "look Bayardo, if anyone asks you about Everardo, you will say: 'Everardo was killed in combat, I never saw him alive, he was killed in combat', and every time they drove by and saw Jennifer Harbury during her hunger strikes, they referred to her as "there is the vieja hija de la gran ... (Note: a strong expletive)."

The witness was transferred to the Department of Jutiapa. Two or three months later, a Specialist called José Víctor Cordero Cardona arrived at the detachment; he said that he had been in Quetzaltenango, "working with Everardo, but that was over". After this, he never heard anything more about Bámaca Velásquez.

To begin with, he did not receive payment of any kind from the Army, but then the G-2 command gave him 200 quetzals a month, which was similar to the amount earned by a soldier. Later, they made him fill out some papers and forms, supposedly to occupy a position in the National Police Force, for which he would be paid 500 quetzals. He wore the National Police Force uniform only as part of his work with the command, even though he was never in the police force.

He never made a statement before a judge during his detention or at any time while he was with the Army.

Regarding his safety and that of his family, and his "collaboration" with the command, he indicated that the Army controlled his family and he added that "he could not escape because [...] I have almost no family left, I only have my brothers; I knew that if I went, they would finish off the rest of my family, because in 1984, the Army disappeared my mother, my father, my sister, my wife and my cousin [...], they were taken away alive and I never [...] heard any more about them". These facts occurred on April 11, 1984, in the village of Guatalón, Municipality of Río Bravo, Suchitepéquez. While he was with the Army, he asked a Colonel called Sergio and the latter answered him "look, Bayardo, you should be grateful that you are alive [...], if you had been captured with your family you would not be around, so don't ask questions."

He found out through the media that Santiago Cabrera López had deserted from the Army, but that the other former combatants who were prisoners were still in the different military zones. With regard to Karina (Anastasia López Calvo), he saw her again when she went to make another statement to the press as a result of Cabrera's desertion.

He knew another ORPA member, known as Valentín (Cristóbal Che Pérez), who was posted to Military Zone No. 1316, Mazatenango, at the end of 1991. However, he heard, through some combatants who had been taken prisoner that Valentín was taken drunk from Mazatenango, put in a prison cell and then nothing more was heard about him.

He left the Army in August 1996, after contacting Jennifer Harbury. When he was in the airport leaving Guatemala, he was told that there was an order of ne exeat against him. Moreover, he

was detained because he was carrying a gun. He was freed after payment of a financial surety. Then he went to Mexico, where he remained from August 1996 until October 1997.
He fears for his safety and that of his family, because he has given testimony before the Court, and because a few days after his arrival in Washington D. C., in November 1997, he heard that people were driving round his family's house in Guatemala. He did not request protection from the law as he considered that “in Guatemala, the laws are controlled by the Army.”
He was granted political asylum in the United States.

h. Testimony of Mario Ernesto Sosa Orellana, Guatemalan Army Staff Officer.

He began his service with the Army on June 30, 1977. In 1992, he held the rank of Major and he was posted to Military Zone No. 1316 at Mazatenango. Subsequently, between March and December that year, he transferred to the Santa Ana Berlín military base while the Quetzal Task Force was active, and when this closed down he was posted to Military Zone No. 18, in the Department of San Marcos, where he worked as an Intelligence Officer.
Regarding the structure of the military in Zone No. 18, he stated that it was a military command, led by three commanders with the rank of colonel, who were well-informed about military operations; the second commander was responsible for the Staff and the third commander, was the inspector. The battalion commanders were under the orders of the second commander and then the Staff officers, including the officer in charge of personnel, intelligence, operations, logistics and civilian matters, and the companies of soldiers. As an intelligence officer, he was under the authority of the second commander of the military zone. With regard to the line of authority among the Staff officers there was a situation of “rank to rank”; in other words, they all had the same employment, but the years spent in the Army were respected.
He knew Julio Alberto Soto Bilbao, who was an Army Major and Operations and Training Officer, and whose function was to plan counterinsurgency operations. He got to know Simeón Cum Chutá in San Marcos, in 1992. There, the latter worked under him as Specialist or office worker, doing typing work; intelligence analysis was carried out by the officer, in this case the witness. He knew Julio Roberto Alpírez, Army Colonel, who was the third commander in Military Zone No. 18, in 1992. Alpírez's functions were to supervise the operation of the detachment and cleaning activities. In July 1992, he was mobilized with a small group of the Staff of Military Zone No. 18 to the “El Porvenir” property, located in San Marcos, responsible for a Task Force formed to confront the rebels in the Zone. He got to know Raúl Rodríguez Garrido in Military Zone No. 1316 in Mazatenango. The latter was a Specialist to whom he gave orders on a daily basis.
Although he, personally, had not taken part in the capture of guerrillas during an armed encounter, should this situation arise, the Army proceeded to call the nearest authorities in order to hand them over and then “they claimed an amnesty.”
During his time in Military Zone No. 18 in San Marcos, he got to know some “former rebels”, including Anastasia López Calvo and Santiago Cabrera López, who [...] were part of us, as they had given themselves up to the Army and carried out cleaning functions and ran errands in the detachment. Cabrera López was not at the Santa Ana Berlín military base.
He was not afraid that these people in the military bases would take information to the guerrilla groups to which they had belonged and, also, he had never heard that any former combatant had been captured and then tortured to obtain information and, subsequently, maintained in military

installations for “military intelligence” purposes. The Army considered that the former guerrillas who were working for them were a very imprecise source of information.
In March 1992, a Task Force called Quetzal was formed; it was led by the then Colonel Ismael Segura Abularach. The purpose was to locate ORPA militants who were in the region. Members of the battalions from San Marcos and Military Zone No. 1715 of Quetzaltenango participated in this military undertaking. He took part in this mission in March that year because Colonel Aguirre Loarca was injured in the shoulder during an encounter with the guerrilla and the witness was called to relieve him. Colonel Conde Uriales was the Second Commander; he was an intelligence officer; Major Soto Bilbao was the logistics officer; Captain Aragón Cifuentes was the civilian affairs officer and there was also a personnel officer.
As an intelligence officer he heard that there had been an encounter between the Quetzal Task Force and the Luis Ixmatá Front in March 1992. He received a radio communication that “a terrorist criminal [...] had been killed in combat” near a river in Nuevo San Carlos. When the situation had calmed down, following orders, he went in one of the three Army helicopters at Retalhuleu to inform the authorities that there had been an armed encounter and that a guerrilla had died, and he helped the Magistrate get to the place in question. He was able to see the corpse, near the Ixcucua River, and they removed it by helicopter as part of the judicial procedure.
He was at the Santa Ana Berlín detachment after the encounter of March 12, 1992, and did not know whether Efraín Bámaca Velásquez had been captured at that time, nor did he know that members of ORPA had made declarations confirming this.
He denied having been with Nery Ángel Urízar at the Santa Ana Berlín base or having taken him to identify Bámaca Velásquez. He did not see Bámaca Velásquez either detained or tortured, or any other person with his physical characteristics at the Santa Ana Berlín base or at San Marcos and only knew of his existence because of all the information that appeared in the newspapers.
He denied having taken the decision to exploit the capture of Bámaca Velásquez for “military intelligence purposes”, by pretending that he was killed in combat and keeping him detained.
He met Nery Ángel Urízar, Specialist from Military Zone No. 1316 in 1991. The same year, he met Cristóbal Che Pérez, former combatant of ORPA's Javier Tambriz Front, who gave himself up directly to the witness. In the case of those mentioned, later “the whole procedure [of presenting them to the competent authorities] was carried out”. Finally, Che Pérez decided to remain at the military installations and he was even given a position as a solider. He denied having ordered his death and then handing him over to the Magistrate as the corpse found in the Ixcucua River. He warned that the testimony of Urízar García could not be trusted, because he is a “criminal” and there are even orders of arrest against him.
As a result of the disappearance of Bámaca Velásquez he made statements before the Public Ministry, in a court and at the Office of the Ombudsman. He was investigated and then the case against him was dismissed in a criminal proceeding arising from the Bámaca Velásquez Case, in about 1994. He also made a statement in the special pre-trial investigation procedure that tried to find the whereabouts of Bámaca Velásquez. During the period when the investigations were being carried out he was not separated from his functions in the Army.

j. Testimony of Acisclo Valladares Molina, Guatemalan lawyer and notary, Attorney General and Head of the Public Ministry

He carried out functions in the judicature, he was Head of the Public Ministry and Attorney General. He occupied the latter post for the period 1991-1993 and during the constitutional

period from 1994-1998. During the first period, the Guatemalan Constitution attributed two principal functions to the post: to be the legal representative of the State and "to ensure strict compliance with the laws and to criminally prosecute crimes". Furthermore, in Guatemala there existed the figure of public prosecution whereby any person could "prosecute any kind of crime, with the exception of private or semi-public crimes", and the Public Ministry was "simply an auxiliary of the tribunals of justice", while it was the judges who really headed investigations.

In the ordinary course of his functions, he heard about the exhumation ordered by the Second Judge of Retalhuleu for May 20, 1992, which had been requested by the Ombudsman, Ramiro de León Carpio, in order to confirm the identity of a corpse buried as XX in March that year. He considered that "the matter might be important" and his interest "began by curiosity to know whether what was planned would accomplish [the] objectives or not", and he never had the intention of "obstructing a procedure that might be viable."

He went in a military airplane to observe this exhumation, which was one of the 10 or 12 that he observed that year; he selected them at random, in order to instill confidence in the various national prosecutors.

When he reached the cemetery, he questioned the judge as to the usefulness of the procedure to identify a buried person and, as none of those present "said anything in reply", he suggested "that the procedure [should be] conducted when the necessary elements [were at hand] in order to achieve the desired success". He did not cancel the exhumation, because this was outside of his functions, but he suggested to the judge that the procedure would be useless. It was the judge who took the final decision. He denied having argued with the Retalhuleu judge and pressured him to cancel the procedure. He did not allege as the reason for canceling the exhumation the fact that no member of the URNG was present to identify the corpse, or that foreigners were presented. He never thought that the exhumation would be delayed for "an unusual amount of time."

About 20 persons were present for the procedure, including the judge, the prosecutor, Edwin Domínguez, four or five foreigners and some armed police. He did not know that, prior to his arrival, the police had informed those present that members of the Army would be coming to supervise the procedure and, after his arrival, no Army personnel arrived. He learned through the press that, with his arrival, some of those present "felt intimidated", but he did not observe "anything threatening."

He was unaware of the existence of a US agency document, according to which the Ombudsman stated that the witness had cancelled this exhumation in Retalhuleu for political reasons.

Although he knew about the contradictions between the exhumation and autopsy records and he knew the father of Efraín Bámaca Velásquez, he made no attempt to seek the latter's family in order to conduct the exhumation, because, at that time, a pre-trial was being conducted against him. He trusted that the Ombudsman would give due follow-up to the case.

He had also learned through the newspapers, on the one hand, that Bámaca Velásquez was in the hands of the Army and being tortured and that, subsequently, he had been executed; and, on the other, that in 1993, an exhumation had been conducted in the Retalhuleu cemetery, when it was concluded that "the body buried as XX and presented as that of Efraín Bámaca Velásquez did not correspond to the physical characteristics of Mr. Bámaca Velásquez."

In 1992, as a result of the proceeding that was underway against him, he requested the Congress of the Republic that to permit an "antejuicio" (pre-trial), a procedure aimed at suspending a Government official from his functions until his legal situation is clarified, so that he may defend

himself “without any kind of privilege”. In consequence, he was effectively suspended as Attorney General from September 1992 to September 1993.
In September 1993, having resolved his situation before the tribunals, he returned to his functions “and immediately present[ed] [his] resignation”, in order to allow the new President of the Republic, Ramiro de León Carpio, to select another person to occupy the position. He was again appointed Attorney General for the period 1994-1998, but by that time the functions of Attorney General and Head of the Public Ministry had been separated.
In 1994, he proposed a series of recourses to determine the whereabouts of Bámaca Velásquez. In October that year, considering that Bámaca Velásquez might possibly be detained, he began a special pre-trial investigation procedure before the Supreme Court of Justice, a procedure that had been introduced during the reform of the Criminal Procedural Code. He also filed a criminal complaint, in order to determine the whereabouts of Bámaca Velásquez. The then Ombudsman, Jorge Mario García Laguardia, was appointed executor in the first proceeding, and statements were received from the father of Bámaca Velásquez, José León Bámaca Hernández, and his sister, Egidia Gebia Bámaca Velásquez, in order to try and gather further information.
He did not remember that, during the judicial proceedings that had been instituted, and during Jennifer Harbury's hunger strike, the US Government had confirmed that the Army had captured Bámaca Velásquez alive and had addressed a formal diplomatic note to the Guatemalan Government on this subject. He knew that Harbury had made statements that criminal proceedings would be instituted against the military officers involved in the death of Bámaca Velásquez.
As Attorney General, he opposed the registration of Jennifer Harbury's marriage to Bámaca Velásquez, because “it [did] not comply with Guatemalan legal requirements”. In November 1994, he filed a civil suit for jactitation against Harbury, strictly with regard to the economic aspects of her pretensions, and not in relation to the case of human rights violations, due to the possibility of financial fraud, of trying to make money at the cost of the Guatemalan State. He recognized that Jennifer Harbury “had always declared that she did not want any money and that she was not seeking money”. The Sixth Judge of the Civil Trial Court rejected the action for jactitation, because he considered that Harbury was referring to filing criminal suits and not civil suits. Owing to the action for jactitation, Jennifer Harbury was obliged to remain in Guatemala under ne exeat, which could have been avoided, since “the proceeding for a [civil] ne exeat to be lifted takes less than 24 hours.”
The various investigations that he instituted did not permit the facts related to the disappearance of Bámaca Velásquez to be clarified, and no military officer was convicted in relation to the instant case.
He denied having received information from Colonel Julio Roberto Alpírez indicating that the Army had kept Bámaca Velásquez detained secretly in order to obtain “intelligence information”, and that it had then decided to execute him.
Owing to the prolonged internal conflict that Guatemala experienced, “it was not always easy [...] to obtain precise information about many things that were happening, so as to be able to clearly establish what had occurred in each case”. Because of his position, he knew about acts of State authorities that involved tortures and extrajudicial executions.

k. Testimony of Ismael Salvatierra Arroyo, former member of the Guatemalan Armed Forces

He worked with the armed forces from November 1979 to September 1997, as First Class Sergeant in the Defense Staff's transport team. The National Palace team of drivers comprised 12 persons, divided into two groups and he served Luis Alberto Gómez Guillermo directly and drove him from his house to the National Palace. He did not meet José Víctor Cordero Cardona, known as "La Yegua" (pilot of an Army helicopter), there.
He denied knowing about the Army practice of presenting all the guerrillas, both those captured in combat and those who gave themselves up voluntarily, to the corresponding civil authorities where they could claim amnesty. And, during his 17 years and 10 months of service, he had not heard of any former guerrilla who worked for the Army.
He did not know whether the Army had organized a special force in March 1992 to operate in San Marcos, or whether someone was captured as a result of an encounter in which this special force took part. Lastly, he denied knowing anything about the detention, torture and transfer to different military detachments of Bámaca Velásquez.

l. Testimony of Luis Alberto Gómez Guillermo, Lieutenant Colonel in the Guatemalan Army

He has been an Army officer and formed part of the intelligence unit called G-2. He later stated that he had not worked as an intelligence officer.
He did not know that the Army captured or arrested members of the guerrilla, or that there were clandestine detention centers for those who had been captured. When such persons gave themselves up they were not mistreated. The sources of information available to "military intelligence" to find out about guerrilla activities, in the context of the "armed conflict", were the local population or information provided by guerrillas who had given themselves up voluntarily.
The Army did not conduct interrogations, but rather "interviews" of the former guerrillas who gave themselves up voluntarily and claimed amnesty, such as the former guerrillas, de la Roca and Boitsiu. In these circumstances, the procedure followed was to immediately inform the superior officers and "then, bring the press so that, both their families and the rebels would know [...] that this man was now 'adaptado a la vida política' (re-adapted to society)". The "interview" was carried out by the competent judge, in the presence of representatives of the Public Ministry and lawyers, so that it could then be "used for or against in a formal proceeding."
He was acquainted with Otoniel de la Roca, and knew that he was a former member of the guerrilla, and did not work in the Army. He had spoken to him and to Luis Boitsiu, in 1991, regarding the existence of "schisms" in the guerrilla. He did not know that Otoniel de la Roca had been captured by the Army, tortured and used to "obtain intelligence" about the guerrilla.
Later he heard that Otoniel de la Roca Mendoza had been detained by the National Police Force because he was carrying a gun and uttering threats. He heard that de la Roca had made declarations to the press, but not that he had said that "something would happen to him or his family" if he did not make such declarations.
He was not acquainted with either Santiago Cabrera López or Anastasia López Calvo, or a member of the armed forces named José Víctor Cordero Cardona.
In June 1992, he abandoned the country to take a military course. In 1992, he was a member of the National Defense Staff, and was specifically appointed as an official member of the Support Committee for the Government Peace Commission, which met in the National Palace, as of January 1991. His function was to gather information on entities of a political nature, "to see how the peace process was regarded."

This Peace Commission was “a Government body, specifically set up to conduct the peace process”. From January to June 1992, this Commission declared itself in permanent session due to internal problems among the guerrilla that might affect the peace process.
He did not take part in the military operation called the Quetzal Task Force, from January 6 to June 15, 1992, because “[his] competence was of a political nature, and not in military operations”, nor was he at the Santa Ana Berlín military detachment in March 1992, nor in Military Zone No. 18 of San Marcos in July 1992. He learned of the capture and torture of Bámaca Velásquez through the media.

m. Testimony of Jesús Efraín Aguirre Loarca, Colonel in the Guatemalan Army

The Guatemalan Army did not capture guerrilla fighters or keep them detained; rather, to the contrary, when they deserted, the general policy was, first, to try and establish their true identity; then, they presented themselves before the tribunals of justice in order to claim “some kind of amnesty” and, subsequently, “they were incorporated into the work [...of] the military command where they had given themselves up”, because they feared that they would “be executed by the guerrilla groups.”
The guerrillas who gave themselves up were used by “Army intelligence” as a source of information on the military structure in which they had taken part and, principally, “to be able to determine the areas where [... there were] minefields” and, thus, alert the patrols to where they could pass. No pressure was exerted to ensure that former guerrillas told the truth. From what he knew of a case in the 1980s, those injured in combat were provided with the necessary medical support.
During his years in the Army, he knew some people who had given themselves up, specifically Santiago Cabrera López and others with the aliases “Karina”, “Augusto” and “Pepe.”
In 1992, he was a major in the Infantry and worked in the area of intelligence for the Quetzal Task Force, at the Santa Ana Berlín military detachment. Santiago Cabrera “performed duties in the [Intelligence] Office in which [the witness] worked.”
On February 28, 1992, he was injured in combat by a group from the Luis Ixmatá guerrilla front that operated in the area of San Marcos. After being injured, he was evacuated from the Zone and spent approximately 15 days recovering in the Military Medical Center in Guatemala City, which he could not leave; subsequently, he was transferred to the United States to continue his treatment for four months.
He returned to Guatemala at the beginning of June 1992 and as he was not totally recovered, “[he] was assigned to an Operations unit with the National Defense Staff in the capital”, so that he did not return to the Zone of Santa Ana Berlín until the end of June 1992.
He knew who Efraín Bámaca Velásquez was and that “he was doing political work in the area of [...] San Marcos”, and that he was a Commander.
Through the press, he learned about the armed encounter between the Luis Ixmatá Front and the Guatemalan Army in March 1992, and also about the capture of an important guerrilla leader.
He was not prosecuted nor did he declare before any tribunal in Guatemala with regard to the Bámaca Velásquez Case.

n. Testimony of Simeón Cum Chutá, former member of the Guatemalan Army

He was in the Guatemalan Army from 1985 to 1997, working as a Specialist in the intelligence unit in Military Zone No. 18 in the Department of San Marcos.
He knew Santiago Cabrera López, former URNG combatant, who, in 1991, presented himself voluntarily to Military Zone No. 18 in San Marcos, with another guerrilla called Karina. He was not aware of the procedure followed when Cabrera López arrived at the Military Zone, because that corresponded to the officer in charge of the intelligence section, Colonel Pérez Solares. He was unaware whether these persons had been taken before a judge.
His superior officers were "Lieutenant Colonel Pérez Solares, then Major Aguirre [and] then [officer] Sosa Orellana."
He was aware that, in March 1992, the Army organized the Quetzal Task Force, with the aim of fighting the guerrilla in San Marcos. This Task Force operated from the Military Zone No. 18 and Santa Ana Berlín bases. He never took part in it in any way. Major Aguirre did participate in it, as an intelligence officer.
He accompanied Santiago Cabrera to request his identity documents in March 1992, because, in his opinion, a person without personal identification could be prosecuted for this in Guatemala.
He knew nothing about an encounter between the Quetzal Task Force and the ORPA Luis Ixmatá Front in March 1992, because he was in San Marcos at that time. He did not know who Bámaca Velásquez was through his work, or whether he was captured as a result of the encounter of March 1992. Nor did he know about possible tortures inflicted on Bámaca Velásquez.
In March 1992, Raúl Sandoval, Santiago Cabrera López and a woman known as Karina, all former members of the guerrilla, formed part of the personnel of the intelligence office. Santiago Cabrera was always posted at the San Marcos base.
He was investigated in a criminal proceeding under the ordinary jurisdiction of Retalhuleu in relation to the disappearance of Bámaca Velásquez, in which he was exonerated.
The testimony of Cabrera López was not true.

o. Testimony of Julio Alberto Soto Bilbao, Infantry Colonel in the Guatemalan Army

From January 1 to September 31, 1992, he was on active service in Military Zone No. 18, carrying out duties as operations and training officer for this military Zone, which was under the command of Colonel Harry Ponce Ramírez.
He did not remember capturing any combatant, but rather having dealt with guerrillas injured in combat. The Guatemalan Army's policy during the conflict was "to give first aid to the [injured] person, transfer him to the command post [and] evaluate his health"; after this, they decided if he should be hospitalized. Then, they proposed to the guerrilla that he should voluntarily claim amnesty, which was processed in the magistrate's courts "and often in the presence of the press".
He did not know whether the Army kept former guerrillas as informers or "the procedure followed to obtain information from former guerrillas."
He did not remember any other former guerrilla who might have been working in Military Zone No. 18. However, he was aware of "various former guerrillas who had presented themselves voluntarily to different military commands, claimed amnesty and, for their own personal safety, remained working with the institution". He did not work with any of them, because they worked with "military intelligence."
He received intelligence information from the intelligence officer on how and where guerrilla detachments were located.

He was at the Santa Ana Berlín detachment in March 1992 and took part in the Quetzal Task Force, commanded by Colonel Ismael Segura Abularach, which "responded to an ORPA attack", specifically by the Luis Ixmatá Front. His tasks were those of an operations officer, carrying out "purely tactical and operational aspects", and executing functions such as overseeing the organization and training of the units before they went into combat.

He did not take part in the encounter between the Quetzal Task Force and the Luis Ixmatá Front on March 12, 1992, and did not know whether Bámaca Velásquez was captured, as a result of that encounter. He did not know the military commander of the Luis Ixmatá Front, Efraín Bámaca Velásquez, although he did know who he was, because "it has been extensively published in the press."

Although he was at the Santa Ana Berlín detachment in March 1992, he knew nothing about the alleged tortures inflicted on Bámaca Velásquez, and he denied having been one of the persons who took part in them in Military Zone No. 18, in July 1992. He was posted to Military Zone No. 18 in June 1992, and, in July the same year, he was posted to the same Zone, but at the "El Porvenir" property.

Santiago Cabrera López could not have left Santa Ana Berlín to go on leave from March 7 to 12, 1992, because the person who authorized that leave was Colonel Harry Ponce Ramírez, Commander of Military Zone No. 18, and a commander cannot authorize leave for a person on active service at another military base. Therefore, if it was Colonel Ponce Ramírez who signed his leave, Cabrera "had to have departed from [Military Zone No. 18] and returned to the same place."

During July 1992, Santiago Cabrera was allegedly working at "El Porvenir", under the orders of Captain Edwin Manuel Lemus Velásquez, so he could not have been at the San Marcos detachment.

He was not criminally prosecuted for the Bámaca Velásquez case; however, he appeared voluntarily before a criminal investigation instituted by the Public Ministry and was left "at liberty due to lack of merit". At the beginning of the proceeding, military courts were involved, but "subsequently, they were closed [...] and the whole process was transferred to the Retalhuleu Criminal Trial Court."

VIII. EVALUATION OF THE EVIDENCE

94. Article 43 of the Rules of Procedure of the Court establishes that

> [i]tems of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto [...] Should any of the parties allege force majeure, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing party is guaranteed the right of defense.

95. Before examining the evidence received, the Court will clarify the general criteria for evaluating evidence and some considerations that are applicable to this specific case, most of which have been developed in the Court's jurisprudence.

96. With regard to the formalities required in relation to tendering evidence, the Court has stated that

the procedural system is a means of attaining justice and [...] cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved [FN50].

[FN50] Cf. Castillo Petruzzi et al. Case. Judgment of May 30, 1999. Series C No. 52, para. 61; Paniagua Morales et al. Case. Judgment of March 8, 1998. Series C No. 37, para. 70; Certain Attributes of the Inter-American Commission on Human Rights (Articles 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 43; and Cayara Case. Preliminary objections. Judgment of February 3, 1993. Series C No. 14, para. 42.

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97. In an international tribunal such as the Court, whose aim is the protection of human rights, the proceeding has its own characteristics that differentiate it from the domestic process. The former is less formal and more flexible than the latter, which does not imply that it fails to ensure legal certainty and procedural balance to the parties [FN51]. This grants the Court a greater latitude to use logic and experience in evaluating the evidence rendered to it on the pertinent facts [FN52].

[FN51] Ibid.

[FN52] Cf. Villagrán Morales et al. Case (the “Street Children” Case). Judgment of November 19, 1999. Series C No. 63, para. 72; Blake Case. Judgment January 24, 1998. Series C No. 36, para. 50; Castillo Páez Case. Judgment of November 3, 1997. Series C No. 34, para. 39; and Loayza Tamayo Case. Judgment of September 17, 1997. Series C No. 33, para. 42.

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98. It must also be remembered that the international protection of human rights should not be confused with criminal justice. When States appear before the Court, they do so not as defendants in a criminal proceeding, since the Court does not impose punishment on those responsible for violating human rights. Its function is to protect the victims and to determine the reparation of the damages caused by the States responsible for such actions [FN53]. To this end

[t]he sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention. Moreover, the State's international responsibility is also at issue when it does not take the necessary steps under its domestic law [FN54].

[FN53] Cf. Castillo Petruzzi et al. Case, supra note 50, para. 90; Paniagua Morales et al. Case, supra note 50, para. 71; Suárez Rosero Case. Judgment of November 12, 1997. Series C No. 35,

para. 37; Fairén Garbi and Solís Corrales Case. Judgment of March 15, 1989. Series C No. 6, para. 136; Godínez Cruz Case. Judgment of January 20, 1989. Series C No. 5; para. 140; and Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 134.
[FN54] Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 75; and Paniagua Morales et al. Case, supra note 50, para. 91.
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99. It is worth emphasizing that, in this case, the State did not present any type of evidence for the defense during the procedural opportunities indicated in Article 43 of the Rules of Procedure and, to the contrary, partially recognized its international responsibility. Both in the reply to the application and in its final arguments, the State concentrated its defense on the argument that, at the time of the facts, Guatemala was experiencing an internal conflict, and accepted its international responsibility with regard to the rights and guarantees established in Articles 8, 25 and 1(1) of the American Convention.

100. In this respect, the Court considers, as it has in other cases, that when the State does not provide a specific reply to the application, it is presumed that the facts about which it remains silent are true, provided that consistent conclusions about them can be inferred from the evidence presented [FN55]. However, the Court will proceed to examine and evaluate all the elements that comprise the evidence in this case, applying the rule of "sound criticism" that enables judges to arrive at a decision as to the truth of the alleged facts [FN56].

[FN55] Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 68; Godínez Cruz Case, supra note 53, para. 144; and Velásquez Rodríguez Case, supra note 53, para. 138.
[FN56] Cf. Cantoral Benavides Case. Judgment of August 18, 2000. Series C No. 69, para. 52; Durand and Ugarte Case. Judgment of August 16, 2000. Series C No. 68, paras. 52-56; Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 71; Castillo Páez Case. Reparations, (Article 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, para. 40; Loayza Tamayo Case. Reparations (Article 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 42, para. 57; and Paniagua Morales et al. Case, supra note 50, para. 76.

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101. In the following paragraphs, the Court will consider various issues relating to the evidence presented in the instant case.

102. In regard to the evidence presented by the Commission, in its final written arguments, the State indicated that Nery Ángel Urízar García had not appeared before the Court and that the witness, Mario Ernesto Sosa Orellana (supra 63) "proved the inexactitude [of his] testimony" and that "he has a history of many criminal activities."

103. In this respect, the Court considers that the videotape with the testimony of Nery Ángel Urízar García, contributed by the Commission as documentary evidence, lacks autonomous value, and the testimony that it contains cannot be admitted as it has not complied with the requirements for validity, such as the appearance of the witness before Court, his identification, swearing in, monitoring by the State and the possibility of questioning by the judge [FN57].

[FN57] Nery Ángel Urízar worked under the orders of Mario Ernesto Sosa Orellana in the intelligence office of Military Zone No. 1316 of Mazatenango, Suchitepéquez. In March 1992, there was a battle between the Army and the Luis Ixmatá Front in Nuevo San Carlos, in which Comandante Everardo was injured. He saw a man who appeared to be Bámaca Velásquez at the Santa Ana Berlín military base, and this was confirmed by Sosa Orellana. It appeared that the Army killed a soldier named Cristóbal Che Pérez in order to simulate that his body was that of Bámaca Velásquez. He deserted the Guatemalan armed forces after an attempt had been made on his life and, subsequently, went to the United States.

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104. Furthermore, in its final written arguments, the State indicated that the annexes to the application containing documents produced by various US Government agencies "are unsigned; produced unilaterally, for purposes of which we are unaware, and for a country other than our own", and therefore, it requested the Court to reject them.

105. With regard to the documents attributed to the Central Intelligence Agency and other US agencies, which the Commission annexed to the application in this case (supra 1), the Court has confirmed that they lack authentication, present defects and do not comply with the minimum formal requirements for admissibility as it is impossible to precisely establish their source, and also the procedure by which they were obtained. Those circumstances prevent these documents from being granted value as evidence.

106. The other documents that the Commission presented with the application were not contested or objected to, nor was their authenticity doubted, and the Court therefore admits them as valid.

107. As for the newspaper cuttings contributed by the Commission, this Court has considered that, although they are not real documentary evidence, they could be taken into consideration when they cover public or well-known facts, or declarations of State officials or when they corroborate what has been established in other documents or testimonies received during the proceeding [FN58]. Consequently, the Court adds them to the probative evidence as an appropriate way of verifying the truth of the facts of the case, in conjunction with all the other evidence presented.

[FN58] Cf. Paniagua Morales et al. Case, supra note 50, para. 75; Fairén Garbi and Solís Corrales Case, supra note 53, para. 145; Godínez Cruz Case, supra note 53, para. 152 and Velásquez Rodríguez Case, supra note 53, para. 146.

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108. The statements made before a Notary and presented by the Commission should be admitted. On the one hand, because they constitute evidence produced by the Commission in March 1998, subsequent to the submission of the application (August 1996) and, on the other, because this Court has discretional powers to evaluate statements or declarations that are presented to it, either orally or by any other means. However, the Court observes that, since the requirements established in Articles 43 and ff. of the Rules of Procedure were not fulfilled, this Court cannot admit them as testimonial evidence and decides to incorporate them to the probative evidence in this case as documentary evidence [FN59].

[FN59] Cf. Castillo Páez Case. Reparations, supra note 56, paras. 40-42; and Loayza Tamayo Case. Reparations, supra note 56, paras. 54-60.

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109. With regard to the reports of the Inter-Diocesan Recovery of the Historical Memory Project and the Commission for Historical Clarification, they were offered as supervening evidence by the Commission, in accordance with Article 43 of the Rules of Procedure, and the State expressly accepted their incorporation into the probative evidence, so the Court incorporates them as documentary evidence.

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110. With regard to the documentary evidence that the State presented on December 4, 1998 (supra 56), the Commission placed "on written record its objection to the inclusion of various documents brought to the public hearing [of November 22 and 23, 1998] by the witnesses as evidence for the case file", since they are documents prior to the application and the State has not alleged force majeure, serious impediment or the emergence of supervening events as grounds for admitting such evidence.

111. On December 10, 1998, the President informed the Commission that he would forward to the Commission any document sent by the State so that it could make the pertinent observations. On January 12, 1999, the Commission repeated the objection set out in its brief of December 4 (supra 58). This objection was reiterated by the Commission in its final written arguments, in which it also indicated that "most of the documents offered by Guatemala are dated between 1992 and April 1996, prior to the submission of the application in this case to the Court. The few exceptions are certifications from 1998 that refer to events that occurred in previous years". It stated that documentary evidence must be offered before the public hearings, so as to be able to question the witnesses about such documents. Lastly, the Commission observed that the State had not complied with the Court's request, according to which, it should forward legible copies of the documents offered in its communication of December 4, 1998, (supra 56) and, also, that it had submitted documents that had not been offered in that communication.

112. The Court examined the 26 documents presented by the State. Of these, five corresponded to telegrams sent by State agents regarding the encounter of March 12, 1992, when the alleged facts of the case commenced; ten were related to the appropriateness of two of the

witnesses who made statements in the case; one was about the death of Bámaca Velásquez and 10 about the specific situation of two Army officers during 1992. Although the State did not make any statement about the reasons for the time-barred presentation of these elements of evidence and, therefore, did not explain the exceptional circumstances that would justify their admission by the Court, the latter considers that they constitute useful evidence inasmuch as they contain information about the facts examined, and accordingly incorporates them into the probative evidence based on Article 44(1) of the Rules of Procedure and deems them to be circumstantial evidence within the probative evidence, in accordance with the principle of "sound criticism." [FN60]

[FN60] Cf. Cantoral Benavides Case, supra note 56, para. 52; Durand and Ugarte Case, supra note 56, paras. 52-56; Villagrán Morales et al. Case (the “Street Children” Case), supra note 52, para. 71; Castillo Páez Case. Reparations, supra note 56, para. 40; Loayza Tamayo Case. Reparations, supra note 56, para. 57; and Paniagua Morales et al. Case, supra note 50, para. 76.

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113. The expert testimony provided by Helen Mack was not contested or objected to, nor was its authenticity doubted, so the Court considers it to be valid.

114. With regard to the testimonies presented, in its final written arguments, the State made the following observations with regard to the testimonies of Santiago Cabrera López, Jennifer Harbury and Otoniel de la Roca Mendoza. The Court summarizes below the State's principal objections to these testimonies:

a) regarding the testimony of Santiago Cabrera López, it indicated that there are irregularities with regard to his position and functions in the Guatemalan Army, since they vary from what was stated by the witnesses who declared on November 22 and 23, 1998; it therefore requests that this testimony should be rejected;
b) as for the testimony of Otoniel de la Roca Mendoza, it stated that he is “a fugitive from Guatemalan justice, that his testimony was given in order to obtain political asylum”, and that it contradicts that of Cabrera López;
c) in relation to the two witnesses mentioned above, it said that the inaccuracy of their testimonies is proved by the testimonies of Salvatierra Arroyo, Simeón Cum Chutá and Soto Bilbao; and
d) with regard to the testimony of Jennifer Harbury, it stated that, on the one hand, she had a financial interest in the case and, on the other, the “Guatemalan legal system does not permit the execution of decisions or judgments pronounced abroad”, so that it was not possible to register her marriage in the national registries.

115. Thus, the State merely made general observations on the alleged lack of competence or impartiality of the testimonies, basing itself on statements of agents or former agents of the State, who have been mentioned as possibly being responsible for the facts of the case. The Court believes that the statements of such witnesses, who have a direct interest in the case, are not

sufficient to invalidate testimonies that coincide fundamentally with other types of evidence that have not been objected to, and therefore the Court is unable to reject them.

116. It is also worth noting that while the witnesses de la Roca and Cabrera give a concurring version of the events that led to the disappearance of Bámaca Velásquez, the military officers who made statements before the Court and who, due to their functions, should have relevant information, merely denied or expressed their lack of knowledge of the events.

117. As for the objections relating to the alleged criminal history or proceedings pending against de la Roca Mendoza and Urízar García, this Court has established that, in such circumstances

this alone [is not] sufficient to deny the competence of witnesses to attest before the Court [because it would be] contradictory, under the American Convention on Human Rights, to deny a priori a witness the possibility of testifying about material facts of a case submitted to the Court, because he was being prosecuted or had even been convicted in a domestic proceeding, even if the said case referred to matters that affect it [FN61].

[FN61] Cf. Godínez Cruz Case, supra note 53, para. 51.

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118. With regard to the State's objection relating to the marriage of Jennifer Harbury and Efraín Bámaca Velásquez, this Court considers that the said union was proved during this proceeding (infra 121 c). In relation to Jennifer Harbury's alleged financial interest, the Court repeats that this circumstance does not disqualify the competence of a witness.

119. In accordance with these criteria, the Court attributes probative value to the declarations of the witnesses Harbury, Cabrera López and de la Roca Mendoza that were objected by the State. It is important to emphasize that, unlike other cases of forced disappearance in which the available evidence is limited to hearsay and circumstantial evidence [FN62], in this case, the Court has the direct testimonies of Santiago Cabrera López and Otoniel de la Roca Mendoza, to form an opinion.

[FN62] Cf. Blake Case, supra note 52, para. 51 and, similarly, Castillo Páez Case, supra note 52, paras. 50-53.

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120. The State had the opportunity to present its own witnesses and to reject the evidence provided by the Commission in its application, but did not do this. Moreover, although the State did reject some of the points put forward by the Commission, it did not provide evidence to support this rejection.

IX. PROVEN FACTS

121. The Court now proceeds to consider the relevant facts that it finds have been proved, which it will present chronologically. They result from the examination of the documents provided by the State and the Inter-American Commission, and also the documentary, testimonial and expert evidence submitted in the instant case.

a) Efraín Bámaca Velásquez was born on June 18, 1957, on the El Tablero property, El Tumbador, San Marcos [FN63].

b) At the time when the facts relating to this case took place, Guatemala was convulsed by an internal conflict [FN64].

c) Jennifer Harbury and Efraín Bámaca Velásquez met in 1990 and were married in the State of Texas, United States, on September 25, 1991 [FN65].

d) In 1992, there was a guerrilla group called the Organization of the People in Arms (ORPA) in Guatemala, which operated on four fronts, one of which was the Luis Ixmatá Front, commanded by Efraín Bámaca Velásquez, known as Everardo [FN66].

e) On February 15, 1992, the Quetzal Task Force, established by the Army to combat the guerrilla in the southwestern zone of the country, began its activities. Its command post was initially at the Santa Ana Berlín military detachment, in Coatepeque, Quetzaltenango. Other military zones, such as Military Zone No. 18 in San Marcos also collaborated with it [FN67].

f) It was the Army's practice to capture guerrillas and keep them in clandestine confinement in order to obtain information that was useful for the Army, through physical and mental torture. These guerrillas were frequently transferred from one military detachment to another and, following several months of this situation, were used as guides to determine where the guerrilla were active and to identify individuals who were fighting with the guerrilla. Many of those detained were then executed, which completed the figure of forced disappearance [FN68].

g) At the time of the facts of this case, various former guerrillas were collaborating with the Army, and providing it with useful information [FN69]. They included Cristóbal Che Pérez, known as Valentín, Santiago Cabrera López, known as Carlos, Otoniel de la Roca Mendoza, known as Bayardo, and Pedro Tartón Jutzuy, known as Arnulfo [FN70].

h) On March 12, 1992, there was an armed encounter between guerrilla combatants belonging to the Luis Ixmatá Front and members of the Army on the banks of the Ixcucua River, in the municipality of Nuevo San Carlos, Department of Retalhuleu [FN71]. Efraín Bámaca Velásquez was captured alive during this encounter. [FN72].

i) Efraín Bámaca Velásquez, who was wounded, was taken by his captors to the Santa Ana Berlín military detachment, Military Zone No. 1715, located in Coatepeque, Quetzaltenango. During his confinement at this detachment, Bámaca Velásquez remained tied up, with his eyes covered, and was submitted to unlawful coercion and threats while he was being interrogated [FN73].

j) Efraín Bámaca Velásquez remained at the Santa Ana Berlín military detachment from March 12, 1992, until April 15 or 20 that year. Subsequently, he was transferred to the detention center known as La Isla (the Island), in Guatemala City [FN74].

k) After his stay in Guatemala City, Efraín Bámaca Velásquez was transferred to the military bases of Quetzaltenango, San Marcos and Las Cabañas [FN75].

l) On about July 18, 1992, Efraín Bámaca Velásquez was in Military Zone No. 18 in San Marcos. Here he was interrogated and tortured. The last time that he was seen, he was in the infirmary of that military base, tied to a metal bed [FN76].

m) As a result of the facts of this case, several judicial proceedings were initiated in Guatemala, including: petitions for habeas corpus [FN77], a special pre-trial investigation procedure and various criminal lawsuits [FN78], none of which was effective, and the whereabouts of Efraín Bámaca Velásquez are still unknown. As a result of those proceedings, on various occasions, exhumation procedures were ordered in order to find his corpse. These procedures did not have positive results as they were obstructed by State agents [FN79].

[FN63] Cf. Declaration and registration of marriage in Travis County, Texas, United States of America of June 22, 1993, Annex 19; official record of interview with Jennifer Harbury of November 3, 1994, in the Public Ministry, Annex 47; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; and Report of the Commission for Historical Clarification, Tome VII.

[FN64] Cf. REMHI report, Tome III; Report of the Commission for Historical Clarification, Tome I; and final arguments of the State during the public hearing held at the seat of the Court on June 16, 17 and 18, 1998.

[FN65] Cf. Declaration and registration of marriage in Travis County, Texas, United States of America of June 22, 1993, Annex 19; judgment of May 23, 1996, delivered by the Second Trial Court of San Marcos, as a court of amparo, Annex 20; official record of the interview with Jennifer Harbury of November 3, 1994, in the Public Ministry, Annex 47; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; testimony of Jennifer Harbury given to the Court on June 16, 1998; and Report of the Commission for Historical Clarification, Tome VII.

[FN66] Cf. Testimonies of Santiago Cabrera López before the Office of the Guatemalan Prosecutor General and before the Inter-American Commission, Annexes 2 and 3; final oral argument of the State during the public hearing held at the seat of the Court on June 16, 17 and 18, 1998; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Efraín Aguirre Loarca, given to the Court on November 23, 1998; testimony of Julio Alberto Soto Bilbao, given to the Court on November 23, 1998; Report of the Commission for Historical Clarification, Tome II; and REMHI Report, Tome III.

[FN67] Cf. Testimonies of Santiago Cabrera López before the Office of the Guatemalan Prosecutor General and before the Inter-American Commission, Annexes 2 and 3; testimony of Nery Ángel Urízar García, before the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; statement sworn before a Notary on the testimony of Otoniel de la Roca Mendoza; testimony of Santiago Cabrera López given to the Court on June 16, 1998; expert testimony of Helen Mack given to the Court on June 18, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Simeón Cum Chutá, given to the Court on November 23, 1998; testimony of Julio Alberto Soto Bilbao,

given to the Court on November 23, 1998; REMHI Report, Tome II; and Report of the Commission for Historical Clarification, Tome VII.

[FN68] Cf. Testimonies of Santiago Cabrera López before the Inter-American Commission on Human Rights and before the Office of the Guatemalan Prosecutor General, Annexes 1 and 2; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; statement sworn before a Notary with the testimony of Pedro Tartón Jutzuy "Arnulfo" of February 23, 1998; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo" of February 24, 1998; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; REMHI Report, Tome II; and Report of the Commission for Historical Clarification, Tome II.

[FN69] Cf. Testimony of Santiago Cabrera López before the Inter-American Commission, Annex 3; testimony of Nery Ángel Urízar García before the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; supplementary statement by Nery Ángel Urízar García before the special prosecutor, Julio Eduardo Arango Escobar, Public Ministry, May 24, 1995, Annex 12; statement sworn before a Notary with the testimony of Pedro Tartón Jutzuy "Arnulfo" of February 23, 1998; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo" of February 24, 1998; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Luis Alberto Gómez Guillermo, given to the Court on November 23, 1998; testimony of Jesús Efraín Aguirre Loarca of November 23, 1998; testimony of Julio Alberto Soto Bilbao, given to the Court on November 23, 1998; and REMHI Report, Tome II.

[FN70] Cf. Testimony of Santiago Cabrera López before the Inter-American Commission, Annex 3; testimony of Nery Ángel Urízar García before the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; supplementary statement by Nery Ángel Urízar García before the special prosecutor, Julio Eduardo Arango Escobar, Public Ministry, May 24, 1995, Annex 12; statement sworn before a Notary with the testimony of Pedro Tartón Jutzuy "Arnulfo" of February 23, 1998; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo" of February 24, 1998; testimony of Santiago Cabrera López. given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Luis Alberto Gómez Guillermo, given to the Court on November 23, 1998; and testimony of Jesús Efraín Aguirre Loarca of November 23, 1998.

[FN71] Cf. Testimony of Nery Ángel Urízar García before the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo" of February 24, 1998; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Julio Alberto Soto Bilbao, given to the Court on November 23, 1998; photocopy of official letter No. 229/G-3-92 of 13 July, 1992, attaching Fragmentary Order

No. 008/G-3-92; two photocopies of telegrams of July 21 and 27, 1992; photocopy of official letter No. 245/G-3-92; photocopy of telegram of August 7, 1992; and Report of the Commission for Historical Clarification, Tome VII.

[FN72] Cf. Testimony of Nery Ángel Urízar García before the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo" of February 24, 1998; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; and Report of the Commission for Historical Clarification, Tome VII.

[FN73] Cf. Testimonies of Santiago Cabrera López before the Inter-American Commission on Human Rights and before the Office of the Guatemalan Prosecutor General, Annexes 1 and 2; testimony of Nery Ángel Urízar García before the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; statement sworn before a Notary about the testimony of Otoniel de la Roca Mendoza "Bayardo" of February 24, 1998; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; REMHI Report, Tome II; and Report of the Commission for Historical Clarification, Tome VII.

[FN74] Cf. Testimonies of Santiago Cabrera López before the Inter-American Commission on Human Rights and before the Office of the Guatemalan Prosecutor General, Annexes 1 and 2; statement sworn before a Notary about the testimony of Otoniel de la Roca Mendoza; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; and Report of the Commission for Historical Clarification, Tome VII.

[FN75] Cf. Statement sworn before a Notary about the testimony of Otoniel de la Roca Mendoza; REMHI Report, Tome II; and Report of the Commission for Historical Clarification, Tome VII.

[FN76] Cf. Testimonies of Santiago Cabrera López before the Inter-American Commission on Human Rights and before the Office of the Guatemalan Prosecutor General, Annexes 1 and 2; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; REMHI Report, Tome II; and Report of the Commission for Historical Clarification, Tome VII.

[FN77] Cf. Decisions of February 25 and 26, 1993 of the Supreme Court of Justice in case No. 14/93, Annex 23; letter of March 11, 1993, from Juan José Rodil Peralta, President of the Supreme Court of Justice, to the members of the Board of Directors of the Guatemalan Human Rights Commission, Annex 24; Decision of the Supreme Court of Justice, of September 1, 1994, in case No. 82/94, Annex 25; complaint presented before the Public Ministry on October 21, 1994, by the Attorney General, Acisclo Valladares Molina, Annex 27; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; testimony of Jennifer Harbury, given to the Court on June 16, 1998; and testimony of Acisclo Valladares Molina given to the Court on November 22, 1998.

[FN78] Cf. Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; Decision of the Public Ministry of March 23, 1995, Annex 29; decision of the First Criminal, Narco-activity and Crimes against the Environment Trial Court of

Guatemala on March 28, 1995, Annex 30; statement by Jennifer Harbury presented to the Inter-American Commission on December 20, 1995, Annex 46; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; Decision of the Military Trial Court of Retalhuleu of April 10, 1995, Annex 52; Decision of the Military Trial Court of Retalhuleu of April 5, 1995, Annex 53; Decision of July 17, 1995, of the Eleventh Chamber of the Retalhuleu Appeals Court, convened in Court Martial, Annex 54; decisions of November 22, 1995, of the Eleventh Chamber of the Appeals Court of Retalhuleu, convened in Court Martial, Annex 55; decisions of the Military Trial Court of Retalhuleu of December 5, 1995, Annex 56; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Fernando Moscoso Moller, given to the Court on June 17, 1998; testimony of Acisclo Valladares Molina, given to the Court on November 22, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Simeón Cum Chutá, given to the Court on November 23, 1998; testimony of Julio Alberto Soto Bilbao, given to the Court on November 23, 1998; Report of the Commission for Historical Clarification, Tome VII; and letter of March 13, 1995, from the Government to the Inter-American Commission.

[FN79] Cf. Transcripts of the reports of the Magistrate and the autopsy that appear in case file No. 395-92 provided to Jennifer Harbury on August 23, 1993, Annex 4; testimony of Patricia Davis of August 24, 1993, Annex 5; judicial record of the exhumation in Retalhuleu, August 17, 1993, Annex 6; report of the forensic expert, Michael Charney, to the Second Criminal Trial Court of Retalhuleu, August 18, 1993, Annex 7; Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; Decision of June 19, 1995, of Second Criminal, Narco-Activity and Crimes against the Environment Trial Court, Annex 37; Newspaper article, "Exhumation of Bámaca Velásquez suspended due to insufficient time", NOTIMEX, June 16, 1995, Annex 39; Forensic Anthropology Team. Preliminary Report. Forensic studies in the investigation proceedings of the Efraín Bámaca Velásquez Case, Annex 40; Newspaper article, "Frustrado nuevo intento para exhumar cadáver de Bámaca Velásquez", Prensa Libre, July 7, 1995, Annex 41; statement by Jennifer Harbury presented to the Inter-American Commission on December 20, 1995, Annex 46; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of James Harrington. given to the Court on June 17, 1998; testimony of Francis Farenthall, given to the Court on June 17, 1998; testimony of Fernando Moscoso, given to the Court on June 17, 1998; testimony of Julio Arango Escobar, given to the Court on June 17, 1998; testimony of Patricia Davis, given to the Court on June 18, 1998; testimony of Acisclo Valladares, given to the Court on November 22, 1998; and letter of May 11, 1992 of Ramiro de León Carpio, Ombudsman, to Francisco Villagrán Muñoz.

X. FORCED DISAPPEARANCE OF PERSONS

122. In its final written arguments, the Commission referred to the phenomenon of the forced disappearance of persons, stating that in this type of situation

the arbitrary detention, solitary confinement, isolation and torture of the victim are followed, in most cases, by the execution of the victim and the concealment of his corpse, accompanied by an

official silence, denials and obstruction; the family, friends and companions remain anxious and uncertain about the fate of the victim. Forced disappearance attempts to erase any trace of the crime in order to ensure the total impunity of those who committed it.

In the light of this reasoning, the Commission argued that, although Guatemala had signed, but not ratified, the Inter-American Convention on Forced Disappearance of Persons, this entered into effect on March 28, 1996, and "constituted an important instrument to classify and understand forced disappearances and to interpret the American Convention", pursuant to its Article 29.

123. In the same arguments, the Commission stated that in Latin America

most victims of dirty wars did not die in combat or accidentally in the crossfire between the armed rebel groups and the Army. Many of them were confined in clandestine detention centers, tortured [... and] buried without dignity or respect in unnamed graves or […] thrown from airplanes into the sea.

124. According to the Commission, at the time of the facts of this case, there was, in Guatemala, a State policy under which captured guerrillas were used to obtain information on the organization and activities of the rebel group of which they formed part. To achieve this, the agents who captured them kept their detention secret and submitted them to torture. This situation constituted the phenomenon of forced disappearance, which often culminated with the execution of the person captured. This practice, which also sought to prevent any possibility of proving it, was applied to Efraín Bámaca Velásquez.

125. In its final oral arguments in the public hearing on merits held in Washington D.C., United States (supra 48), the State admitted that

it effectively knew that, within the ranks of the Army, there was a systematic practice, when a member of the URNG was detained or gave himself up, of transferring him to the National Army, if this was useful or offered sufficient benefits to make it attractive.

However, during the same hearing, the State added that

if Mr. Bámaca [Velásquez] was effectively a prisoner of war, he was an exception and it was not common practice.

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126. In its Article II, the Inter-American Convention on Forced Disappearance of Persons defines forced disappearance as

the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information or a refusal to acknowledge

that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

127. Article 201 TER of the Guatemalan Criminal Code - reformed by Decree No. 33-96 of the Congress of the Republic, adopted on May 22, 1996 - establishes:

[t]he person who, with the authorization or support of State authorities, shall, for political motives, in any way, deprive one or more persons of their liberty, concealing their whereabouts, refusing to reveal their fate or acknowledge their detention, and also the public official or employee, whether or not he is a member of a State security agency, who orders, authorizes, supports or acquiesces to such actions, shall commit the crime of forced disappearance [FN80].

[FN80] Cf. Blake Case, supra note 52, para. 64.

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128. Involuntary or forced disappearance constitutes a multiple and continuing violation of a number of rights protected by the Convention [FN81], because not only does it produce an arbitrary deprivation of liberty, but it also endangers personal integrity, safety and the very life of the detainee. Moreover, it places the victim in a state of complete defenselessness, resulting in other related crimes.

[FN81] Cf. Blake Case, supra note 52, para. 65; Godínez Cruz Case, supra note 53, paras. 163 and 166; Caso Fairén Garbi, supra note 53, para. 147; and Velásquez Rodríguez Case, supra note 53, paras. 155 and 158.

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129. This phenomenon also presumes “a disregard of the duty to organize the apparatus of the State in such a manner as to guarantee the rights recognized in the Convention” [FN82]. Therefore, when it implements or tolerates actions tending to execute forced or involuntary disappearances, when it does not investigate them adequately and does not punish those responsible, when applicable, the State violates the obligation to respect the rights protected by the Convention and to guarantee their free and full exercise [FN83], of both the victim, and of his next of kin to know his whereabouts [FN84].

[FN82] Ibid.

[FN83] Cf. Paniagua Morales et al. Case, supra note 50, para. 90; Fairén Garbi and Solís Corrales Case, supra note 53, para. 152; Godínez Cruz Case, supra note 53, paras. 168-191; and Velásquez Rodríguez Case, supra note 53, paras. 159-181;

[FN84] Cf. Blake Case, supra note 52, para. 66; Fairén Garbi and Solís Corrales Case, supra note 53, para. 147; Godínez Cruz Case, supra note 53, para. 165; and Velásquez Rodríguez Case, supra note 53, para. 158.

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130. According to the jurisprudence of this Court, forced disappearance "frequently involves secret execution [of those detained], without trial, following by concealment of the corpse in order to eliminate any material evidence of the crime and to ensure the impunity of those responsible" [FN85]. Due to the nature of the phenomenon and its probative difficulties, the Court has established that if it has been proved that the State promotes or tolerates the practice of forced disappearance of persons, and the case of a specific person can be linked to this practice, either by circumstantial or indirect evidence [FN86], or both, or by pertinent logical inference [FN87], then this specific disappearance may be considered to have been proven [FN88].

[FN85] Cf. Godínez Cruz Case, supra note 53, para. 165; and Velásquez Rodríguez Case, supra note 53, para. 157.
[FN86] Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 69; Castillo Petruzzi et al. Case, supra note 50, para. 62; Paniagua Morales et al. Case, supra note 50, para. 72; Blake Case, supra note 52, paras. 47 and 49; Caso Gangaram Panday. Judgment of January 21, 1994. Series C No. 16, para. 49; Fairén Garbi and Solís Corrales Case, supra note 53, paras. 130-133; Godínez Cruz Case, supra note 53, paras. 133-136; and Velásquez Rodríguez Case, supra note 53, paras. 127-130.
[FN87] Cf. Blake Case, supra note 52, para. 49.
[FN88] Cf. Similarly, Blake Case, supra note 52, para. 49; Godínez Cruz Case, supra note 53, paras. 127 and 130; and Velásquez Rodríguez Case, supra note 53, para. 124.

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131. Taking this into account, the Court attributes a high probative value to testimonial evidence in proceedings of this type, that is, in the context and circumstances of cases of forced disappearance, with all the attendant difficulties, when, owing to the very nature of the crime, proof essentially takes the form of indirect and circumstantial evidence [FN89].

[FN89] Cf. Blake Case, supra note 52, para. 51.

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132. This Court has considered proven, on the basis of both the circumstantial evidence and the direct evidence, that, as the Commission has indicated, at the time of the facts of the case, the Army had a practice of capturing guerrillas, detaining them clandestinely without advising the competent, independent and impartial judicial authority, physically and mentally torturing them in order to obtain information and, eventually, killing them (supra 121f). It can also be asserted, according to the evidence submitted in this case, that the disappearance of Efraín Bámaca Velásquez is related to this practice (supra 121 h, i, j, k, l), and therefore the Court deems it to have been proved.

133. There is sufficient evidence to conclude that the facts indicated in relation to Efraín Bámaca Velásquez were carried out by persons who acted in their capacity as agents of the State, which involves the international responsibility of Guatemala as State Party to the Convention.

134. It has also been proved that, despite the various domestic remedies used in order to clarify the facts, these were not effective to prosecute and, if applicable, punish those responsible (supra 121 m). Guatemala even accepted its international responsibility, stating that "it has still not been possible for the competent bodies to identify the persons or person criminally responsible for the unlawful acts that are the subject of this application."

135. Now that it has been proved that the detention and disappearance of Efraín Bámaca Velásquez occurred and that they may be attributed to the State, the Court will examine these facts in the light of the American Convention.

XI. VIOLATION OF ARTICLE 7 (RIGHT TO PERSONAL LIBERTY)

136. With regard to the violation of Article 7 of the Convention, the Commission alleged that:

a) the detention of Efraín Bámaca Velásquez by agents of the Guatemalan armed forces and his captivity in a clandestine center, without presenting him before the judicial authorities, violated the right established in Article 7 of the Convention and Article 6 of the Guatemalan Constitution. This is concluded from the statements of various witnesses who describe military installations where Velásquez was detained;
b) on other occasions, the Commission has reached the conclusion that agents of the State have abducted persons and kept them prisoner in clandestine detention centers, located in installations of the armed forces, and this situation constitutes "a particularly serious form of arbitrary deprivation of liberty". These actions of State agents are beyond the law and, due to their secret nature, may not be examined; and
c) from the evidence in this case, it is proved that Bámaca Velásquez was alive in the hands of the Army up until at least May 1993, or even until August that year, without knowing the cause of his detention and in a place that was not "legally and publicly (destined to that end)", which proves that he "was not detained in accordance with the laws of Guatemala, and this implies that Article 7.2 of the Convention has been violated."

137. The State limited its defense to the assertion that "it has still not been possible to identify the persons or person criminally responsible for the unlawful acts against Mr. Bámaca [Velásquez] and, thus, clarify his disappearance" and, in consequence, it did not put forward any defense related to the violation of the right to personal liberty embodied in the American Convention, either at the procedural opportunity of answering the application or in its final arguments.

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138. Article 7 of the American Convention establishes, in this regard:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
[...]

139. Article 7 of the Convention regulates the necessary guarantees to safeguard personal liberty. With regard to its numerals 2 and 3, the Court has said that

[a]ccording to the first of these regulatory provisions, no one shall be deprived of his physical liberty, except for reasons, cases or circumstances specifically established by law (material aspect), but, also, under strict conditions established beforehand by law (formal aspect). In the second provision, we have a condition according to which no one shall be subject to arrest or imprisonment for causes or methods that - although qualified as legal - may be considered incompatible with respect for the fundamental rights of the individual because they are, among other matters, unreasonable, unforeseeable or out of proportion [FN90].

[FN90] Cf. Durand and Ugarte Case, supra note 56, para. 85; Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 131; Suárez Rosero Case, supra note 53, para. 43; and Caso Gangaram Panday, supra note 86, para. 47.

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140. Both this Court [FN91] and the European Court [FN92] have considered that the prompt judicial supervision of detentions is of particular importance in order to prevent arbitrariness. An individual who has been deprived of his freedom without any type of judicial supervision should be liberated or immediately brought before a judge, because the essential purpose of Article 7 of the Convention is to protect the liberty of the individual against interference by the State. The European Court has stated that, although the word "immediately" should be interpreted according to the special characteristics of each case, no situation, however, grave, grants the authorities the power to unduly prolong the period of detention without affecting Article 5(3) of the European Convention [FN93]. That Court emphasized that failure to acknowledge the detention of an individual is a complete denial of the guarantees that must be granted and an even greater violation of the Article in question [FN94].

[FN91] Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 135.

[FN92] Cf. Eur. Court HR, Aksoy v. Turkey judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, para. 76; Eur. Court H.R., Brogan and Others Judgment of 29 November 1988, Series A no. 145-B, para. 58; and Eur. Court HR, Kurt v. Turkey judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, para. 124.
[FN93] Cf. Castillo Petruzzi et al. Case, supra note 50, para. 108; and Eur. Court H. R., Case of Brogan and Others, supra note 92, paras. 58-59, 61-62.
[FN94] Cf. Eur. Court HR, Kurt v. Turkey, supra note 90, para. 124.
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141. In the same way, this Court has indicated that, by protecting personal liberty, a safeguard is also provided for

both the physical liberty of the individual and his personal safety [...], in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those arrested of the minimum legal protection [FN95].

[FN95] Cf. Villagrán Morales et al. Case (the “Street Children” Case), supra note 52, para. 135.
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142. In cases of forced disappearance of persons, the Court has stated that this represents a phenomenon of “arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention.” [FN96]

[FN96] Cf. Godínez Cruz Case, supra note 53, paras. 163 and 196; Fairén Garbi and Solís Corrales Case, supra note 53, para. 148; and Velásquez Rodríguez Case, supra note 53, paras. 155 and 186.
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143. This Court has established as proven in the case being examined, that Efraín Bámaca Velásquez was detained by the Guatemalan army in clandestine detention centers for at least four months, thus violating Article 7 of the Convention (supra 121 I, j, k, l). Although this is a case of the detention of a guerrilla during an internal conflict (supra 121 b), the detainee should have been ensured the guarantees that exist under the rule of law, and been submitted to a legal proceeding. This Court has already stated that, although the State has the right and obligation to guarantee its security and maintain public order, it must execute its actions “within limits and according to procedures that preserve both public safety and the fundamental rights of the human person.” [FN97]

[FN97] Cf. Durand and Ugarte Case, supra note 56, para. 69; Castillo Petruzzi et al. Case, supra note 50, paras. 89 and 204; Godínez Cruz Case, supra note 53, para. 162; and Velásquez Rodríguez Case, supra note 53, para. 154.
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144. In view of the foregoing, the Court concludes that the State violated Article 7 de la American Convention to the detriment of Efraín Bámaca Velásquez.

XII. VIOLATION OF ARTICLE 5 (RIGHT TO HUMANE TREATMENT)

145. Regarding the violation of Article 5 of the Convention, the Commission alleged that:

a) the forced disappearance of Efraín Bámaca Velásquez and his confinement in a clandestine detention center constitute violations of Article 5 of the Convention, because they represent cruel and inhuman forms of treatment that, according to the jurisprudence of this Court, injure the physical and moral integrity of the person and his dignity;
b) the interrogations of Bámaca Velásquez by agents of the armed forces, during which his feet and hands were bound and he was tied to a bed, while he received death threats, constitute cruel, inhuman or degrading treatment, contrary to Articles 5(1) and 5(2) of the Convention;
c) the acts of violence and physical abuse against the person of Bámaca Velásquez in San Marcos, presumably to punish him for his activity as a guerrilla and to obtain information on the guerrilla strategy, correspond to the figure of torture established in Article 5(2) of the American Convention;
d) the fact that the State agents tried to conceal his corpse was designed "to eliminate any evidence of torture. Consequently, the fact that the body was concealed, leads to the presumption of torture". Moreover, the Army had the practice of torturing the guerrillas they captured, which was proved very exactly in the testimonies of Cabrera López, Urízar García and de la Roca, and also in the reports prepared by both the Commission for Historical Clarification and the REMHI;
e) in the same way that the Court has established the inversion of the burden of proof with regard to the right to life in cases of the forced disappearance of persons, the same reasoning must be applied to the violation of the right to humane treatment "and, in particular, [to] the torture of the victim, particularly in view of the characteristics of forced disappearance";
f) the State violated the right to humane treatment of the next of kin of Bámaca Velásquez as a result of "the anxiety and suffering that [they underwent as] a consequence of the forced disappearance of Efraín Bámaca Velásquez". The uncertainty caused by the lack of effectiveness of the remedies under domestic jurisdiction constituted cruel treatment. Furthermore, the fact that the remains of Bámaca Velásquez were not given proper burial has profound repercussions in the Mayan culture to which he belonged, "due to the fundamental importance of its culture and the active relationship that unites the living and the dead, [thus t]he lack of a sacred place where this relationship could be nurtured constitutes a profound concern that emerges from the testimonies of many Mayan communities"; and
g) the "Guatemalan public authorities not only obstructed the investigation into the fate of Mr. Bámaca [Velásquez] with a blanket of silence, [but] they also began a campaign of harassing Mrs. Harbury"; for example, through press campaigns, the legal action for jactitation, and her exclusion from the criminal proceedings. In view of the foregoing, the Commission requested the Court to declare that this article had been violated with regard to the next of kin of Bámaca Velásquez, who are: Jennifer Harbury, José de León Bámaca Hernández, the victim's father, and Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez, the victim's sisters.

146. As mentioned above (supra 137), the State did not put forward any defense in relation to the violation of the right to personal liberty embodied in the American Convention, either at the procedural opportunity of replying to the application or in its final arguments. However, the State said that Bámaca Velásquez "did not have a close relationship with his family because he was dedicated to guerrilla activities in a distant and isolated place [...] so that it could not accept the presumption to create relationships where they did not exist, according to the testimony that had been presented."

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147. Article 5 of the Convention establishes that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
[...]

148. The Court considers that it should proceed to examine the possible violation of Article 5 of the Convention from two different perspectives. First, it should examine whether or not there was a violation of Article 5(1) and 5(2) of the Convention to the detriment of Efraín Bámaca Velásquez. Second, the Court will evaluate whether the next of kin of the victim were also subjected to the violation of their right to humane treatment.

149. The Court considers that it has been proved that Bámaca Velásquez was detained by members of the Army and that his detention was not communicated to a competent judge or to his next of kin (supra 121 h, i).

150. As this Court has already established, a "person who is unlawfully detained is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated" [FN98]. We should add to the foregoing that: "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being" [FN99]. Solitary confinement produces moral and psychological suffering in the detainee, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in detention centers [FN100]. Therefore, the Court has stated that, "in international human rights law [...] incommunicado detention is considered to be an exceptional instrument and [...] its use during detention may constitute an act against human dignity." [FN101]

[FN98] Cf. Cantoral Benavides Case, supra note 56, para. 90; Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 166; and similarly, Eur. Court H.R., Case of Ireland v. the United Kingdom, Judgment of 18 January 1978, Series A no. 25. para. 167.

[FN99] Cf. Fairén Garbi and Solís Corrales Case, supra note 53, para. 149; Godínez Cruz Case, supra merits, paras. 164 and 197; and Velásquez Rodríguez Case, supra note 53, paras. 156 and 187.
[FN100] Cf. Castillo Petruzzi et al. Case, supra note 50, para. 195; and Suárez Rosero Case, supra note 53, para. 90.
[FN101] Cf. Cantoral Benavides Case, supra note 56, para. 82; and Suárez Rosero Case, supra note 53, para. 90.
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151. With regard to the treatment of Bámaca Velásquez by the State authorities during his detention, the Court has taken into account a series of testimonial evidence given by former guerrillas, which may be classified as direct evidence, which indicates that Bámaca Velásquez was tortured by State agents at the various military bases where he was kept captive. The witness, de la Roca Mendoza, declared that Bámaca Velásquez was beaten and he heard his cries in the night (supra 93 C h); while the witness, Cabrera López, saw him swollen, tied up and with bandages on his extremities and his body (supra 93 C a).

152. As this Court has often repeated, in cases of forced disappearance, the State's defense cannot rely on the impossibility of the plaintiff to present evidence in the proceedings since, in such cases, it is the State that controls the means to clarify the facts that have occurred in its jurisdiction and, therefore, in practice, it is necessary to rely on the cooperation of the State itself in order to obtain the required evidence [FN102].

[FN102] Cf. Cantoral Benavides Case, supra note 56, para. 55; Neira Alegría et al. Case. Judgment of January 19, 1995. Series C No. 20, para. 65; Caso Gangaram Panday, supra note 86, para. 49; Godínez Cruz Case, supra note 53, paras. 141 and 142; and Velásquez Rodríguez Case, supra note 53, paras. 135 and 136.
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153. In the same way, the United Nations Human Rights Committee has indicated that

the burden of proof cannot fall solely on the author of the communication, considering, in particular, that the author and the State Party do not always have equal access to the evidence and that, frequently, it is only the State Party that has access to the pertinent information [...]. In cases when the authors have presented charges supported by attesting evidence to the Committee [...] and in which subsequent clarification of the case depends on information that is exclusively in the hands of the State Party, the Committee may consider that those charges are justified unless the State Party presents satisfactory evidence and explanations to the contrary [FN103].

[FN103] Communication Hiber Conteris v. Uruguay, No. 139/1983, paras. 182-186; [17th to 32nd sessions (October 1982 to April 1988)]. Selection of Decisions of the Human Rights Committee adopted in accordance with the Optional Protocol, Vol. 2, 1992.
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154. The probative elements gathered while processing this case lead the Court to consider proved the abuses that, it is alleged, were committed against Bámaca Velásquez during his reclusion in various military installation. The Court must now determine whether such abuses constitute torture or cruel, inhuman or degrading treatment. Clearly, it is important to state that both types of acts are strictly prohibited under any circumstance [FN104].

[FN104] Cf. Cantoral Benavides Case, supra note 56, para. 95.

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155. The Inter-American Court has observed that when a State faces a situation of internal upheaval, this should not result in restrictions in the protection of the physical integrity of the person. Specifically, the Court has indicated that

[… a]ny use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person [...] in violation of Article 5 of the American Convention [FN105].

[FN105] Cf. Cantoral Benavides Case, supra note 56, para. 96; Castillo Petruzzi et al. Case, supra note 50, para. 197; and Loayza Tamayo Case, supra note 52, para. 57.

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156. According to Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, torture implies deliberately inflicting punishment or physical or mental suffering in order to intimidate, punish, investigate or prevent crimes, punish their commitment or any other end.

157. Article 2 of the Inter-American Convention to Prevent and Punish Torture defines this as

any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty or to any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause him physical pain or mental anguish.

and adds:

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

158. The Court considers that the acts denounced in the present case were deliberately prepared and inflicted, in order to obtain information that was relevant for the Army from Efraín Bámaca Velásquez. According to the testimonies received in this proceeding, the alleged victim was submitted to grave acts of physical and mental violence during a prolonged period of time

for the said purpose and, thus, intentionally placed in a situation of anguish and intense physical suffering, which can only be qualified as both physical and mental torture.

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159. It its final arguments, the Commission requested the Court to declare that Article 5 of the Convention had been violated, to the detriment of the wife of Bámaca Velásquez, Jennifer Harbury, and his direct next of kin, José de León Bámaca Hernández, Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez.

160. This Court has indicated on other occasions, that the next of kin of the victims of human rights violations may, in turn, become victims [FN106]. In a case involving the forced disappearance of a person, the Court stated that the violation of the mental and moral integrity of the next of kin is precisely a direct consequence of the forced disappearance. In particular, the Court considered that the "circumstances of such disappearances generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate." [FN107]

[FN106] Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 175; Castillo Páez Case, supra note 52, fourth decision; Castillo Páez Case. Reparations, supra note 56, para. 59; and Blake Case, supra note 52, para. 115.
[FN107] Cf. Blake Case, supra note 52, para. 114.

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161. This Court has even stated, in the recent "Street Children" case, that the mothers of the victims suffered due to the negligence of the authorities in establishing the latter's identity; because the said State agents "did not make the necessary efforts to immediately locate the relatives" of the victims and notify them of their death, delaying the opportunity to give them "burial according to their traditions"; because the public authorities abstained from investigating the corresponding crimes and punishing those responsible. In that case, the suffering of the victims' next of kin also arose from the treatment of the corpses, because they appeared after several days, abandoned in an uninhabited place with signs of extreme violence, exposed to the inclemency of the weather and the action of animals. Such treatment of the victims' remains, "which were sacred to their families and, particularly, their mothers, constituted cruel and inhuman treatment for them." [FN108]

[FN108] Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 174.

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162. The jurisprudence of the European Court of Human Rights has also accepted that, when fundamental human rights are violated, such as the right to life or the right to humane treatment, the persons closest to the victim may also be considered victims. That Court had the occasion to go on record on the condition of victim of cruel, inhuman or degrading treatment of a mother due

to the detention and disappearance of her son and, to this end, it evaluated the circumstances of the case, the gravity of the ill-treatment and the fact that she did not receive official information to clarify the facts. In view of these considerations, the European Court concluded that this person had also been a victim and that the State was responsible for violating Article 3 of the European Convention [FN109].

[FN109] Cf. Eur. Court HR, Kurt v. Turkey, supra note 90, paras. 130-134.

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163. Recently that Court developed this concept further, emphasizing that the following were included among the issues to be considered: the closeness of the family relationship, the particular circumstances of the relationship with the victim, the degree to which the family member was a witness of the events related to the disappearance, the way in which the family member was involved in attempts to obtain information about the disappearance of the victim and the State's response to the steps undertaken [FN110].

[FN110] Cf. Eur. Court HR, Timurtas v. Turkey, Judgment of 13 June 2000; para. 95; and Eur. Court HR, Çakici v. Turkey, Judgment of 8 July 1999, para. 98.

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164. In the same way, the United Nations Human Rights Committee, in accordance with the International Covenant on Civil and Political Rights, has stated that the next of kin of those who are detained and disappear should be considered victims of ill treatment, among other violations. In the Quinteros v. Uruguay (1983), the Human Rights Committee indicated that

it understood the profound grief and anguish that the author of the communication suffered owing to the disappearance of her daughter and the continued uncertainty about her fate and her whereabouts. The author has the right to know what has happened to her daughter. In this respect, she is also a victim of violations of the [International] Covenant on Civil and Political Rights], in particular article 7 (corresponding to Article 5 of the American Convention], suffered by her daughter [FN111].

[FN111] Cf. United Nations Human Rights Committee, Quinteros v. Uruguay, 21 July 1983 (19th session) Communication Nº 107/1981, para. 14; [17th to 32nd sessions (October 1982 to April 1988)]. Selection of Decisions of the Human Rights Committee adopted in accordance with the Optional Protocol, Vol. 2, 1992.

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165. The Court has evaluated the circumstances of this case, particularly the continued obstruction of Jennifer Harbury's efforts to learn the truth of the facts and, above all, the concealment of the corpse of Bámaca Velásquez and the obstacles to the attempted exhumation procedures that various public authorities created, and also the official refusal to provide relevant information. Based on these circumstances, the Court considers that the suffering to which

Jennifer Harbury was subjected clearly constitutes cruel, inhuman or degrading treatment, violating Article 5(1) and 5(2) of the Convention. The Court also considers that ignorance of the whereabouts of Bámaca Velásquez caused his next of kin the profound anguish mentioned by the Committee and, therefore, considers that they, too, are victims of the violation of the said Article.

166. In view of the foregoing, the Court concludes that the State violated Article 5(1) and 5(2) of the Convention, to the detriment of Efraín Bámaca Velásquez and also of Jennifer Harbury, José de León Bámaca Hernández, Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez.

XIII. VIOLATION OF ARTICLE 4 (RIGHT TO LIFE)

167. With regard to the violation of Article 4 of the Convention, the Commission alleged that:

a) "[the a]gents of the Guatemalan armed forces violated Article 4(1) of the Convention when they executed Efraín Bámaca [Velásquez] while he was secretly detained by the Army"; and
b) Bámaca Velásquez was confined in at least two clandestine detention centers and, according to existing indications and the passage of time, it can be presumed that he is dead.

168. As has been mentioned previously (supra 137 and 146), the State limited its defense to stating that "it has still not been possible to identify the persons or person criminally responsible for the unlawful acts against Mr. Bámaca [Velásquez] and, thus, clarify his disappearance" and, consequently, it did not submit any defense with regard to the violation of the right to life embodied in the American Convention, either at the procedural opportunity of the answer to the application or in its final arguments.

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169. Article 4(1) of the American Convention establishes that

[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

170. This Court has already deemed that it has been proved that Bámaca Velásquez was captured and retained in the hands of the Army, constituting a case of forced disappearance (supra 132, 133, 143 and 144).

171. The Court has already made it clear that

any person deprived of liberty has the right to live in conditions of detention that are compatible with his personal dignity, and the State must guarantee his right to life and to humane treatment. Consequently, the State, as the body responsible for detention establishments, is the guarantor of such rights of those detained [FN112].

[FN112] Cf. Neira Alegría et al. Case, supra note 102, para. 60.

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172. As the United Nations Human Rights Committee mentioned above has indicated,

[t]he protection against arbitrary deprivation of life that is explicitly required by the third phrase of Article 6(1) [of the International Covenant on Civil and Political Rights] is of paramount importance. The Committee considers that States Parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, [the State] must strictly control and limit the circumstances in which [a person] may be deprived of his life by such authorities [FN113].

[FN113] United Nations Human Rights Committee, General Commentary 6/1982, para. 3 and Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 145.

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173. In this case, the circumstances in which the detention by State agents of Bámaca Velásquez occurred, the victim's condition as a guerrilla commander, the State practice of forced disappearances and extrajudicial executions (supra 121 b, d, f, g) and the passage of eight years and eight months since he was captured, without any more news of him, cause the Court to presume that Bámaca Velásquez was executed [FN114].

[FN114] Cf. Castillo Páez Case, supra note 52, paras. 71-72; Neira Alegría et al. Case, supra note 102, para. 76; Godínez Cruz Case, supra note 53, para. 198; and Velásquez Rodríguez Case, supra note 53, para. 188.

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174. This Court has indicated on previous occasions and in this judgment itself, that although the State has the right and obligation to guarantee its security and maintain public order, its powers are not unlimited, because it has the obligation, at all times, to apply procedures that are in accordance with the law and to respect the fundamental rights of each individual in its jurisdiction (supra 143).

175. In view of the foregoing, the Court concludes that the State violated Article 4 of the American Convention, to the detriment of Efraín Bámaca Velásquez.

XIV. VIOLATION OF ARTICLE 3 (RIGHT TO JURIDICAL PERSONALITY)

176. With regard to the violation of Article 3 of the Convention, the Commission alleged that:

a) the disappearance of Efraín Bámaca Velásquez by agents of the Guatemalan armed forces resulted in his exclusion from the legal and institutional system of the State, denying recognition

of his very existence as a human being and, therefore, violated his right to be recognized as a person before the law; and

b) according to Article 1(2) of the Declaration on the Protection of All Persons from Forced Disappearances, the phenomenon of forced disappearance is defined as a violation of the rules of international law that guarantee, inter alia, the right to be recognized as a person before the law (Resolution 47/133 of the General Assembly of the United Nations, 18 December 1992).

177. The State did not present any argument related to the alleged violation of Article 3 of the Convention.

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178. Article 3 of the Convention establishes that "[e]very person has the right to recognition as a person before the law."

179. This principle should be interpreted in the light of the provisions of Article XVII of the American Declaration of the Rights and Obligations of Man, which says textually: "Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights". The right to the recognition of juridical personality implies the capacity to be the holder of rights (capacity of exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of such rights and obligations.

180. In this respect, the Court recalls that the Inter-American Convention on Forced Disappearance of Persons (1994) does not refer expressly to the juridical personality among the elements that typify the complex crime of forced disappearance of persons. Naturally, the arbitrary deprivation of life suppresses the human being and, consequently, in these circumstances, it is not in order to invoke an alleged violation of the right to juridical personality or other rights embodied in the American Convention. The right to the recognition of juridical personality established in Article 3 of the American Convention has its own juridical content, as do the other rights protected by the Convention [FN115].

[FN115] Cf. Durand and Ugarte Case, supra note 56, para. 79.

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181. From these considerations and the facts of the case, the Court deems that the right of Efraín Bámaca Velásquez to juridical personality was not violated.

XV. VIOLATION OF ARTICLES 8 AND 25 IN RELATION TO ARTICLE 1(1) (RIGHT TO A FAIR TRIAL AND JUDICIAL PROTECTION)

182. With regard to the violation of Articles 8, 25 and 1(1) of the Convention, the Commission alleged that:

a) neither Bámaca Velásquez nor his wife received the judicial protection that the State must grant them, according to Articles 8, 25 and 1(1) of the Convention, not only because they did not have access to a simple recourse before a competent, independent and impartial authority, but also because the right of the next of kin of Bámaca Velásquez to know his fate and, then, the whereabouts of his remains, was violated;

b) the State did not fulfill its obligation to conduct the pertinent investigations to save the life of Bámaca Velásquez, despite the contradictions established between the descriptions given by the magistrate and the coroner of the body found after the armed encounter. Moreover, the exhumation of May 20, 1992, was cancelled based on various obstacles that sought to "cover up the fact that Mr. Bámaca Velásquez was not buried in the Retalhuleu cemetery". If an investigation had been initiated at the time of the exhumation planned for May 20, 1992, that is, if the right to judicial protection of Bámaca Velásquez had been guaranteed, his life might have been saved. Although it was possible to conduct an exhumation in August 1993, and it was determined that the corpse exhumed was not that of Bámaca Velásquez, no other exhumation could be conducted;

c) by keeping Bámaca Velásquez in clandestine detention, the State denied his right to file a judicial recourse by his own means; furthermore, by not adequately investigating the petitions for habeas corpus filed by Jennifer Harbury in 1993, and by declaring them without grounds, Bámaca Velásquez was deprived of the right to the judicial protection of his life and safety and Jennifer Harbury was deprived of her right to know the fate of her husband and, then, to know the whereabouts of his remains. The petition for habeas corpus filed by the Guatemalan Attorney General in 1994 also had negative results;

d) with regard to the special pre-trial investigation initiated by the Ombudsman in 1994, the Commission stated that, although it "constituted [...] the first serious investigation effort", during which members of the armed forces who were allegedly involved in the facts were questioned (supra 81), this process "was begun too late to save [the] life" of Bámaca Velásquez. Moreover, the armed forces obstructed the investigation, both by not telling the truth when questioned and also by not presenting the evidence required by the Attorney General; therefore, it cannot be considered that adequate judicial protection was provided;

e) the number of judicial proceedings filed in this case without results "constitute[s] an omission of the right to judicial protection and a way of tormenting Mrs. Harbury", and the acts of violence that have occurred, have prevented the execution of a valid investigation, which offers due judicial protection. The State has not fulfilled the obligation to conduct a serious investigation and, "instead of seeking the truth, the Government [has attempted] to defend itself and to defend its agents against any claim owing to an illegal action". The Commission added that the "procedures initiated at the end of [19]94 were not [directed] to clarifying the case, but rather to distracting public attention and harassing Mrs. Harbury";

f) Jennifer Harbury has cooperated with the domestic procedures in Guatemala; the State "cannot renounce its responsibility to conduct the necessary investigations, in fulfillment of the provisions of Article 1(1) of the Convention, and transfer to Mrs. Harbury the obligation to ensure that the process moves forward". To the contrary, the case history shows that Government agents have harassed Jennifer Harbury in reprisal for her attempts to obtain justice in the Guatemalan tribunals; and

g) Jennifer Harbury and the special prosecutors assigned to the case suffered harassment and the Guatemalan authorities did not take the necessary measures to find the whereabouts of the remains of Bámaca Velásquez.

183. The State recognized its international responsibility, because its institutions have been unable to clarify who was responsible for the illegal acts established in the application. In its final oral arguments, the State indicated that the said acceptance of responsibility "was made in good faith in application of the respective Vienna Convention" and that it could not be interpreted as a "tacit acceptance [of the facts as] the Commission claims."

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184. Article 8 of the American Convention establishes:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
b) prior notification in detail to the accused of the charges against him;
c) adequate time and means for the preparation of his defense;
d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
g) the right not to be compelled to be a witness against himself or to plead guilty; and
h) the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

185. Article 25 de la American Convention provides that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b) to develop the possibilities of judicial remedy; and

c) to ensure that the competent authorities shall enforce such remedies when granted.

186. This Court observes, in the first place, that the State, when replying to the application, recognized its international responsibility in the following terms:

[Guatemala] accepts the facts set out in numeral II of the application in the case of Efraín Bámaca Velásquez, inasmuch as it has still not been possible to identify the persons or person criminally responsible for the unlawful acts against Mr. Bámaca [Velásquez] and, thus, clarify his disappearance, with a reservation regarding the Commission's assertion in numeral II, subparagraph 2, because it has not been possible to confirm the circumstances of the disappearance of Mr. Bámaca [Velásquez] in the domestic proceedings.

This act of the State shows its good faith towards the international commitments assumed when it signed and ratified the American Convention on Human Rights and accepted the obligatory jurisdiction of this Court.

187. With regard to Bámaca Velásquez, the State expressly left outside its recognition of responsibility (supra 24) “the Commission's assertion in numeral II, subparagraph 2” of the application, that is to say, that the alleged victim “disappeared after an exchange of fire between the Army and the guerrilla near the Ixcucua River [...and] that the Guatemalan armed forces captured Mr. Bámaca alive after the skirmish and imprisoned him secretly in several military detachments, where they tortured and, eventually executed him”. Therefore, it does not recognize the detention, torture and disappearance of Bámaca Velásquez, nor does it state that it has accepted the violation of his guarantees embodied in Article 8 and the judicial protection established in Article 25 of the Convention, so that it corresponds to the Court to analyze this alleged violation based on the elements presented by the parties.

188. This Court has recently indicated that

[i]n order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceedings [FN116].

[FN116] Cf. Villagrán Morales et al. Case (the “Street Children” Case), supra note 52, para. 222.

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189. Likewise, the European Court has indicated that the procedures should be considered as a whole, including the decisions of the appeals tribunals, and that the function of the international tribunal is to determine if all the procedures, and the way in which the evidence was produced, were fair [FN117].

[FN117] Cf., inter alia, Eur. Court H. R., Edwards v. the United Kingdom judgment of 16 December 1992, Series A no. 247-B, para. 34 and Eur. Court H. R., Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, para. 33.

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190. It is worth indicating that, although, in this case, numerous domestic recourses have been attempted in order to determine the whereabouts of Bámaca Velásquez, such as the petitions for habeas corpus, the special pre-trial investigation procedure, and the criminal actions (supra 121 m), none of them were effective, and the whereabouts of Bámaca Velásquez are still unknown.

191. This Court has repeated that it is not sufficient that such recourses exist formally, but that they must be effective [FN118]; that is, they must give results or responses to the violations of rights established in the Convention. In other words, every person has the right to a simple and prompt recourse or to any effective recourse before competent judges or tribunals that protects him against the violation of his fundamental rights [FN119]. This guarantee "constitutes one of the basic pillars, not only of the American Convention, but also of the rule of law in a democratic society according to the Convention" [FN120]. Moreover, as the Court has also indicated,

[t]hose remedies which prove illusory, due to the general situation of the country or even the particular circumstances of any given case, cannot be considered effective [FN121].

[FN118] Cf. Caso Cesti Hurtado. Judgment of September 29, 1999. Series C No. 56, para. 125; Caso Paniagua et al., supra note 50, para. 164; Suárez Rosero Case, supra note 53, para. 63; Godínez Cruz Case, supra note 53, paras. 66, 71 and 88; and Velásquez Rodríguez Case, supra note 53, paras. 63, 68 and 81.
[FN119] Cf. Cantoral Benavides Case, supra note 56, para. 163; Durand and Ugarte Case, supra note 56, para. 101; Caso Cesti Hurtado, supra note 118, para. 121; Castillo Petruzzi et al. Case, supra note 50, para. 185; and Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8, American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.
[FN120] Cf. Cantoral Benavides Case, supra note 56, para. 163; Durand and Ugarte Case, supra note 56, para. 101; Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 234; Caso Cesti Hurtado, supra note 118, para. 121; Castillo Petruzzi et al. Case, supra note 50, para. 184; Paniagua Morales et al. Case, supra note 50, para. 164; Blake Case, supra note 52, para. 102; Suárez Rosero Case, supra note 53, para. 65 and Castillo Páez Case, supra note 52, para. 82.
[FN121] Cf. Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8, American Convention on Human Rights), supra note 117, para. 24.

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192. Among essential judicial guarantees, habeas corpus represents the ideal means of guaranteeing liberty, controlling respect for the life and integrity of a person, and preventing his

disappearance or the indetermination of his place of detention, and also to protect the individual from torture or other to cruel, inhuman or degrading punishment or treatment [FN122].

[FN122] Cf. Cantoral Benavides Case, supra note 56, para. 165; Durand and Ugarte Case, supra note 56, para. 103; Caso Cesti Hurtado, supra note 118, para. 121; Castillo Petruzzi et al. Case, supra note 50, para. 187; Paniagua Morales et al. Case, supra note 50, para. 164; Blake Case, supra note 52, para. 102; Suárez Rosero Case, supra note 53, paras. 63 and 65; Castillo Páez Case, supra note 52, para. 83; Neira Alegría et al. Case, supra note 102, para. 82; and Habeas Corpus in Emergency Situations (Articles 27(2), 25(1) and 7.6, American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 35.

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193. As can be inferred from the chapter on domestic proceedings, three petitions for habeas corpus in favor of Bámaca Velásquez were filed in this case, in February 1993 and in June and October 1994 (supra 75, 78 and 80). However, it has been shown that these recourses did not protect the victim from the acts against him committed by State agents. The lack of effectiveness of habeas corpus in Guatemala was also shown by the statements of the President of the Supreme Court of Justice of Guatemala, that the "mechanisms that currently exist for habeas corpus procedures are inadequate to carry out an effective investigation under petitions for habeas corpus" (supra 75).

194. This Court has indicated that, as part of the general obligations of States, they have a positive obligation of guarantee with regard to persons under their jurisdiction. This obligation of guarantee presumes

taking all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees. Any State which tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is consequently in violation of Article 1(1) of the Convention [FN123].

[FN123] Cf. Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)a and 46(2)b, American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 34 and similarly Velásquez Rodríguez Case, supra note 53, para. 68; Godínez Cruz Case, supra note 53, para. 71; and Fairén Garbi and Solís Corrales Case, supra note 53, para. 93.

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195. With regard to Jennifer Harbury and the next of kin of Bámaca Velásquez, the Court considers that the State's acceptance of responsibility (supra 186) refers to the violation of the rights of these persons to judicial guarantees and judicial protection and, therefore, this should be stated.

196. In view of the foregoing, the Court concludes that the State violated Articles 8 and 25 in relation to Article 1(1) of the American Convention, to the detriment of Efraín Bámaca Velásquez and also of Jennifer Harbury, José de León Bámaca Hernández, Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez,

XVI. RIGHT TO THE TRUTH

197. In its final arguments, the Commission alleged that, as a result of the disappearance of Bámaca Velásquez, the State violated the right to the truth of the next of kin of the victim and of society as a whole. In this respect, the Commission declared that the right to the truth has a collective nature, which includes the right of society to "have access to essential information for the development of democratic systems", and a particular nature, as the right of the victims' next of kin to know what happened to their loved ones, which permits a form of reparation. The Inter-American Court has established the obligation of the State to investigate the facts while there is uncertainty about the fate of the person who has disappeared, and the need to provide a simple and prompt recourse in the case, with due guarantees. Following this interpretation, the Commission stated that this is a right of society and that it is emerging as a principle of international law under the dynamic interpretation of human rights treaties and, specifically, Articles 1(1), 8, 25 and 13 of the American Convention.

198. The State limited its defense to stating that "it has still not been possible to identify the persons or person criminally responsible for the unlawful acts against Mr. Bámaca [Velásquez] and, thus, clarify his disappearance" and, consequently, it did not put forward any defense in relation to the alleged violation of the right to the truth, either at the procedural opportunity of the answer to the application or in its final arguments.

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199. The Court has already transcribed Articles 8 and 25 of the Convention in this Judgment (supra 184 and 185). Article 1(1), will be transcribed in the following chapter (infra 205).

200. As has already been established in this judgment (supra 196), several judicial remedies were attempted in this case to identify the whereabouts of Bámaca Velásquez. Not only were these remedies ineffective but, furthermore, high-level State agents exercised direct actions against them in order to prevent them from having positive results. These obstructions were particularly evident with regard to the many exhumation procedures that were attempted; to date, these have not permitted the remains of Efraín Bámaca Velásquez to be identified (supra 121 m). It is undeniable that this situation has prevented Jennifer Harbury and the victim's next of kin from knowing the truth about what happened to him.

201. Nevertheless, in the circumstances of the instant case, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention.

202. Therefore, this issue is resolved in accordance with the findings in the previous chapter, in relation to judicial guarantees and judicial protection.

XVII. FAILURE TO COMPLY WITH ARTICLE 1(1) IN RELATION TO ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS (OBLIGATION TO RESPECT RIGHTS)

203. As for the violation of Article 1(1) of the American Convention and its relation to Article 3 common to the Geneva Conventions, the Commission alleged that:

a) the forced disappearance, torture and execution of Efraín Bámaca Velásquez by agents of the Guatemalan armed forces shows that the State violated its obligation to respect and guarantee the rights established in Article 1(1) of the Convention. These violations cannot be justified by the fact that the State was faced with a guerrilla movement, because, although the State has the right and obligation to guarantee its own security and maintain public order, it must do so in accordance with law and ethics, including the international legislation to protect human rights;
b) when a State faces a rebel movement or terrorism that truly threatens its "independence or security", it may restrict or temporarily suspend the exercise of certain human rights, but only in accordance with the rigorous conditions indicated in Article 27 of the Convention. Article 27(2) of the Convention strictly forbids the suspension of certain rights and, thus, forced disappearances, summary executions and torture are forbidden, even in states of emergency;
c) according to Article 29 of the Convention, its provisions may not be interpreted in the sense of restricting the enjoyment of the rights recognized by other conventions to which Guatemala is a party; for example, the Geneva Conventions of August 12, 1949. Therefore, considering that Article 3 common to those Conventions provides for prohibitions against violations of the right to life and ensures protection against torture and summary executions, Bámaca Velásquez should have received humane treatment in accordance with the common Article 3 and the American Convention; and
d) Article 3, common to the Geneva Conventions, constitutes a valuable parameter for interpreting the provisions of the American Convention, as regards the treatment of Bámaca Velásquez by State agents.

204. With regard to applying international humanitarian law to the case, in its final oral arguments the State indicated that, although the case was instituted under the terms of the American Convention, since the Court had "extensive faculties of interpretation of international law, it could [apply] any other provision that it deemed appropriate."

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205. Article 1(1) of the Convention provides that

[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

206. Article 3 common to the 1949 Geneva Conventions provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

[... t]he following acts are and shall remain prohibited at any time and in any place whatsoever [...]:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b) taking of hostages;
c) outrages upon personal dignity, in particular humiliating and degrading treatment;
d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[...]

207. The Court considers that it has been proved that, at the time of the facts of this case, an internal conflict was taking place in Guatemala (supra 121 b). As has previously been stated (supra 143 and 174), instead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations. Therefore, and as established in Article 3 common to the Geneva Conventions of August 12, 1949, confronted with an internal armed conflict, the State should grant those persons who are not participating directly in the hostilities or who have been placed hors de combat for whatever reason, humane treatment, without any unfavorable distinctions. In particular, international humanitarian law prohibits attempts against the life and personal integrity of those mentioned above, at any place and time.

208. Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.

209. Indeed, there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the Las Palmeras Case (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention [FN124].

[FN124] Las Palmeras Case. Preliminary Objections. Judgment of February 4, 2000. Series C No. 67, paras. 32-34.

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210. Based on Article 1(1) of the American Convention, the Court considers that Guatemala is obliged to respect the rights and freedoms recognized in it [FN125] and to organize the public sector so as to guarantee persons within its jurisdiction the free and full exercise of human rights [FN126]. This is essential, independently of whether those responsible for the violations of these rights are agents of the public sector, individuals or groups of individuals [FN127], because, according to the rules of international human rights law, the act or omission of any public authority constitutes an action that may be attributed to the State and involve its responsibility, in the terms set out in the Convention [FN128].

[FN125] Cf. Caballero Delgado and Santana Case. Judgment of December 8, 1995. Series C No. 22, paras. 55 and 56; Fairén Garbi and Solís Corrales Case, supra note 53, para. 161; and Velásquez Rodríguez Case, supra note 53, para. 165.
[FN126] Cf. Caballero Delgado and Santana Case, supra note 125, paras. 55 and 56; Godínez Cruz Case, supra note 53, paras. 175 and 176; and Velásquez Rodríguez Case, supra note 53, paras. 166 and 167.
[FN127] Paniagua Morales et al. Case, supra note 50, para. 174.
[FN128] Cf. Caballero Delgado and Santana Case, supra note 125, para. 56; Godínez Cruz Case, supra note 53, para. 173; and Velásquez Rodríguez Case, supra note 53, para. 164.

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211. The Court has confirmed that there existed and still exists in Guatemala, a situation of impunity with regard to the facts of the instant case (supra 134, 187 and 190), because, despite the State's obligation to prevent and investigate [FN129], it did not do so.. The Court understands impunity to be

the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human right violations, and total defenselessness of victims and their relatives [FN130].

[FN129] Understanding this figure as established in reiterated jurisprudence, Castillo Páez Case, supra note 52, para. 90; Caballero Delgado and Santana Case, supra note 125, para. 58; and Velásquez Rodríguez Case, supra note 53, paras. 174-177.
[FN130] Paniagua Morales et al. Case, supra note 50, para. 173.

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212. This Court has clearly indicated that the obligation to investigate must be fulfilled

in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government [FN131].

[FN131] Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra note 52, para. 226; Godínez Cruz Case, supra note 53, para. 188; and Velásquez Rodríguez Case, supra note 53, para. 177.

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213. The violations of the right to personal safety and liberty, to life, to physical, mental and moral integrity, to judicial guarantees and protection, which have been established in this judgment, are attributable to Guatemala, which had the obligation to respect these rights and guarantee them. Consequently, Guatemala is responsible for the non-observance of Article 1(1) of the Convention, in relation to violations established in Articles 4, 5, 7, 8 and 25 of the Convention.

214. In view of the foregoing, the Court concludes that the State violated Article 1(1) of the Convention, in relation to its Articles 4, 5, 7, 8 and 25.

XVIII. VIOLATION OF ARTICLES 1, 2, 6 AND 8 OF THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

215. With regard to the violation of Articles 1, 2, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter "Inter-American Convention against Torture"), the Commission alleged that:

a) this Convention, ratified by Guatemala on January 29, 1987, develops the principles contained in Article 5 of the American Convention in greater detail and, therefore, constitutes an auxiliary instrument to the Convention;
b) the treatment that Bámaca Velásquez suffered at the hands of Government agents constitutes torture in the terms of the said Convention; and
c) based on Article 8 of the Inter-American Convention against Torture and 29 of the American Convention, the Court is competent to directly apply that instrument.

216. The State did not submit any defense with regard to the violation of the above-mentioned articles of the Inter-American Convention against Torture.

217. Articles 1, 2, 6 and 8 of the Inter-American Convention against Torture establish:

1. The States Parties undertake to prevent and punish torture in accordance with the terms of the Convention.
[...]
2. For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for

purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or entail anguish.
The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.
[...]
6. In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.
The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.
The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman or degrading treatment or punishment within their jurisdiction.
[...]
8. The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.
Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.
After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by the State.

218. This Court has had the occasion to apply the Inter-American Convention against torture and to declare the responsibility of a State owing to its violation [FN132].

[FN132] Cf. Cantoral Benavides Case, supra note 56, para. 185; Villagrán Morales et al. Case (the “Street Children” Case), supra note 52, para. 249; and Paniagua Morales et al. Case, supra note 50, para. 136.

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219. In the instant case, it is the Court's responsibility to exercise its competence to apply the Inter-American Convention against Torture, which entered into force on February 28, 1987.

220. As has been shown, Bámaca Velásquez was submitted to torture while he was secretly imprisoned in military installations (supra 121 i, l). Consequently, it is clear that the State did not effectively prevent such acts and that, by not investigating them, it failed to punish those responsible.

221. Article 8 of the Inter-American Convention against Torture expressly embodies the State's obligation to proceed immediately de oficio in cases such as this one. Therefore, the Court has stated that “in proceedings on human rights violations, the State's defense cannot rest on the impossibility of the plaintiff to obtain evidence that, in many cases, cannot be obtained without the State's cooperation” [FN133]. However, in this case, the State did not act in accordance with these provisions.

[FN133] Cf. Cantoral Benavides Case, supra note 56, para. 189; Villagrán Morales et al. Case (the “Street Children” Case), supra note 52, para. 251; Caso Gangaram Panday, supra note 86, para. 49; Godínez Cruz Case, supra note 53, para. 141 and Velásquez Rodríguez Case, supra note 53, para. 135.

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222. It has also been confirmed that, despite the numerous proceedings initiated in order to discover the whereabouts of Bámaca Velásquez, these were ineffective (supra 121 m). The proven denial of judicial protection also determined that the State did not prevent or effectively investigate the torture to which the victim was being submitted. Consequently, the State failed to fulfill the commitments it had made under the Inter-American Convention against Torture.

223. Therefore, the Court concludes that the State failed to comply with its obligations to prevent and punish torture in the terms of Articles 1, 2, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Efraín Bámaca Velásquez.

XIX. ARTICLE 63(1)

224. In the application brief, the Commission requested the Court that the State should remedy all the consequences of the violations of the rights it had committed, both by a material compensation and also by “immaterial forms of reparation, such as the public admission of the damage it had caused and the revelation of everything that can be known about the fate of the victim and the whereabouts of his remains”. It also asked the Court to order the State to adopt reforms in the military training regulations and programs (supra 2). Lastly, it requested the State to assume the costs of the proceedings before the inter-American system for the protection of human rights.

225. The Court considers that Guatemalan legislation was not sufficient or adequate to protect the right to life, in accordance with the provisions of Article 4 of the American Convention (supra 173), in any circumstance, including during internal conflicts. Therefore, the Court reserves the right to examine this point at the appropriate time during the reparations stage.

226. Article 63(1) of the American Convention establishes that

[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party 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.

227. As a consequence of the violations confirmed in this Judgment, the Court considers that Guatemala should order a real and effective investigation to identify and eventually punish the persons responsible for them.

228. In view of the nature of the instant case, although the Court is unable to order that the injured parties should be guaranteed the enjoyment of the rights and liberties violated, by means of the restitutio in integrum, it must, instead, order the reparation of the consequences of the violation of the rights mentioned and, consequently, the establishment of fair compensation. The amounts and form of this will be determined during the reparations stage.

229. Since the Court will need sufficient probative elements and information to determine the said reparations, it must order the opening of the corresponding procedural stage. The Court authorizes its President to take the necessary measures.

XX. OPERATIVE PARAGRAPHS

230. Therefore,

THE COURT,

unanimously,

1. finds that the State violated the right to personal liberty embodied in Article 7 of the American Convention on Human Rights, to the detriment of Efraín Bámaca Velásquez.

unanimously,

2. finds that the State violated the right to humane treatment embodied in Article 5(1) and 5(2) of the American Convention on Human Rights, to the detriment of Efraín Bámaca Velásquez, and also of Jennifer Harbury, José de León Bámaca Hernández, Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez.

unanimously,

3. finds that the State violated the right to life embodied in Article 4 of the American Convention on Human Rights, to the detriment of Efraín Bámaca Velásquez.

unanimously,

4. finds that the State did not violate the right to recognition of juridical personality embodied in Article 3 of the American Convention on Human Rights, to the detriment of Efraín Bámaca Velásquez.

unanimously,

5. finds that the State violated the right to judicial guarantees and judicial protection embodied in Articles 8 and 25 of the American Convention on Human Rights, to the detriment of Efraín Bámaca Velásquez, and also of Jennifer Harbury, José de León Bámaca Hernández, Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez.

unanimously,

6. finds that the State did not comply with the general obligations of Articles 1(1) of the American Convention on Human Rights in connection with the violations of the substantive rights indicated in the previous decisions of this Judgment.

unanimously,

7. finds that the State did not comply with the obligation to prevent and punish torture in the terms of Articles 1, 2, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

unanimously,

8. decides that the State should order an investigation to determine the persons responsible for the human rights violations referred to in this Judgment, and also to publicly disseminate the results of such investigation and punish those responsible.

unanimously,

9. decides that the State should remedy the damages caused by the violations indicated the decisions 1 to 7, and to this effect authorizes its President to duly order the opening of the reparations stage.

Judges Cançado Trindade, Salgado Pesantes, García Ramírez and de Roux Rengifo informed the Court of their Opinions, which accompany this judgment.

Done in Spanish and English, the Spanish text being authentic, at San José, Costa Rica, on November 25, 2000.

Antônio A. Cançado Trindade
President

Máximo Pacheco-Gómez
Hernán Salgado-Pesantes
Alirio Abreu-Burelli
Sergio García-Ramírez
Carlos Vicente de Roux-Rengifo

Manuel E. Ventura-Robles

Secretary

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption by the Inter-American Court of Human Rights of the present Judgment on the Bámaca Velásquez case (Merits) in all resolutory points. Certain transcendental questions raised in the present case lead me, moreover, to leave on the records some thoughts, in the present Separate Opinion, in order to substantiate my conception and position on such questions. From the start, it is truly painful and worrisome to find out that this is not the first time that, in cases submitted to the consideration of the Inter-American Court, the issue is presented, in the framework of the forced disappearance of persons, of the lack of respect for their mortal remains.

2. One may recall, for example, the cases already decided by this Court, Velásquez Rodríguez (1988), Godínez Gruz (1989), Caballero Delgado and Santana (1995), Garrido and Baigorria (1996), and Castillo Páez (1997), in which the whereabouts of the mortal remains of the disappeared persons continues being ignored to date. The same has taken place in cases of violation of the right to life without the occurrence of forced disappearance of persons, - Neira Alegría (1995), Durand and Ugarte (2000), - in which one has not succeeded so far to identify the mortal remains of the victims. To these the cases of the Street Children (1999) and of Blake (1998) may be added, in which the mortal remains of the victims were non-identified or hidden for some time, having subsequently been found.

3. The arguments before the Court, referred to in the present Judgment on the Bámaca Velásquez case, introduce a new element for the consideration of this tragedy. In its final written arguments (of 22.10.1999), the Inter-American Commission of Human Rights warned that, in the internal conflicts in countries of Latin America, many individuals were "kidnapped in clandestine centres of detention, were object of tortures", as well as "were burried without dignity nor respect in graves without name", or thrown out "from airplanes into the sea" (par. 123).

4. In the public hearing before the Court on 16 June 1998, the Inter-American Commission, in its final oral oral pleadings, referred to "the anguishes and sufferings" undertaken by the relatives of Mr. Bámaca Velásquez as a consequence of his forced disappearance (par. 145(f)). In its aforementioned final written arguments, the Commission singled out, in this respect, the repercussion, in the maya culture - to which Mr. Bámaca Velásquez belonged, - of not having given a worthy burial to his mortal remains, "for the central relevance which has in his culture the active link which unites the living with the dead", as the "lack of a sacred place where to

come to in order to cultivate this link constitutes a deep concern which is diclosed by the testimonies of many maya communities" (par. 145(f)).

5. This new element for the examination of the question, pointed out by the Commission, is not to pass unnoticed in the determination of the violation, correctly established by the Court in the present Judgment (resolutory point n. 2) in the Bámaca Velásquez case (Merits), of Article 5(1) and (2) of the American Convention on Human Rights, to the detriment not only of Mr. Efraín Bámaca Velásquez but also of his close relatives. The negligence and lack of respect for the mortal remains of the victims - disappeared or not - of violations of human rights, and the impossibility of recovering them, in various cases before the Court concerning distinct States, appear to me to configure a malaise of our times, disclosing the apalling spiritual poverty of the dehumanized world in which we live.

6. The point raises in me some concerns, which I feel obliged to express in this Separate Opinion, since the link between the living and the dead - sustained by so many cultures, including the maya, - does not appear to me to have been sufficiently developed in the domain of legal science. I thus allow myself to focus my thoughts on four interrelated aspectsof the question, from the perspective of human rights, namely: a) the respect for the dead in the persons of the living; b) the unity of the human kind in the links between the living and the dead; c) the ties of solidarity between the dead and the living; and d) the prevalence of the right to truth, in respect for the dead and the living.

I. Death and Law: The Respect for the Dead in the Persons of the Living.

7. In the present Bámaca Velásquez case, attention is drawn to the systematic opposition of the public power to the exhumations (par. 121(m)) and the incapacity of the State to to find the burial's place of the mortal remains of the victim, with the consequent impunity of those responsible for the violations of human rights to the detriment of Mr. Bámaca Velásquez as well as of his relatives. In a given moment of her testimony before this Court, Mrs. Jennifer Harbury pointed out that "what she seeks is justice and that the remains of Efraín Bámaca Velásquez", her husband, "are returned to her" (par. 93(b)). In fact, since immemorial times the human being has taken care to give a worthy grave to those related to him who died.

8. This is one of the oldest concerns of the human being [FN134], rendered immortal, e.g., more than four centuries before Christ, by the well-known tragedy of Antigone of Sofocles, which pertained precisely to the firm determination of Antigone, a courageous woman, to confront the tyranny of Creon and to give a worthy grave to one of her two dead brothers (like the other brother who had been buried). The search for an understanding of death is indeed present in all cultures and philosophical traditions of the world [FN135]. This is a truly universal theme, besides being a perennial one, cultivated by the cultures of all peoples in all times [FN136].

[FN134] As exemplified, e.g., by the Book of the Dead of the Ancient Egyptians (of 2350-2180 b.C.), also known as the Texts of the Pyramids.

[FN135] Cf., e.g., J.P. Carse, Muerte y Existencia - Una Historia Conceptual de la Mortalidad Humana, México, Fondo de Cultura Económica, 1987, pp. 17-497.
[FN136] A. Desjardins, Pour une mort sans peur, Paris, Table Ronde, 1983, p. 61.

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9. In the lucid remark by Pictet, the conflict between Creon and Antigone about the respect due to the mortal remains of the beloved person, corresponds to the eternal antagonism between the positive law (to maintain public order) and the unwritten law (to follow the individual conscience): that is, necessity versus humanity [FN137]. Why, - it may be asked, - in spite of the attention always devoted to the theme in the cultures and in all the forms of expression of the human feelings (such as literature and the arts), the whole rich contemporary thinking about the rights inherent to the human being has been concentrated almost exclusively on the persons of the living, and does not seem to have retained with sufficient clarity the links between these latter and their dead [FN138], including for the determination of their juridical consequences?

[FN137] Jean Pictet, Development and Principles of International Humanitarian Law, Dordrecht/Geneva, Nijhoff/ H. Dunant Inst., 1985, pp. 61-62.
[FN138] The link between the living and those who depart from this world ensues from several works of universal literature, such as, e.g., the beautiful Tibetan Book of the Dead, the contents of which are thought to have been orally transmitted since the XIVth century, having been published in the so-called "Western world" for the first time in 1927; cf. Bardo-Thödol, El Libro Tibetano de los Muertos, Madrid, EDAF, 1997, pp. 9-223.

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10. In the long run, the fundamental challenge of the existence of each human being is summed up in the search for the meaning of such existence; one is thus bound, amidst the occupations of daily life, to reflect on the destiny of each one [FN139], and on death as part of life. As so lucidly pondered A.D. Sertillanges, in a monograph published more than half a century ago (and almost forgotten in our days), "it is believed that death is an absence, when it is a secret presence. (...) Earlier, only that which was visible ocuppied home; nowadays, a mystery inhabits it; it has been instituted in it an intimate cult (...). The dead survive, whilst they can inspire us noble actions. (...) Fortunately there are faithful hearts. For them, those who have disappeared remain on earth in order to continue doing goodness (...)" [FN140].

[FN139] In spite of all that has already been written, in universal literature and in philosophy throughout the centuries, on the human being and his destiny, one has not reached an explanation or conclusive answer on this latter. Destiny continues to be a mysterious enigma which follows each one throughout his whole existence, and which seems to have its roots in the depths of the interiority of each human being.
[FN140] A.D. Sertillanges, Nuestros Muertos, Buenos Aires, Impr. Caporaletti, s/f, pp. 13, 36-37 and 49. - A contemporary account of the experience in the asisstance to persons closed to the end of their lives lead the author to single out the deepend relations of the agonizing person with the others, and to call for "una società che, invece di negare la morte, impari a integrarla nella vita" M. de Hennezel, La Morte Amica, 4th. ed., Milano, Bibl. Univ. Rizzoli, 2000, pp. 39 and 16.

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11. In fact, the respect for the dead, always cultivated in the most distinct cultures and religions, soon found expression (though insufficient treatment) also in the domain of Law. Already the ancient Roman law, for example, safeguarded penally such respect for the dead. In the comparative law of our days, it can be found that the penal codes of numerous countries tipify and sanction the crimes against the respect for the dead (such as, e.g., the subtraction and the hiding of the mortal remains of a human being). And at least one trend of the legal doctrine on the matter visualizes as passive subject of the right to respect for the dead the community itself (starting with the relatives) which the dead belonged to.

12. Even though the juridical subjectivity of an individual ceases with his death (thus no longer being, when having died, a subject of Law or titulaire of rights and duties), his mortal remains - containing a corporeal parcel of humanity, - continue to be juridically protected (supra). The respect to the mortal remains preserves the memory of the dead as well as the sentiments of the living (in particular his relatives or persons close to him) tied to him by links of of affection, - this being the value juridically protected [FN141]. In safeguarding the respect for the dead, also penal law gives concrete expression to a universal feeling of the human conscience. The respect for the dead is thus due - at the levels of both internal and international legal orders, - in the persons of the living.

[FN141] Bruno Py, La mort et le droit, Paris, PUF, 1997, pp. 31, 70-71, 79-80 and 123.

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13. In fact, the respect for the dead is not an element entirely alien to the international judicial practice. It may be recalled that, in the Advisory Opinion of the International Court of Justice of 16 October 1975 on the Western Sahara, the Hague Court took into account the modus vivendi, the cultural practices of the nomad populations of the Western Sahara, in affirming the right of these latter to self-determination [FN142]. One of the elements, pointed out by the Tribunal, proper to the culture of the nomad tribes of the Western Sahara, was precisely the cult of the memory of the dead [FN143]. In sum, the respect for the dead is due in the persons of the living, titulaires of rights and duties.

[FN142] The aforementioned Advisory Opinion was delivered by the International Court of Justice (ICJ), in answer to a request formulated by the General Assembly of the United Nations. The question concerned the territory of Western Sahara, over which Morocco and Mauritania claimed rights at the moment in which Spain intended to put an end to its administration of such territory. The ICJ pondered that, as the Western Sahara, still at the time of its colonization, was inhabited by populations socially and politically organized in nomad tribes, it could not, therefore, be considered as terra nullius. In spite of the claims of Morocco and Mauritania, the ICJ affirmed the right of the populations - even though nomad - of the Western Sahara to self-determination; this latter should be exercised "through the free and genuine expression of the will of the peoples of the Territory". ICJ Reports (1975) pp. 68 and 36, pars. 162 and 70.

[FN143] Significantly, in affirming the right of those nomad tribes to self-determination, the ICJ, - perhaps malgré elle-même, - took into account their modus vivendi, their cultural practices, such as the cultivation of certain lands (including with the concession of rights), the controlled access to the sources of water, and even the cemeteries in which numerous tribes met (ibid., p. 41, par. 87). This, in the aforementioned Advisory Opinion of the ICJ of 1975, the cult of the memory of the dead was taken into account as one of the elements integrating the culture of the nomad populations of the Western Sahara, titulaires of the right to self-determination of the peoples.

II. The Unity of the Human Kind in the Links between the Living and the Dead.

14. The International Law of Human Rights discloses an even wider horizon for the consideration of the question. In my understanding, what we conceive as the human kind comprises not only the living beings - titulaires of human rights, - but also the dead with their spiritual legacy. We all live in the time; likewise, legal norms are created, interpreted and applied in the time (and not independently of it, as the positivists mistakenly assumed).

15. In my view, the time - or rather, the passing of the time, - does not represent an element of separation, but rather of approximation and union, between the living and the dead, in the common journey of all towards the unknown. The knowledge and the preservation of the spiritual legacy of our predecessors constitute a means whereby the dead can communicate with the living [FN144]. Just as the living experience of a human comunidad develops with the continuous flux of thought and action of the individuals who compose it, there is likewise a spiritual dimension which is transmitted from an individual to another, from a generation to another, which precedes each human being and survives him, in the time.

[FN144] Is is what I allowed myself to point out, - recalling in this sense a remark by Simone Weil in her book L'Enracinement (1949), - in my Concurring Opinion (par. 5) in the case of the Haitians and Dominicans of Haitian Origin in the Dominican Republic (Provisional Measures of the Inter-American Court of Human Rights, of 18.08.2000).

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16. There is effectively a spiritual legacy from the dead to the living, apprehended by the human conscience. Likewise, in the domain of legal science, I cannot see how not to assert the existence of a universal juridical conscience (corresponding to the opinio juris comunis), which constitutes, in my understanding, the material source par excellence (beyond the formal sources) of the whole law of nations (droit des gens), responsible for the advances of the human kind not only at the juridical level but also at the spiritual one. What survives us is only the creation of our spirit, to the effect of elevating the human condition. This is how I conceive the legacy of the dead, from a perspective of human rights.

17. This spiritual dimension - of the universal juridical conscience - has found expression in distinct international instruments of protection of the rights of the human person: pertinent illustrations are found, e.g., in the preambles of the American Declaration on the Rights and

Duties of Man (1948), of the Convention against Genocide (1948), of the Inter-American Convention on Forced Disappearance of Persons (1994), of the Rome Statute of the International Criminal Court (1998), - besides the well-known Martens clause (with its evocation to the "laws of humanity" and to the "dictates of the public conscience"), set forth repeatedly in successive instruments of International Humanitarian Law [FN145].

[FN145] E.g., Hague Conventions of 1899 and 1907 (preambles), Geneva Conventions of 1949 on International Humanitarian Law (preambles), Additional Protocol I of 1977 (Article 1) to the Geneva Conventions of 1949, Aditional Protocol II (in simplified form, in the preamble, considerandum 4).

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18. It is significant that the Inter-American Convention on Forced Disappearance of Persons (1994) warns in its preamble that "the systematic practice of the forced disappearance of persons constitutes a crime against humanity" [FN146]. This expression has a juridical content of its own and a strong semantic weight, seeming to conceptualize humanity itself as subject of law. The doctrinal conceptualization of the so-called crimes against humanity, - victimizing in massive scale human beings, in their spirit and in their body, - has its origins, well before the Convention against Genocide of 1948, in customary international law itself, on the basis of fundamental notions of humanity and of the dictates of the public conscience [FN147].

[FN146] Paragraph 6 (emphasis added).
[FN147] For an account, cf., e.g., S.R. Ratner and J.S. Abrams, Accountability for Human Rights Atrocities in International Law, Oxford, Clarendon Press, 1997, pp. 45-77.

III. The Links of Solidarity between the Dead and the Living.

19. The respect to the memory of the dead in the persons of the living constitutes one of the aspects of human solidarity that links the living to those who have already died. The respect to the mortal remains is also due to the spirit which animated in life the dead person, in connection moreover with the beliefs of the survivors as to the destiny post mortem of the person who died [FN148]. It cannot be denied that the death of an individual affects directly the life, as well as the juridical situation, of other individuals, especially his relatives (as illustrated, in the frameword of civil law (droit civil), by the norms of family law and the law of successions).

[FN148] B. Py, op. cit. supra n. (8), pp. 94 and 77, and cf. pp. 7, 38, 47, 77 and 123.

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20. In the face of the anguish generated by the death of a beloved person, the burial rites, with the mortal remains, purport to bring a minimum of consolation to the survivors. Hence the importance of the respect for the mortal remains: their hiding deprives the relatives also of the burial ritual, which fulfils the needs of the unconscious itself and nourishes the hope in the

prolongation or permanence of being [FN149] (even though only in the live memory and in the links of affection of the survivors). The hiding and lack of respect for the mortal remains of the beloved person affect, thus, his close relatives in the innermost part of their being.

[FN149] L.-V. Thomas, La mort, 4th. corr. ed., Paris, PUF, 1998, pp. 91-93, 107, 113 and 115.

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21. The spiritual legacy of the dead, in its turn, constitutes, in my understanding, an expression of the solidarity of those who have already died with those who are still alive, in order to help these latter to confront the injustices of this world, and to live with its queries and misteries (such as those of the passing of time and of the destiny of each one). But the expression of solidarity seems to me to operate also in the other, reciprocal, sense, of the living towards their dead, by virtue of the sufferings that these latter had to undergo before their crossing towards eternity [FN150].

[FN150] This latter expression of solidarity has been expressed, in the XIXth century, not without pessimism but with compassion, by Arthur Schopenhauer, in recommending that we ought to wish that our dead have "learned their lesson" and that they "have benefited from it"; A. Schopenhauer, Meditaciones sobre el Dolor del Mundo, el Suicidio y la Voluntad de Vivir, Madrid, Tecnos, 1999, p. 88.

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22. The human kind, that is, the unity of the human kind, ought, thus, in my understanding, to be better appreciated in its essentially temporal (and not static) dimension, comprising in the same way also future generations (who begin to attract the attention of the contemporary doctrine of international law) [FN151]. No one would dare to deny the duty that we have, the living beings, to contribute to construct a world in which future generations find themselves free from the violations of human rights which victimized their predecesors (the guarantee of non-repetition of past violations).

[FN151] Cf., e.g., E. Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity, Tokyo/Dobbs Ferry N.Y., United Nations University/Transnational Publs., 1989, pp. 1-351; E. Agius and S. Busuttil et alii (eds.), Future Generations and International Law, London, Earthscan, 1998, pp. 3-197.

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23. Human solidarity manifests itself not only in a spacial dimension - that is, in the space shared by all the peoples of the world, - but also in a temporal dimension - that is, among the generations who succeed each other in the time [FN152], taking the past, present and future altogether. It is the notion of human solidarity, understood in this wide dimension, and never that of State sovereignty [FN153], which lies on the basis of the whole contemporary thinking on the rights inherent to the human being.

[FN152] Cf. A.-Ch. Kiss, "La notion de patrimoine commun de l'humanité". 175 Recueil des Cours de l'Académie de Droit International de La Haye (1982) pp. 113, 123, 224, 231 and 240; R.-J. Dupuy, La Communauté internationale entre le mythe et l'histoire, Paris, UNESCO/Economica, 1986, pp. 160, 169 and 173, and cf. p. 135 for the "anteriority of conscience over history".

[FN153] Which is not even the sovereignty of the peoples, and which appears far too limited in space and pathetically restricted in historical time.

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24. Hence the importance of the cultures, - as a link between each human being and the comunity en which he lives (the external world), - in their unanimous attention to the respect due to the dead. In social milieux strongly permeated by a community outlook, - such as the African ones, for example, - there prevails a feeling of harmony between the living and the dead, between the natural environment and the spirits who animate it [FN154]. The cultural manifestations ought to find expression in the universe of Law [FN155]. This does not at all amount to a "cultural relativism", but rather to the recognition of the relevance of the cultural identity and diversity for the effectiveness of the juridical norms.

[FN154] J. Matringe, Tradition et modernité dans la Charte Africaine des Droits de l'Homme et des Peuples, Bruxelles, Bruylant, 1996, pp. 69-70.

[FN155] It may be recalled that the Inter-American Court of Human Rights had the occasion to take into account the modus vivendi and the cultural practices of the maroons in Suriname (the saramaca [cf.] custom), in its Judgment on reparations in the Aloeboetoe and Others case (of 10.09.1993).

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25. The adepts of the so-called "cultural relativism" seem to forget some unquestionable basic elements, namely: first, cultures are not static, they manifest themselves dynamically in the time, and have shown themselves open to the advances in the domain of human rights in the last decades [FN156]; second, many human rights treaties have been ratified by States with the most diverse cultures; third, there are more recent treaties, - such as the Convention on the Rights of the Child (1989), - which, in their travaux préparatoires [FN157], have taken in due account cultural diversity, and today enjoy a virtually universal acceptance [FN158]; fourth, cultural diversity has never been an obstacle to the formation of a universal nucleus of non-derogable fundamental rights, set forth in many human rights treaties; fifth, the Geneva Conventions on International Humanitarian Law also count on a virtually universal acceptance.

[FN156] E.g., women's rights, in various parts of the. - Furthermore, no-one would dare to deny, for example, the right to cultural identity, which thus would have, that right itself, a universal dimension; cf. [Various Authors,] Law and Cultural Diversity (eds. Y. Donders et alii), Utrecht, SIM, 1999, pp. 41, 72 and 77.

[FN157] Cf. The United Nations Convention on the Rights of the Child - A Guide to the Travaux Préparatoires (ed. S. Detrick), Dordrecht, Nijhoff, 1992, pp. 1-703.

[FN158] With very rare exceptions.

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26. As if these elements were not sufficient, in our days cultural diversity has not refrained the contemporary tendency of criminalization of grave violations of human rights, nor the advances in the international criminal law, nor the provision for universal jurisdiction in some human rights treaties (such as the United Nations Convention against Torture (1984), among others), nor the universal struggle to put an end to the crimes against humanity. In fact, cultural diversity has not impeded, either, the creation, in our days, of a true international regime against torture, forced disappearances of persons, and summary, extra-legal and arbitrary executions [FN159].

[FN159] Cf. A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, vol. II, Porto Alegre/Brasil, S.A. Fabris Ed., 1999, pp. 338-358. - Thus, the so-called "cultural relativism" in the domain of the International Law of Human Rights is thereby marked by too many fallacies. I feel also unable to accept the so-called "juridical relativismo" in the domain of Public International Law: such relativism is nothing but a neopositivist outlook of the international legal order, from an anachronistic State-centred perspective, rather than community-centred (the civitas maxima gentium). Equally unsustainable appears to me the "realist" trend in contemporary legal and social sciences, with their intellectual cowardice and their capitulation before the raw "reality" of the facts (as if these latter were reduced to product of a simple historical inevitability).

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27. All this points to the prevalence of the safeguard of the non-derogable rights in any circumstances (in times of peace as well as of armed conflict). The normative and interpretative convergences between the International Law of Human Rights and International Humanitarian Law, acknowledged in the present Judgment in the Bámaca Velásquez case (pars. 205-207), contribute to place those non-derogable rights, - starting with the fundamental right to life itself, - definitively in the domain of jus cogens.

28. Universal human rights find support in the spirituality of all cultures and religions [FN160], are rooted in the human spirit itself; as such, they are not the expression of a given culture (Western or any other), but rather of the universal juridical concience itself. All the aforementioned advances, due to this universal juridical conscience, have taken place amidst cultural diversity. Contrary to what the spokesmen of the so-called - and distorted - "cultural relativismo" preach, cultural manifestations (at least those which conform themselves with the universally accepted standards of treatment of the human being and of respecto for their dead) do not constitute obstacles to the prevalence of human rights, but quite on the contrary: the cultural substratum of the norms of protection of the human being much contributes to secure their effectiveness. Such cultural manifestations - such as that of respect for the dead in the persons of the living, titulaires of rights and duties - are like superposed stones with which is erected the great pyramid [FN161] of the universality of human rights.

[FN160] Cf. [Various Authors,] Les droits de l'homme - bien universel ou fruit de la culture occidentale? (Colloquy of Chantilly/France, March 1997), Avignon, Institut R. Schuman pour l'Europe, 1999, pp. 49 and 24.
[FN161] To evoke an image quite proper to the rich maya culture.

IV. The Prevalence of the Right to Truth, in Respect for the Dead and the Living.

29. Several peoples of Latin America have, in their recent history, known and suffered the scourge and cruelty of torture, inhuman or degrading treatment, summary and arbitrary or extra-legal executions, and forced disappearances of persons [FN162]. The search for truth - as illustrated by the cases of forced disappearance of persons - constitutes the starting-point for the liberation as well as the protection of the human being; without truth (however unbearable it might come to be) one cannot be freed from the torment of uncertainty, and it is not possible either to exercise the protected rights.

[FN162] To which one may add contemporary atrocities and acts of genocide in other continents, such as the European (e.g., ex-Yugoslavia) and the African (e.g., Rwanda), - besides massive violations of human rights in the Middle-East and the Far East.
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30. In fact, the prevalence of the right to truth appears as a conditio sine qua non to render effective the right to judicial guarantees (Article 8 of the American Convention) and the right to judicial protection (Article 25 of the Convention), all reinforcing each other mutually, to the benefit of the close relatives of the disappeared person. The right to truth is thus endowed with an individual as well as a collective dimensions.

31. It has, in my understanding, a wider dimension than that which may prima facie be ensued from Article 19 of the Universal Declaration of Human Rights of 1948. Beyond what is formulated in that provision [FN163], which has inspired other provisions of the kind of distinct human rights treaties, the right to truth applies ultimately also as a sign of respect for the dead and the living. The hiding of the mortal remains of a disappeared person, in a flagrant lack of respect to them, threatens to disrupt the spiritual bond which links the dead to the living, and attempts against the solidarity which ought to guide the paths of the human kind in her temporal dimension.

[FN163] According to which "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to receive and impart information and ideas through any media and regardless of frontiers".
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32. As to the jurisprudential construction of the right to truth, an advance can be found between what was in this respect pointed out by the Court in the Castillo Páez case (Judgment on the merits, of 03.11.1997) [FN164], and what was pondered in the present Judgment on the

merits in the Bámaca Velásquez case (pars. 198-199). The right to truth indeed requires the investigation by the State of the wrongful facts, and its prevalence constitutes, moreover, as already observed, the prerequisite for the effective access itself to justice - at national and international levels - on the part of the relatives of the disappeared person (judicial guarantees and protection under Articles 8 and 25 of the American Convention). As the State is under the duty to cease the violations of human rights, the prevalence of the right to truth is essential to the struggle against impunity [FN165], and is ineluctably linked to the very realization of justice, and to the guarantee of non-repetition of those violations [FN166].

[FN164] In which the Court characterized the right to truth as "a concept still in doctrinal and jurisprudential development", linked to the State duty to investigate the facts which produced the violations of the American Convention (pars. 86 and 90).
[FN165] Just like in other cases, in the present Judgment on the Bámaca Velásquez case the Inter-American Court has pointed out the need to fight impunity (pars. 211-213), particularly under the general obligation set forth in Article 1(1) of the American Convention.
[FN166] L. Joinet, Informe Final acerca de la Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos, U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1997/20, of 26.06.1997, pp. 5-6 and 19-20.

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33. For the affirmation of such right, to the benefit of the relatives of the disappeared person, it does not appear to me necessary to resort to the contemporary European doctrine - in my view not much inspired and still less inspiring - of the so-called protection par ricochet. We are before a legitimate exercise of interpretation, in perfect conformity with the general rules of interpretation of treaties [FN167], whereby one seeks to secure the effet utile of the American Convention on Human Rights in the domestic law of the States Parties, maximizing the safeguard of the rights protected by the Convention.

[FN167] Articles 31-33 of the Vienna Conventions on the Law of Treaties (of 1969 and 1986).

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34. The international case-law itself in the matter of human rights has disclosed its understanding of that legitimate exercise of interpretation, extending the protection to new situations as from the pre-existing rights. The Inter-American Court has timely recalled, in its important Advisory Opinion on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, of 01.10.1999, that "human rights treaties are living instruments, the interpretation of which has to follow the evolution of times and the conditions of present-day life" (par. 114).

35. In the same line of such evolutive interpretation, in its recent Judgment on the merits in the Cantoral Benavides case (of 18.08.2000), the Inter-American Court pondered [FN168] that, for example, "certain acts which were qualified in the past as inhuman or degrading treatment", may subsequently, with the passing of time, come to be considered "as torture, since to the growing exigencies of protection" of human rights "ought to correspond a greater firmness in

confronting the infringements to the basic values of the democratic societies" (par. 99, and cf. pars. 100-104).

[FN168] In an approach also followed by the European Court of Human Rights.

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36. In both the Cantoral Benavides case (pars. 104 and 106) and in the present Bámaca Velásquez case (par. 158), the Court established, inter alia, the violation of Article 5(2) of the American Convention, in view of the tortures suffered by the direct victim (Mr. Cantoral Benavides and Mr. Bámaca Velásquez, respectively). The prohibition of cruel, inhuman or degrading treatment, in the terms of the same Article 5(2) of the American Convention, retains relevance, as recognized by the Court in the present Judgment, for the sufferings undertaken by the indirect victims, the close relatives of Mr. Bámaca Velásquez. The prohibition of torture as well as cruel, inhuman or degrading treatment, under the American Convention and other human rights treaties, is absolute.

37. In fact, the juridical content itself of the absolute prohibition of cruel, inhuman or degrading treatment, in particular, has had a domain of application widened ratione materiae, comprising new situations perhaps not foreseen at the moment of its formulation in human rights treaties [FN169]. Thus, the prohibition of such treatment has been invoked, under the European Convention of Human Rights, in cases pertaining also to non-extradition (such as the cas célèbre Soering versus United Kingdom (1989) and non-deportation [FN170]. This has taken place by means of an evolutive interpretation of the international instruments of protection of the rights of the human being.

[FN169] For example, in its Provisional Measures of Protection (of 18.08.2000) in the case of the Haitians and Dominicans of Haitian Origin in the Dominican Republic, the Inter-American Court of extended such Measures to rights other than the fundamental rights to life and to personal integrity, in such way as, e.g., to impede the deportation or the expulsion of certain individuals, and to allow their return and family reunification (par. 13). And in the Provisional Measures of Protection which the Court has just adopted yesterday (24.11.2000), in the case of the Community of Peace of San José of Apartadó, it extended such Measures to internally displaced persons in Colombia (resolutory point n. 6).

[FN170] On such extensive application of the absolute prohibition of inhuman or degrading treatment, cf., e.g., H. Fourteau, L'application de l'article 3 de la Convention Européenne des Droits de l'Homme dans le droit interne des États membres, Paris, LGDJ, 1996, pp. 211-265. - Likewise, Article 8 of the European Convention on Human Rights, on the respect to privathe and family life, has had an interpretation and application expanded ratione materiae to cases pertaining to, e.g., non-deportation (such as, for example, the important cases Moustaquim versus Belgium, 1991, and Beldjoudi versus France, 1990); R, Cholewinski, "Strasbourg's `Hidden Agenda'?: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights", 12 Netherlands Quarterly of Human Rights (1994) pp. 287-306.

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38. The absolute prohibition of cruel, inhuman or degrading treatment has experienced, furthermore, a widening also ratione personae, comprising, in given cases (such as those of forced disappearance of person), as to the titularity of rights, also the relatives of the direct victim (in their condition of indirect victims - cf. supra). Thus, the Inter-American Court has correctly established that, in circumstances such as those of the present Bámaca Velásquez case, the victims are the disappeared person as well as his close relatives.

39. Already on previous occasions, such as in the Blake case (Judgments on the merits, of 24.01.1998, and reparations, of 22.01.1999), and in the "Street Children" case (Judgment on the merits, of 19.11.1999), the Inter-American Court correctly established the juridical foundation of the widening of the notion of victim, to comprise, in the specific circumstances of the aforementioned cases (in which the mortal remains of those victimized had been non-identified or hidden for some time), also the close relatives of the direct victims. There persisted, nevertheless, the need to develop, as I have attempted to do in this Separate Opinion, the question of the bonds and links of solidarity between the dead and the living, forming the unity of the human kind, with the respect due to ones and the others, for which there ought to prevail the right to truth.

40. The widening of the notion of victim again occurs in the present case, in relation to the close relatives of Mr. Efraín Bámaca Velásquez. The intense suffering caused by the violent death of a beloved person is further aggravated by his forced disappearance, and discloses one of the great truths of the human condition: that the fate of one is ineluctably linked to the fate of the others. One cannot live in peace in face of the disgrace of a beloved person. And peace should not be a privilege of the dead. The forced disappearance of a person victimizes likewise his close relatives (at times disrupting the family nucleus itself [FN171]), not only for the intense suffering and the desperation ensuing therefrom, but also from substract all from the protecting shield of Law. This understanding already forms today, on the eve of the XXIst century, jurisprudence constante of the Inter-American Court of Human Rights.

[FN171] As clearly stated in testimonies in public hearings pertaining to various contentious cases before the Inter-American Court in the last years.

Antônio A. Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

SEPARATE CONCURRING OPINION OF JUDGE HERNÁN SALGADO PESANTES

As a result of this case, we have reflected once more on the so-called right to the truth and, although this right is not set out in the American Convention, there is an implicit reference to it in some of its provisions, such as Articles 8, 11, 14 and 25.

The right to the truth has been shaped in a historical context where the State's abuse of power has caused serious conflicts, particularly when the forced disappearance of persons has been used by State agents. In these circumstances, the community demands the right to the truth as a means of permitting reconciliation and overcoming friction between the State and society.

From the foregoing, it is clear that the right to the truth -at least up until now- has a collective and general nature, a type of extended right, whose effectiveness should benefit society as a whole. However, under certain circumstances, such as those of forced disappearance, this extended nature should not prevent a person or a family from claiming the right to obtain the truth.

In Article II (in fine) of the Inter-American Convention on Forced Disappearance of Persons, when the elements that constitute forced disappearance are established, they include "... the absence of information or a refusal to acknowledge that deprivation of freedom and to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

This reference leads us to recall Articles 8 and 25 of the American Convention, which, as we have said, implicitly contain the right to the truth, since the person who has recourse to justice is seeking clarification of certain facts, particularly in criminal matters. As regards freedom of thought and expression, specifically the right to information, society requires that this should be truthful, which makes us think that there also are elements of the right to the truth in this area.

In my opinion, the doctrine that is developed should take into account issues such as the following:

- The nature of this faculty or prerogative to obtain the truth is essentially moral, since the conduct opposed to the truth is lying; and it has a subjective content that must be defined, so as not to fall into negative subjectivism;
- The failure to tell, reveal or establish the truth may give rise to different degrees of responsibility (unintentional error, premeditation, etcetera);

In any case, axiology or legal evaluation must construct a solid doctrine that allows the right to the truth to be included in positive law and, at the same time, determines to what extent such a right can and should be applied.

Hernán Salgado-Pesantes
Judge

Manuel E. Ventura-Robles
Secretary

SEPARATE CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ ON THE JUDGMENT ON MERITS OF THE BÁMACA VELÁSQUEZ CASE

1. The Judgment pronounced by the Inter-American Court of Human Rights in the Bámaca Velásquez case, on November 25, 2000, examines various alleged violations of rights embodied in the American Convention on Human Rights, the Pact of San José. It constitutes a valuable jurisdictional reflection on various concepts that are relevant for international human rights law and the development of the jurisprudence of the Court. It repeats and expands positions adopted previously and encourages the examination and definition of some new issues in the Court's own experience. I believe it pertinent to associate this concurring opinion with the considerations and decisions of this Judgment.

I. VICTIM OF VIOLATION

2. When examining the violation of Article 5 of the Convention (Right to humane treatment), the Judgment looks at two issues that I will examine in this opinion. One of them relates to the burden of proof in the alleged forced disappearance of persons, an issue to which I will return infra (sub V, B). The other concerns the very concept of victim of violation, a matter of fundamental importance in international human rights law, both because of its substantive implications - to identify the passive subject of the injury, holder of the affected rights and others generated by the respective conduct - and because of its procedural consequences - to define the competency and the corresponding capacity to act at different moments of the proceeding.

3. The development of the concept of victim is well know, starting from the nuclear notion centered on what would be called the direct victim, until it reaches, when applicable, the expanded notions that are expressed in the concepts of indirect victim and potential victim, issues that have been explored and disputed at length [FN172]. This evolution clearly reveals the guiding momentum of international human rights law, which strives to take the real protection of human rights increasingly further - in a trend that I believe to be pertinent and encouraging. The principle that favors the individual, which is summarized in the expanded version of the pro homine rule - a source of progressive interpretation and integration - has one of its most notable expressions here.

[FN172] cf. Rogge, Kersten, “The ´victim´ requirement in article 25 of the European Convention on Human Rights”, in Various, Protecting human rights: the European Dimension/Protection des droits de l´homme: la dimension européenne, ed. Franz Matscher-Herbert Petzhold, Carl Heymanns Verlag K G. Köln. Berlin. Bonn. München, 1988, pp. 539 and ff.; and Cancado Trindade, A. A., Co-existence and co-ordination of mechanisms of international protection of human rights (At global and regional levels). Academy of International Law, Offprint from the Collected Courses, vol. 202 (1987-II), pp. 243 and ff.

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4. Like the European Court, the Inter-American Court has dealt with this matter (through an evolving jurisprudence that works with the figures of direct and indirect victim and beneficiaries of the victim [FN173]), through decisions in which it initiated or continued the elaboration of a broad concept of victim of violation. This judgment progresses in this sense, and distinguishes between, on the one hand, the infringement of the rights of Efraín Bámaca Velásquez and, on the other, the violation of the rights of his next of kin and of Jennifer Harbury. It is clear that some

violations directly and immediately affect the former; and others affect Jennifer Harbury and the closest members of Mr. Bámaca's family, who also suffered the consequences - effects on the person with legal effects - of the violation of his rights.

[FN173] cf. Pasqualucci, Jo M., "Victim reparations in the Inter-American Human Rights System: a critical assessment of current practice and procedure", in Michigan Journal of International Law, vol. 18, no. 1, fall 1996, esp. pp. 16 and ff.; also, cf., in their respective considerations, Villagrán Morales et al. case (the "Street Children" case). Judgment of November 19, 1999. Series C No. 63, paras. 173-177; and Blake case. Judgment of January 24, 1998. Series C No. 36, paras. 97 and 116.

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5. It is probable that the Court will re-examine this issue in future decisions. To that end, it could consider that the person who suffers impairment of his fundamental rights as the immediate effect of the violation, is a direct victim; between the victim and the impairment of his rights there is a relation of cause and effect (in the juridical sense of the connection), without intermediary or interruption. Conversely, an indirect victim would be the person who experiences the impairment of his right as an immediate and necessary consequence, according to the circumstances, of the injury suffered by the direct victim.Under this hypothesis, the effect on the latter would be the source of the violation experienced by the indirect victim. The technical distinction between the two categories does not imply that one of them has a higher rank for the purposes of the protection of the law. They are equally protected by the Convention and may be dealt with in the judgment, both to consider them, substantively, as passive subjects of a violation with claims to reparations, and to attribute them procedural competency, generically and without distinction.

6. In this respect, that is, with regard to the violation of Article 5 of the Convention, the Court has begun, briefly and almost tangentially for the moment, to examine the difference between torture, on the one hand, and cruel, inhuman and degrading treatment, on the other (para. 154, where it is also recalled that all these acts "are strictly prohibited under any circumstance", as the Court has declared in the Cantoral Benavides case. Judgment on merits, para. 95), and the three components of the latter category can also be the object of delimitation and definition. Thus, in this case, the Court has considered that certain acts denounced "were deliberately prepared and inflicted, in order to obtain information that was relevant for the Army from Efraín Bámaca Velázquez. According to the testimonies received in this proceeding, "the alleged victim was submitted to grave acts of physical and mental violence during a prolonged period of time for the said purposes and, thus, intentionally placed in a situation of anguish and intense physical suffering, which can only be qualified as both physical and mental torture" (para. 158).

7. The difference between torture and other acts assembled under Article 5(2) of the Convention, is not to be found in the pre-ordained and deliberate nature of some of them, because, generally, they all have these characteristics; or in the purpose for which they are inflicted, which may also be common to all. The description of torture contained in conventions on this subject - the universal and the American - offers elements that also characterize cruel and

inhuman treatment. In other words, the latter could be differentiated from the former by the gravity of the suffering caused to the victim, by the intensity of the pain - physical or moral - that is inflicted, by the characteristics of the prejudicial action and of the reaction that this causes in the person who suffers it.

8. For example, the Court maintained that what Mrs. Harbury and the next of kin of Mr. Bámaca Velásquez suffered, as a result of the obstacles they confronted in their efforts to learn the truth about the facts, the concealment of the corpse of Mr. Bámaca Velásquez, and the official refusal to provide the requested information, "clearly constitutes cruel, inhuman and degrading treatment" (para. 165). Taking into account the meaning of the words and the characteristics of the facts and their impact on the victims, it is evident, in my opinion, that the treatment inflicted was cruel and inhuman. However, there would evidently be those who would question calling it degrading, a qualifier that would correspond to another type of treatment, the characteristic of which would possibly be its humiliating or offensive effectiveness.

9. It is clear that progress in the general conditions of life, and the impact this has on the development of the culture and sensitivity of the individuals who are part of it, may entail an evolution in the way in which certain treatment is perceived and, consequently, how it is characterized. Accordingly, its nature could vary in relation to the persons who suffer it at a specific time and in a specific place: cruel and inhuman treatment, and even degrading treatment, might then become torture, owing to its characteristics and its effect on the victim.

II. RECOGNITION OF JURIDICAL PERSONALITY

10. The Court considers that Article 3 of the Convention was not violated in the case referred to in this judgment. This article establishes that "every person has the right to recognition as a person before the law" and it is, therefore, in order to declare it so. Although the lack of evidence about a fact merely supports the conclusion that it has not been proved, putting on record the absence of support for a claim in the judgment on merits - in this case, the lack of support for the declaration that the right to the recognition of juridical personality has been violated - should be translated into an explicit declaration with regard to the absence of violation of the respective right.

11. In order to reach the conclusion affirmed by the Court, we need to examine the meaning of the right embodied in Article 3: recognition of the juridical personality; that is, recognition of a fact that pre-existed the act of the person recognizing it. This fact is the juridical personality, which, in turn, implies the capacity of the individual to be a juridical person, because of this same fundamental condition. And the latter is characterized as the possibility of being the subject of obligations and the holder of rights.

12. The juridical personality that interests us here is that of the human being, the physical person, in the terms of Article 1(2) of the Convention which states: "For the purposes of this Convention, "person" means every human being". The concept contained in Article 3 of the said Convention should be understood through a systematic interpretation of all the legislation applicable to the matter on the American continent, which suffices to indicate its scope. Thus, the need to relate the said Article 3 to its antecedent - and source (natural and necessary reference) -

Article XVII of the American Declaration of the Rights and Duties of Man, which precisely under the heading "Right to recognition of juridical personality and civil rights", establishes that "[e]very person has the right to be recognized everywhere as a person having rights and obligations and to enjoy the basic civil rights". As can be seen, the juridical personality also involves precisely this capacity to be the subject of rights and obligations, holder of the juridical consequences of a certain situation: the condition of a human being, who must be recognized and developed - normatively - by the system of laws.

13. It is evident that this title alludes to the capacity to enjoy rights, which belongs to human beings in general, but not necessarily to the enjoyment or exercise of all the rights. Indeed, the scope of the enjoyment, that is, the definition or concrete integration of the said capacity, and also the possibility of exercising the rights are subject to positive law (objective) in function of the place of the individual in the totality of the juridical relations in which he participates or within which he is inserted. A minor, who lacks maturity and competence to determine his own conduct, freely and in an informed manner, and thus produce juridical consequences that may benefit or prejudice him, cannot have title to the enjoyment and exercise of rights that are, to the contrary, attributed to the adult person. There are numerous and reasonable distinctions in this area; thus, between the situation of the citizen, who is assigned full political rights, and the person who is not a citizen; or between the head of the household who has specific powers and obligations and the person who lacks them; or between the professional who has a distinctive status, and the person who does not have that preparation and activity, etcetera.

14. In view of the foregoing, disregarding the juridical personality would be equivalent to the absolute denial of the possibility that a human being could have title to rights and obligations. In this case, he would be treated as an object - the matter of a juridical relation, not the subject of it - or he would be reduced to the condition of slave. Accordingly, we can infer that the right to the recognition of juridical personality has its own substance or entity and cannot be seen as a reflection of a de facto situation that would deprive the individual of the possibility of exercising the rights to which, however, he has not been refused ownership. The latter would involve a juridical situation - disregard of the personality of this individual - while the former would constitute a fact, extremely deplorable or limiting perhaps, but not necessarily, in itself, annulling the juridical personality of the human being who suffers it.

15. If we maintained that forced disappearance, which is an extreme form of illegal deprivation of liberty, entails disregard of the juridical personality and, consequently, violation of Article 3 of the Convention, we would have to reach the same conclusion in the case of arbitrary detention or of absolute, or even relative, solitary confinement. Further still, in such cases, and evidently in that of forced disappearance, we would have to conclude that the subject is also deprived of all the rights that he is unable to exercise due to the factual impediment that disappearance, solitary confinement or detention imposes on him: the right or freedom to circulate, expression, meeting, association, property, work, education and so on. It is obvious that such a conclusion would be excessive from the juridical perspective, which is the one that governs these observations.

16. Finally, the judgment points out that Article II of the Inter-American Convention on Forced Disappearance of Persons, which formulates a characterization of this on which the

national criminal figure can be constructed, alludes to the violation of some rights - and in this sense, that description is related to the fifth paragraph of the preamble of the Convention, which refers to the violation of many essential rights of the human being - which do not include the recognition of juridical personality. However, the rights to liberty, to information about the disappeared person, to the recognition of the capture and the exercise of legal remedies and procedural guarantees are to be found in the above-mentioned Article II.

III. RIGHT TO THE TRUTH

17. The Inter-American Commission on Human Rights stated that the forced disappearance of Mr. Bámaca Velásquez entailed a violation of the right to the truth of the victim's next of kin and society in general. As the Court has summarized, this right would have "a collective nature, which includes the right of society to 'have access to essential information for the development of democratic systems', and a particular nature, as the right of the victims' next of kin to know what has happened to their loved ones, which permits a form of reparation" (para. 197).

18. The right to the truth has been examined from two angles, which imply the same -or a very similar- consideration: to know the reality about certain facts. Based on this knowledge a juridical, political or moral consequence will be constructed of a diverse nature. On the one hand, that right is assigned to society as a whole; on the other, the right is attributed to the direct or indirect victim of conduct that violates human rights [FN174].

[FN174] cf. The administration of justice and the human rights of detainees. Final report on the question of the impunity of perpetrators of human rights violations (civil and political) prepared by L. Joinet pursuant to decision 1996/119 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities - E/CN.4/Sub.2/1997/20, 26 June 1997, para. 17, where a distinction is made between "the right of any individual victim or his nearest and dearest to know what happened, [which is] a the right to the truth" and "the right to know [which] is also a collective right".

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19. In its first acceptation, the so-called right to the truth covers a legitimate demand of society to know what has happened, generically or specifically, during a certain period of collective history, usually a stage dominated by authoritarianism, when the channels of knowledge, information and reaction characteristic of democracy are not operating adequately or sufficiently. In the second, the right to know the reality of what has happened constitutes a human right that is immediately extended to the judgment on merits and the reparations that arise from this.

20. In the Court's judgment to which this opinion is associated, the Court has confined itself to the individual perspective of the right to the truth, which is the one that is strictly linked to the Convention, because it is a human right. Accordingly, in this case, this right is contained or subsumed in another that is also a subject of this judgment: that corresponding to the investigation of the violating facts and the prosecution of those responsible. Thus, the victim - or his heirs - has the right that the investigations that are or will be conducted will lead to knowing

what “really” happened [FN175]. The individual right to the truth follows this reasoning, which is supported by the Convention and, based on this, by the Court's recognition in its judgment.

[FN175] cf. Study on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms. Final report presented by Theo van Boven, Special Rapporteur. Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub. 2/1993/8, 2 July 1993; the study notes that Chile has put great emphasis on revealing the truth about the most serious human rights violations relating to the right to life. The reparation was and is focused principally on the vindication of the victims of such serious violations and on compensation for their next of kin, para. 117.

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21. Furthermore, the satisfaction of the right to the truth that corresponds to the victims, through the public investigation of the facts and prosecution of those responsible - as the Court has ordered in its decisions in this judgment - also allows society's demand to know what has happened to be fulfilled. This situation is similar to the one that arises with regard to the effectiveness of a judgment declaring the violation of rights, in itself, to repair the wrong perpetrated, as regards the moral satisfaction of the victim; an issue that has been dealt with by international jurisprudence and several of the Court's decisions. The Court has reiterated in its jurisprudence that, with regard to the request that the State should make a public apology as reparation of the violations committed, “the judgment on merits in the […] case constitutes, in itself, a significant and important form of reparation and moral satisfaction for [the victim] and his relatives. [FN176]”

[FN176] Thus, in the Suárez Rosero case. Reparations (Article 63.1 American Convention on Human Rights). Judgment of January 20, 1999. Series C No. 44, para. 72; Loayza Tamayo case. Reparations (Article 63.1 American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 42, para. 158; and Caballero Delgado and Santana case. Reparations (Article 63.1 American Convention on Human Rights). Judgment of January 29, 1997. Series C No. 31, para. 58.

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22. This is the first time that the Court has explicitly referred to the right to the truth, cited in the Commission's application. The innovation that the judgment contributes on this point could lead to further examination in the future, which would help to strengthen the role of inter-American human rights jurisprudence as a factor in the fight against impunity. Society's demand for knowledge of the facts that violate human rights and the individual right to know the truth are clearly addressed at banishing impunity, which encourages human rights violations.

IV. APPLICATION OF THE GENEVA CONVENTIONS

23. The Court's decision also makes some observations about the applicability to this case of Article 3, common to the Geneva Conventions. In this respect, it is clear that the competence of the Inter-American Court to decide litigations, ratione materiae, is circumscribed to violations of

the American Convention on Human Rights, since it is expressly invested with contentious jurisdiction to hear cases relating to "the interpretation or application" of this Convention (Article 62(1) and 3); to this could be added those expressly assigned to the Court by other treaties or conventions in force in America, such as the Inter-American Convention to Prevent and Punish Torture, a hypothesis that is also examined in this judgment. Thus, the Court cannot directly apply the rules of international humanitarian law embodied in the 1949 Geneva Conventions and, pursuant to them, decide a dispute, determining that there has been a violation of the provisions of those conventional instruments.

24. As the Court itself has indicated [FN177], the foregoing does not preclude taking into consideration these provisions of international humanitarian law - another perspective of the international system - in order to interpret the American Convention. It is not an issue of directly applying Article 3 common to the Geneva Conventions in the case, but of admitting the facts provided by the whole system of laws - to which this principle belongs - in order to interpret the meaning of a norm that the Court must apply directly.

[FN177] cf. Las Palmeras case, Preliminary objections. Judgment of February 4, 2000, paras. 32-34; here, it is noted that the American Convention "has only attributed the Court with competence to determine whether the acts or the laws of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions."

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25. The Court can go further in its appreciation of this matter, even when it is not strictly required to under the terms of the application, and observe the presence of norms of jus cogens resulting from the evident correlation - which shows an international consensus - between the provisions of the American Convention, the Geneva Conventions, and "other international instruments" - as is indicated in para. 209 of the judgment - regarding "non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman and degrading treatment."

V. PROBATIVE MATTERS

A) Admissibility of the evidence

26. Some probative matters, which should be commented on, are examined in the judgment. The importance and transcendence of the evidence in a jurisdictional proceeding is obvious. It has even been said that the proceeding constitutes, in essence, a broad probative opportunity directed at verifying the de facto conditions that support the legal claims. The juridical consequences are constructed on the basis of the facts. Consequently, the judge must give special attention to the issue of the evidence before beginning the juridical consideration, and, particularly, do so in a firm and reasonably certain way, so that justice may be done in the specific case. This leads to identifying some points on the admissibility, effectiveness and evaluation of the evidence, and also on the conditions for its presentation in the natural context of the accusatory system established by the Convention, its Statute and the Rules of Procedure of the Court.

27. The judgment on merits observes that certain documents “lack authentication, present defects and do not comply with the minimum formal requirements for admissibility, because it is impossible to establish precisely their source, and also the procedure by which they were obtained. Those circumstances prevent these documents from being granted value as evidence” (para. 105). In the instant case, these are documents attributed to Government agencies, which have not been confirmed by the latter; they contain deletions that prevent knowing everything that is written in them or the names of the hypothetical deponents, whose testimonies they present, and who cannot be questioned critically by the other party, in accordance with the rules of the system whereby both parties are heard, or eventually examined by the Court.

28. The Court is not denying the truth of the information contained in such documents, which it does not even discuss. It rejects them because they do not satisfy the indispensable “minimum requirements for admissibility”, as the judgment indicates. Consequently, it is not possible to begin to evaluate them, because this presumes that they have been admitted. I have already stated my opinion about this evidence, in a concurring opinion to the Order of the Court of June 19, 1998, in the case referred to in this judgment. In this particular opinion, I analyzed the disputed points of this evidence in greater detail and also observed that its admission would make it impracticable to fulfill the various categorical provisions of the Court's Rules of Procedure, such as those contained in Articles 41 (Questions put during the hearings), 46 (Convocation of witnesses and expert witnesses), 47 (Oath or solemn declaration by witnesses and expert witnesses) and 48 (Objections to witnesses).

29. In my opinion, the Court cannot admit evidence that does not meet the said minimum requirements for admissibility, with the argument that the Court has broad powers to examine it and evaluate it, linked to other information or circumstances. Indeed, the admission of evidence which is manifestly vitiated would alter the nature of a proceeding governed by democratic principles and would lead also to accepting other means of evidence that are rejected by the law or illegally obtained, taken to the full extent of its natural consequences. Thus, it would be decided that a confession or testimony obtained through the intimidation or even the torture of the witness is admissible, if, in the Court's opinion, it appears to corroborate other evidence and helps to clarify the facts. In this way, the proceeding would be impaired and we would return to an probative regime that has been widely overcome and condemned. Briefly, in matters of evidence - as in so many others - the end does not justify the means. To the contrary, the legitimacy of the latter helps to legitimize the end. Obtaining a hypothetical - and even remote - historical truth, does not exempt from fulfilling the requirements of the law and good faith that should govern the conduct of the judge.

B) The burden of proof

30. I have already said that, when examining the violation of Article 5 of the Convention (Right to humane treatment), the judgment emphasizes an interesting procedural issue, which is, the burden of proof in the hypothesis of forced disappearance of persons, which could also engender other possible violations. In principle, the burden of proof - onus probandi, which normally does not constitute an obligation, but a condition to be satisfied in order to obtain a determined procedural advantage - corresponds to the person who states a fact on which the

claim put forward is totally or partially based. This rule cannot be applied in absolute terms in a process to protect human rights, nor could it be applied in any procedural process dominated by the principle of historical truth. It is evident that, in the first stage of the procedure, the Commission must investigate the facts fully and objectively, independently of the assertions made by the participants, precisely in order to learn the historical truth and, it is even more evident, that the Court must assume this same function in the procedural stage that concerns it.

31. However, there are hypotheses where the burden of proof is naturally displaced from the person who asserts a fact to the person who denies it, when the latter is in a better position to prove what is said - the fact or the situation on which his defense is based - taking into account the circumstances of the case. In my opinion, this is what the expression contained in the judgment implies, which has precedents in other decisions of the Court as well as similarities, also cited, to a decision of the United Nations Human Rights Committee: “in cases of forced disappearance, the State's defense cannot rely on the impossibility of the plaintiff to present evidence in the proceedings since, in such cases, it is the State that controls the means to clarify the facts that have occurred in its jurisdiction and, therefore, in practice, it is necessary to rely on the cooperation of the State itself in order to obtain the required evidence” (para. 152 of the Judgment).

32. In my opinion, the Court has acted correctly by not establishing a universal and rigid principle about the burden of proof, which thus maintains its relative character. Indeed, although it is certain that the rule could correspond - both when the burden is established and when it is dispensed with - to most cases, according to its usual nature, it is also certain that the circumstances in which cases are presented introduces, a fortiori, a pertinent corrective, whose consequence could be the inversion of the burden of proof. In other words, the non-observance of the general rule, precisely in favor of justice, which depends more on the reality of things than on the abstract rationality of principles that could be irrational, and then unjust or unfair, in the specific reality of the disputed facts.

33. In cases such as forced disappearance - and others, including, for example, the demonstration that remedies under domestic law are accessible and effective, another issue that has been explored thoroughly - the State has better possibilities of assuming the function of proving what it denies, than the individual to prove what he affirms. Nevertheless, not even this frequently corroborated experience should lead to the adoption of an immovable rule: it is possible to accept the general effectiveness of the principle, while not accepting its universal applicability.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary

SEPARATE OPINION OF JUDGE DE ROUX RENGIFO

I share the point of view, according to which, the right to the recognition of juridical personality, that is, to be considered a subject of rights by the legal system, is not related to the question of whether or not a person is allowed to exercise such rights in the practice.

In this respect, there is a valid distinction between the juridical personality (which would be the who of the condition of subject of rights and obligations), the legal capacity (which would be the how much, the quantitative expression of this condition, and which could be measured and compared in order to say, for example, that it is more in an adult and less in a minor), and the effective exercise of this capacity (which could be affected in many different ways, by the legal or illegal action of the State or of individuals).

It would be possible to mention numerous examples of behaviors that signify severe illegal restrictions to the exercise of rights, without it being viable to affirm that they suppress the juridical personality of the victim. This would be the case, to mention the first thing that comes to mind, of arbitrary detention (particularly when this is accompanied by the prolonged, solitary confinement of the person detained), of submitting a person to a regime of restraint due to madness or dissipation without previously conducting a due process, or of abduction.

However, we could imagine that certain restrictions to the exercise of rights are so intense and so profound that they are equivalent to a derogation of the recognition of juridical personality, and that forced disappearance constitutes an exemplary case in this respect. Nevertheless, it will always be pertinent to counter this with the argument that the question of juridical personality belongs to a completely different legal category to that of the use and enjoyment of the rights of the subject, in the context of the facts that we are discussing. And not because the recognition of juridical personality is a sort of entelechy that lacks points of contact with the reality of real men and women, but rather because the normative embodiment of the right to that recognition is addressed at counteracting a scourge that merits combating, in its specificity, with the greatest vigor: that by which some legal systems establish, by definition, that certain categories of human beings lack the condition of subjects of rights and obligations and are, to all intents and purposes, comparable to things [FN178].

[FN178] In the preparatory work for the International Covenant on Civil and Political Rights, there are traces of the fact that, at that time, the members of the Drafting Committee faced the question of the level at which the right to the recognition of juridical personality should be placed. In this respect, the differences should be noted between the pertinent part of the Drafting Committee's report on the first working session in 1947 and the text that emerged from the Commission on Human Rights in 1950, corresponding to Article 16 of the Covenant. The formula contained in the 1947 report united in the same provision the issue of the exercise of rights and that of "judicial personality"; it said: “no person shall be restricted in the personal exercise of his civil rights or deprived of judicial personality, save in case of: a) minors, b) ...”. The final text concentrates on the issue of juridical personality and states: “everyone shall have the right to recognition everywhere as a person before the law.”

In any case, in recent decades, international human rights law has been considering the issue of whether forced disappearance does or does not violate the right to recognition of juridical personality.

The Declaration on the Protection of All Persons from Enforced Disappearances adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992, without pretending to be exhaustive, devotes an article to enunciating the rights violated by disappearances and heads this list with the right to recognition of juridical personality (Article 1(2)). The 1994 Inter-American Convention on Forced Disappearance of Persons - the first international conventional instrument against this scourge - abstains, however, from making that type of statement, although in a “whereas clause” it indicates that forced disappearance violates numerous essential, non-derogable human rights.

As regards the jurisprudence of the Inter-American Court, an interesting point should be emphasized. In two of its notable judgments in the “Honduran cases” (Velásquez Rodríguez and Godínez Cruz), the Court abstained from declaring that Article 3 of the American Convention, which refers to juridical personality, had been violated, on the occasion of separate cases of forced disappearance of persons. In other words, it restricted the scope of forced disappearance to the violation of Article 7 (right to personal liberty), Article 5 (right to humane treatment) and Article 4 (right to life) of the said Convention. Twelve years later, in the judgment in the Trujillo Oroza case, referring to a forced disappearance that occurred in Bolivia this time, the Court declared that, in addition to Articles 4, 5 and 7 of the above-mentioned international instrument, its Article 3 had also been violated. However, it should be noted that this declaration was made, as the judgment itself says, “pursuant to the terms of the State's recognition of responsibility”, and that the Court did not construct an explicit reasoning on the basic juridical question to which we have been referring.

Behind the recurring question of whether forced disappearance of persons violates the right to recognition of juridical personality, we find, among other issues, concern about the fact that certain very aggressive and offensive aspects of the corresponding conduct are not covered by the scope of the provisions on the rights to liberty, humane treatment and life.

Forced disappearance is characterized, among other matters, by creating a situation of overwhelming uncertainty about whether the victim is alive or dead; in other words, about whether he continues or has ceased to exist.This situation arises from the fact that the authors of the disappearance, not only cut off all forms of communication between the person who has disappeared and the society to which he belongs, but also eliminate any trace or information, about either the survival or death of the person in question (except for the mere passage of time as a growing sign of the probability that the victim is dead). In other words, the abductors create a state of uncertainty about the existence of the person who has disappeared [FN179].

[FN179] The motives that lead to this are fairly complex. Despite what is usually said, it is not only a case of eliminating evidence in order to guarantee the impunity of the abductors. It is also, among other matters, a question of breaking the resistance of the victim through torture, making him feel that he has lost all hope, taking the aggression against the victim to limits that go

beyond death, by disrespecting and hiding his corpse, and, above all, terrorizing and immobilizing the groups and communities that make up the social environment of the disappeared person.

The Declaration on the Protection of All Persons from Enforced Disappearance of the General Assembly of the United Nations and the Inter-American Convention on the Forced Disappearance of Persons, clearly capture this aspect of the scourge, which is related to a radical disinformation of the social environment of the person who has disappeared with regard to his whereabouts, and survival or death. Consequently, according to those instruments, the fight against this is mainly engaged in the area of recording and conserving information on persons who are at risk of being disappeared, and in reconstructing the lost thread of information about the fate and whereabouts of the victims of an actual disappearance. Much of the content of these instruments is devoted to prescribing the adoption of measures towards these ends [FN180].

[FN180] Among the provisions referred to, we should mention the following: a prompt and effective recourse must be designed in application of which the competent authorities would have access to all the places where persons deprived of their liberty are kept and to any other type of place where there is reason to believe that disappeared persons could be; persons deprived of liberty may only be confined in officially-recognized places; precise information should be provided promptly about the detention of these persons and the places where they are detained (including places of transfer), to their families and their lawyers; in any place of detention, there must be an official up-to-date record of all the persons deprived of liberty, available to the families and lawyers of those detained; a central record should be established that complies with the characteristics mentioned in the previous point; State agents who, without reason, refuse to provide information on a deprivation of liberty should be punished; when information is given that a detainee has been freed, the means should be provided to allow this to be verified with certainty; the results of investigations into disappearances shall be communicated to all interested persons, unless this obstructs the preparation of the respective criminal action; any forced disappearance shall be considered to be a permanent crime while its authors continue to conceal the fate and whereabouts of the person who has disappeared and while the facts are not clarified.

However, it does not seem possible to relate this aspect of forced disappearance to the provision of the American Convention (not to mention other protection treaties) on the right to recognition of juridical personality. During discussions on the draft of this judgment, I have been wondering whether this aspect of a disappearance attacks some of the basic presumptions of the right to recognition of juridical personality. And I have been reflecting on the possibility of arguing that, for a human being to be recognized as a subject of rights and obligations or, more precisely, for maintaining in effect the recognition of his condition of subject of rights and obligations, which jurisprudence grants him, it is important that he should not fall into this nebulous limbo of uncertainty about his existence that disappearance implies. However, I have finally been obliged to conclude that matters relating to this state of uncertainty belong to the order of the exercise of

rights and not to the recognition of juridical personality, in the terms and for the purposes for which it is embodied in Article 3 of the American Convention.

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I must express my dissatisfaction with paragraph 180 of the judgment, which forms part of the Court's considerations about the issue of whether or not Article 3 of the Convention was violated. In my opinion, this paragraph combines issues that should be treated separately and also introduces a reflection on the arbitrary deprivation of life, the relationship of which to the right to the recognition of juridical personality needs to be developed further in order to make the thread of the argument comprehensible.

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I share the Court's assertion, formulated in the context of examining the compliance or non-compliance with Article 1(1) of the American Convention, about its lack of competence to declare that a State has violated the 1949 Geneva Conventions on international humanitarian law.

I regret, however, that the issue of humanitarian laws was not introduced in relation to Article 2 of the American Convention. In a country undergoing an internal armed conflict, such as that experienced by Guatemala when the facts of the case occurred, the “legislative or other measures” that are needed in order to make the rights established in the Convention effective, undoubtedly include those that consist in assuming, disseminating and fulfilling the rules of humanitarian law applicable to that type of conflict and in investigating and punishing violations against them.

Carlos Vicente de Roux-Rengifo
Judge

Manuel E. Ventura-Robles
Secretario