

**Order of the
Inter-American Court of Human Rights
of January 27, 2009
Case of *Bámaca Velásquez v. Guatemala*
Provisional Measures and
Monitoring Compliance with Judgment**

HAVING SEEN:

A) *Monitoring Compliance with Judgment*

1. The Judgment on the merits rendered by the Inter-American Court of Human Rights (hereinafter "the Court", the Inter-American Court" or "the Tribunal") on November 25, 2000.
2. The Judgment on reparations and costs delivered by the Inter-American Court on February 22, 2002.
3. The Order of the Court of November 27, 2003, in which it declared, *inter alia*, that: "the State ha[d] fully complied with operative paragraphs 5, 6, and 7 of the Judgment on reparations [...] regarding compensation" for pecuniary and non-pecuniary damages, costs and expenses.
4. The Orders of the Court of March 3, 2005 and July 4, 2006, in which it decided, *inter alia*, "[t]o require the State to adopt all necessary measures to effectively and promptly comply with the orders that have not been completed [...]."
5. The Order of the Court of July 10, 2007, in which it declared that "the State ha[d] fully complied with the third operative paragraph of the Judgment on reparations" regarding the duty to publish the chapter on proven facts and the operative paragraphs of the Judgment on the merits in the Official Gazette and in another newspaper of national circulation and to hold a public ceremony to acknowledge its responsibility in connection with the facts of the instant case and to make reparation to the victims.
6. The Order of the President of the Court (hereinafter "the President") of November 11, 2008, whereby, in the exercise of the powers of the Court to monitor compliance with its own decisions, and upon prior consultation with the other judges of this Court, it was decided to call the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission"), the Republic of Guatemala (hereinafter "the State" or "Guatemala") and the representatives of the victim and his next of kin and of the beneficiaries of the provisional measures (hereinafter "the representatives") to a private hearing to obtain information from the

State regarding compliance with the Judgments rendered in the instant case, to hear the comments of the Commission and the representatives in that regard, and to receive information about the State's request to lift the provisional measures.

7. The private hearing held at the seat of the Court in San José de Costa Rica on January 20, 2009.¹ During the course of said private hearing the State, the Commission and the representatives made reference to the obligations that have yet to be performed in the instant case, namely: location of the mortal remains of Bámaca-Velásquez, their exhumation in the presence of his widow and next of kin, and subsequent release to them (*first operative paragraph of the Judgment on reparations*); investigation of the facts that gave rise to the violations of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and the Inter-American Convention to Prevent and Punish Torture (hereinafter "the IACPPT"), identification and punishment of those responsible therefor as well as public disclosure of the results of the respective investigation (*eighth operative paragraph of the Judgment on the merits and second operative paragraph of the Judgment on reparations*); and adoption of such legislative or other measures as may be necessary to adapt the Guatemalan legal system to international human rights and humanitarian law standards, and to effectively enforce said standards at the domestic level (*fourth operative paragraph of the Judgment on reparations*).

B) *Provisional Measures*

8. The Orders of the President of the Court of June 30, 1998, December 20, 2002 and September 26, 2003 and the Orders of the Court of August 29, 1998, September 5, 2001, February 21 and November 20, 2003 and March 11, 2005. In this last order the Court decided, *inter alia*:

1. To call upon the State to maintain all necessary measures to protect the life and safety of the following persons: Santiago Cabrera-López, Alfonso Cabrera-Viagres, Maria Victoria López, Blanca Cabrera, Carmenlinda Cabrera, Teresa Aguilar-Cabrera, Olga Maldonado, Carlos Alfonso Cabrera, José León Bámaca-Hernández, Egidia Gebia Bámaca-Velásquez, Josefina Bámaca-Velásquez, Alberta Velásquez, Rudy López-Velásquez and all other members of the Bámaca-Velásquez family who are permanently residing in Guatemala, Emerita Mendoza, Wendy Pérez-Álvarez, Sulni Madeli Pérez-Álvarez, José Oswaldo Pérez-Álvarez, Jacobo Álvarez, José Pioquinto Álvarez, Alez Javier Alvarez, Germán Anibal de la Roca-Mendoza, Kevin Otoniel de la Roca-Mendoza, Blanca Noelia Meléndez, Aron Álvarez-Mendoza and his family and all other members of Mr. Otoniel de la Roca-Mendoza's family who are permanently residing in Guatemala.

2. To call upon the State to investigate, forthwith, the facts that led to the adoption of these provisional measures in order to identify the perpetrators and punish them accordingly.

3. To request the State to allow the representatives of the beneficiaries to participate in the planning and implementation of the measures of protection and, in general, to keep them informed of progress in the provisional measures ordered by the Inter-American Court.

[...]

¹ The followings persons appeared at the hearing: on behalf of the Commission, Lilly Ching; on behalf of the representatives, Jennifer Harbury, relative of the victim, and Gisela De León, Francisco Quintana and Marcela Martino from the Center for Justice and International Law (CEJIL) and, on behalf of the State, Ruth del Valle-Cóbar, Chairman of the Presidential Human Rights Executive Policy Coordinating Commission (COPREDEH); Delia Marina Dávila-Salazar, Agent, and Vivian Nohemí González-Westendorff, alternate Agent.

9. The Order of the President of November 11, 2008 (*supra* Having Seen clause No. 6).

10. The private hearing held at the seat of the Court in San José de Costa Rica on January 20, 2009 (*supra* Having Seen clause No. 7). During said private hearing the State, the Commission and the representatives made reference to the provisional measures in force in the instant case.

CONSIDERING:

1. That Guatemala has been a State Party to the American Convention since May 25, 1978 and accepted the jurisdiction of the Court on March 9, 1987.

A) *Monitoring Compliance with Judgment*

2. That monitoring compliance with its decisions is a power inherent in the judicial functions of the Court.

3. That, pursuant to Article 68(1) of the American Convention, “[t]he States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.” For such purposes, States are required to ensure the implementation of the Court’s rulings at the domestic level.²

4. That, given that the Court’s judgments are final and not subject to appeal, as set out in Article 67 of the American Convention, said judgments are to be promptly and fully complied with by the State within the specified time period.

5. That the obligation to comply with the judgments of the Court conforms to a basic principle of the Law of International Responsibility of States, upheld by international case law, under which States are required to comply with their international treaty obligations in good faith (*pacta sunt servanda*) and, as previously held by this Court and provided for in Article 27 of the Vienna Convention on the Law of Treaties of 1969, States may not invoke the provisions of its internal law to escape their pre-established international responsibility. The treaty obligations of States Parties are binding on all State powers and organs.³

6. That the States Parties to the Convention are required to guarantee compliance with the provisions thereof and their effects (*effet utile*) at the domestic level. This principle is applicable not only with regard to the substantive provisions of human rights treaties (*i.e.* those dealing with the protected rights) but also with regard to procedural rules, such as those concerning compliance with the decisions of the Court. These obligations are to be interpreted and enforced in a manner such that the

² Cf. *Case of Baena-Ricardo et al. v. Panama*. Competence. Judgment of November 28, 2003. Series C No. 104, para. 131; *Case of Vargas-Areco v. Paraguay*. Monitoring Compliance with Judgment. Order of the Court of October 30, 2008, Considering clause No. 3, and *Case of Claude-Reyes v. Chile*. Monitoring Compliance with Judgment. Order of the Court of November 24, 2008, Considering clause No. 3.

³ Cf. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 35; *Case of Vargas-Areco v. Paraguay*, *supra* note 2, Considering clause No. 5, and *Case of Claude-Reyes v. Chile*, *supra* note 2, Considering clause No. 5.

protected guarantee is truly practical and effective, bearing in mind the special nature of human rights treaties.⁴

7. That the States Parties to the American Convention which have accepted the compulsory jurisdiction of the Court are under a duty to fulfill the obligations imposed by this Court. This obligation includes the State's duty to report on the measures adopted to comply with the orders of the Court in said judgments. Timely fulfillment of the State's obligation to report to the Court on the manner in which it is complying with each of the aspects ordered by the latter is essential to evaluate the level of compliance with the Judgment as a whole.⁵

8. That the Court considers that the hearing held to monitor compliance with the pending orders in the instant case has been very useful.

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9. That, as regards the location of the mortal remains of Mr. Bámaca-Velásquez, their exhumation in the presence of his widow and next of kin, and subsequent release to them (*first operative paragraph of the Judgment on reparations*) and the investigation of the facts that gave rise to the violations, the identification and punishment of those responsible therefor as well as the public disclosure of the results of the respective investigation (*second operative paragraph of the Judgment on reparations*), the State considered that both matters were "intimately connected with the investigation being conducted by the Attorney General's Office;" therefore, it addressed both issues together during the public hearing.

10. That the State informed the Court that, on December 29, 2008, a meeting was held with the prosecutors in charge of the investigation and they reported that they had identified two locations where Mr. Bámaca-Velásquez may be buried. The State pointed out that said prosecutors "need to gather information from relatives to produce a genetic profile;" therefore, they "conducted several enquiries" to locate two sisters of the victim, who stated that they "did not want to be involved in the case." Furthermore, Guatemala stated that the case was assigned to said prosecutors last year and that the anthropological investigation and subsequent exhumation is dependent on the support and authorization of the victim's next of kin. The State added that the prosecutors "will subsequently analyze the possibility of referring the case to the Human Rights Prosecutor's Office" created "with special focus on the investigations of relevant facts for historical clarification." Regarding progress in the investigations, the State pointed out that:

- a) on August 15, 2007, the Retalhuleu Prosecutor's Office continued with the investigation procedures, including taking witness statements, and
- b) on May 2, 2008, the Attorney General's Office reported that additional visits were made to the municipality of San Sebastián, department of Retalhuleu, to try to locate the individuals who might have information on the inhumations

⁴ Cf. *Case of Ivcher-Bronstein v. Peru*. Competence. Judgment of September 24, 1999. Series C No. 54, para. 37; *Case of Vargas-Areco v. Paraguay*, supra note 2, Considering clause No. 6, and *Case of Claude-Reyes v. Chile*, supra note 2, Considering clause No. 6.

⁵ Cf. *Case of Barrios Altos v. Peru*. Monitoring Compliance with Judgment. Order of the Court of September 22, 2005, Considering clause No. 7; *Case of Baena-Ricardo et al v. Panama*. Monitoring Compliance with Judgment. Order of the Court of October 30, 2008, Considering clause No. 7, and *Case of Vargas-Areco v. Paraguay*, supra note 2, Considering clause No. 7.

conducted in the cemetery of the municipality of Nuevo San Carlos, Retalhuleu, which had not been easy because they had either moved or died.

11. That the State informed the Court that a witness had been located who "state[d] that he had seen Efraín Bámaca in a military area in San Marcos in [...] 1992" and provided "important information about the state in which he saw Bámaca and [...] regarding some military officers in charge of that military area." In addition, Guatemala pointed out that, after the visit of the representatives of the victim to Guatemala, several meetings were held with different agents and agencies of the State. It was agreed that "the case will be referred to the Human Rights Prosecutor's Office, located in the capital city, which is a special Prosecutor's Office created in 2005 to investigate this type of cases that occurred during the internal armed conflict in Guatemala." Furthermore, the State informed the Court of the "strengthening of the Human Rights Prosecutor's Office," the "analysis and investigations unit" and the "Criminalistic Investigation Division of the Attorney General's Office." Finally, the agents of the State expressed their frustration at the "wall of impunity, given that impunity is structural in Guatemala" and requested cooperation and ideas to tackle such impunity.

12. That the representatives stated that there had been no progress in the criminal investigation and delivery of the remains to the family. They stressed that while this "is a case of forced disappearance, there are eyewitnesses to the victim's detention" and "torture." They added that "those witnesses are alive and some of them are in Guatemala, and the military authorities who participated in the incidents are fully identified, which should at least be enough to link them to the case." As regards the specific problems of the investigation, they pointed out that:

- a) the Attorney General's Office contacted the sisters of Mr. Bámaca-Velásquez directly to attend a potential exhumation even though it had been "established on several occasions that contact with the relatives had to be done through Jennifer Harbury or through the CEJIL." They stated that such contact caused "a great deal of anxiety" and concern among the victim's next of kin. In addition, they pointed out that the Prosecutor wanted to open the grave in Retalhuleu, which had already been opened in 1993, with no positive results;
- b) in a conversation held with the Retalhuleu Prosecutor, the officer who contacted Mr. Bámaca's sisters, she said, verbatim, "that the case file was lost," which they consider "extremely disquieting." In this connection, the representatives pointed out that "the disappearance of this case file, [which contains 16 years of proceedings] is no accident; but part of an impunity strategy." They stated that they did not know the date on which the file went missing; that it was difficult to understand based on what evidence the Prosecutor could conduct an exhumation, and that said Prosecutor had not read the judgment rendered by the Inter-American Court in the instant case. They added that the last steps had been "taken in an isolated manner, in disregard not only of the circumstances surrounding the incidents but also of the evidence presented before this Court and the evidence gathered by the authorities during the early stages of the investigation;"
- c) there were facts "that could be lost if [the] file is not recovered; there are people that died; other people [were] forced to remove themselves from the case; some prosecutors were indirectly threatened" and, in addition, "eyewitnesses [...] fear greatly for their safety [...] and now they may again

face harassment and pressure." They added that "the Inter-American Court could play a significant role in these proceedings by providing now [...] the file at the domestic level;"

- d) "the shortcomings in coordination between State agencies" and the steps taken by the Prosecutor's Office, taking into account "the reopening of a grave that had already been opened in 1993, without any positive results" were matters of great concern;
- e) in relation to the referral of the case to the Human Rights Prosecutor's Office, they believed that the proceedings to be referred "are the steps taken in November, only those related to the abovementioned exhumations, which is not much;"
- f) "within the [Human Rights] Prosecutor's Office appropriate personnel should be assigned to the case and provided with financial resources as well as with security given that the case will most probably regain prominence." They noted "the upsurge in violence and constant reprisals against all the witnesses and other people involved in this case as well as their next of kin," especially against Otoniel de la Roca and his next of kin. Therefore, they insisted that "it is key that protection is provided to all witnesses and counsels and officers of the Court that will be involved," and
- g) the full participation of Mrs. Harbury in the criminal proceedings must be ensured and the appointment of the Prosecutor in charge of the investigation must be made in consultation with the victim's next of kin.

13. That Guatemala stated that it did not have specific information regarding the existence or nonexistence of the case file and that, according to the report from the Attorney General's Office, "the Prosecutor's Office is updating the case file in order to make available all the information gathered."

14. That the Commission expressed regret over the fact that after ten years "there is still no information about any procedures that have been somewhat effective." In addition, it expressed concern over the loss of the case file.

15. That the Court notes that the information provided by the parties at the hearing shows that there has been no significant progress in the location of the mortal remains of Mr. Efraín Bámaca-Velásquez or in the investigation into the facts that gave rise to the violations and the identification and punishment of those responsible therefor, which means that the violations declared in the instant case remain unpunished, which impunity was noted by the Court in its Judgment on the merits⁶ over eight years ago and nearly seventeen years after the incidents.

16. That, at the hearing, the State recognized "that Guatemala has yet to comply with this and other Judgments of the Court," in relation to the obligation to investigate, prosecute and punish those responsible for the violations. Moreover, the Agent added that it would be useful for the State not only to be able to resort to international instruments and Court decisions but also to specific ideas and global formulas that could help break the cycle of impunity in Guatemala.

⁶ Cf. *Case of Bámaca-Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, para. 211.

17. That the Court values the State's acknowledgment and, in response to its express request, it deems necessary to highlight its uniform case law in respect of Guatemala in relation to the systematic human rights violations committed during the armed conflict, impunity, and the State's duty to fight it. Furthermore, this Court deems it pertinent and necessary to mention some standards laid down by the Court in past decisions as well as international standards, related to due diligence in the investigation of forced disappearances.

18. That the Court has found to have been established that, between 1962 and 1996, there was an internal armed conflict in Guatemala which entailed significant human, economic, institutional and moral costs.⁷

19. That the Court has held that the fact that Guatemala was experiencing an internal armed conflict, "instead of exonerating the State from its obligations to respect and guarantee human rights, placed it under the obligation to act in accordance with such obligations."⁸

20. That this Court has established in several cases regarding Guatemala that forced disappearance of persons in that country constituted a State practice during the internal armed conflict, carried out mainly by officers of the security forces, through which members of insurgent movements or people identified as prone to insurgency were captured and held secretly without notifying a competent, independent, and impartial judicial authority, and then physically and psychologically tortured in order to obtain information, and even murdered.⁹ It has been estimated that "more than two hundred thousand people" were victims of arbitrary executions and forced disappearances during said conflict.¹⁰

21. That, furthermore, the Court has noted that impunity became a determining factor that is part of the systematic patterns that facilitated gross human rights violations during the armed conflict.¹¹ Specifically, the Court held that "the Guatemalan administration of justice system resulted ineffective in ensuring compliance with the law and protection of the rights of the victims [...] in almost [all] human rights violations committed during that period of time" and that, "[t]hus, the lack of investigation into this type of incidents constituted a determining factor in the systematic practice of human rights violations."¹²

22. That, in addition, in a case brought before the Court it was held that "to date, the courts in Guatemala have been incapable of effectively investigating, prosecuting,

⁷ Cf. *Case of Bámaca-Velásquez v. Guatemala*, *supra* note 6, para. 121(b) and 207; *Case of Myrna Mack-Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, para. 134(8) and 134(10); *Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs*. Judgment of November 27, 2003. Series C No. 103, para. 58(1); *Case of Molina-Theissen v. Guatemala. Merits*. Judgment of May 4, 2004. Series C No. 106, para. 40(6); *Case of the Plan de Sánchez Massacre v. Guatemala. Merits*. Judgment of April 29, 2004. Series C No. 105, para. 42(1), and *Case of Tiu-Tojín v. Guatemala. Merits, Reparations and Costs*. Judgment of November 26, 2008. Series C No. 190, para. 48.

⁸ Cf. *Case of Bámaca-Velásquez v. Guatemala*, *supra* note 6, para. 207.

⁹ Cf. *Case of Bámaca-Velásquez v. Guatemala*, *supra* note 6, para. 132; *Case of Molina-Theissen v. Guatemala*, *supra* note 7, para. 40(1), and *Case of Tiu-Tojín v. Guatemala*, *supra* note 7, para. 49.

¹⁰ Cf. *Case of Tiu-Tojín v. Guatemala*, *supra* note 7, para. 48 (quote from Cf. Historical Clarification Commission (CEH), *Memory of Silence*, Volume V, *Conclusions and Recommendations*, page 21).

¹¹ Cf. *Case of Tiu-Tojín v. Guatemala*, *supra* note 7, para. 70.

¹² Cf. *Case of Tiu-Tojín v. Guatemala*, *supra* note 7, para. 51.

trying, and punishing those responsible for human rights violations” and that “[t]he courts have often subordinated their actions to the executive branch or to military influence, “applying legal provisions or rules that are contrary to due process or failing to apply those they should have.”¹³

23. That, in this connection, in the Judgments rendered in the Myrna Mack-Chang, Maritza Urrutia, Plan de Sánchez Massacre, Molina-Theissen and Tiu-Tojín cases, all of them involving human rights violations during the armed conflict in Guatemala, the Court pointed out that after 13, 11, 22, 22 and 17 years after the facts, respectively, the obligations of the State to investigate and end impunity remained unfulfilled.¹⁴ Moreover, this Court finds that, in all these cases, the State has, to this day, failed to comply with the obligations set forth in the Judgments rendered by this Tribunal regarding the investigation of the facts of the case and the identification, prosecution and punishment of the perpetrators and masterminds of the human rights violations.¹⁵

24. That this Court deems it necessary to reiterate what it has consistently stated in its past decisions about the fact that, pursuant to the obligation enshrined in Article 1(1) of the American Convention, the State has the duty to prevent and fight impunity, which has been defined by the Court as “the overall failure to investigate, search, arrest, prosecute and convict those responsible for violations of the rights protected by the American Convention.”¹⁶ In this regard, the Court has held that the State “has the obligation to combat this situation by all legal means available, as impunity fosters the chronic repetition of human rights violations and renders victims and their next of kin completely defenseless.”¹⁷ This obligation implies the duty of the States Parties to the Convention to organize the entire government apparatus and, in general, all structures through which public power is exercised, in such a manner as to be capable of legally ensuring the free and full exercise of human rights.¹⁸

¹³ Cf. *Case of Myrna Mack-Chang v. Guatemala*, supra note 7, para. 134(13).

¹⁴ Cf. *Case of Myrna Mack-Chang v. Guatemala*, supra note 7, para. 272; *Case of Maritza Urrutia v. Guatemala*, supra note 7, para. 176; *Case of the Plan de Sánchez Massacre v. Guatemala*, supra note 7, para. 95; *Case of Molina-Theissen v. Guatemala. Reparations and Costs*. Judgment of July 3, 2004. Series C No. 108, para. 79 and *Case of Tiu-Tojín v. Guatemala*, supra note 7, para. 72.

¹⁵ Cf. *Case of Myrna Mack-Chang v. Guatemala*. Monitoring Compliance with Judgment. Order of the Court of November 26, 2007, second declaratory paragraph, and *Case of Maritza Urrutia v. Guatemala*. Monitoring Compliance with Judgment. Order of the Court of November 21, 2007, Considering clauses No. 7, 11, and 12; *Case of the Plan de Sánchez Massacre v. Guatemala*. Monitoring Compliance with Judgment. Order of the Court of August 5, 2008, third declaratory paragraph; *Case of Molina-Theissen v. Guatemala*. Monitoring Compliance with Judgment. Order of the Court of July 10, 2007, second declaratory paragraph. It should be noted that, in the *Case of Tiu-Tojín*, the Judgment was rendered on November 26, 2008; therefore, the compliance monitoring process by this Court has not began yet.

¹⁶ Cf. *Case of the “White Van” (Paniagua-Morales et al.) v. Guatemala*. Merits. Judgment of March 8, 1998. Series C No. 37, para. 173; *Case of Vargas-Areco v. Paraguay*. Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C No. 155, para. 153, and *Case of Tiu-Tojín v. Guatemala*, supra note 7, para. 69.

¹⁷ Cf. *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2006. Series C No. 148, para. 299; *Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 137, and *Case of Vargas-Areco v. Paraguay*, supra note 16, para. 81.

¹⁸ Cf. *Case of Velásquez-Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 166; and *Case of Almonacid-Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 110, and *Case of Tiu-Tojín v. Guatemala*, supra note 7, para. 69.

25. That the Court notes that its past decisions, regarding both the merits of the case as well as the monitoring of compliance with the Judgments, show that Guatemala has a serious problem with the impunity that prevails in the country, in particular, in relation to the systematic human rights violations committed during the armed conflict.

26. That this Court has held that the prohibition of forced disappearance of persons and the corresponding duty to investigate and punish those responsible therefor are norms which "have attained the status of *jus cogens*."¹⁹

27. That this Court's case law, the decisions of other international bodies and organizations as well as other international treaties and instruments, such as the 1992 Declaration on the Protection of All Persons from Enforced Disappearance and the 2007 International Convention for the Protection of All Persons from Enforced Disappearance set certain standards that should guide investigations on the part of the State and/or that determine when an investigation is considered appropriate and effective.

28. That, specifically, the Court has held that "in cases of [...] forced disappearances and other egregious human rights violations, [...] the conduct of a prompt, serious, impartial and effective *ex officio* investigation is a fundamental and determining factor in the protection of certain rights that are affected or annulled by those situations, such as the rights to life, to personal liberty and to humane treatment."²⁰ In this regard, the Court has held that an investigation must not be carried out "as a mere formality preordained to be ineffective;"²¹ rather, "it must be conducted in a purposeful manner and undertaken by the State as its own legal duty and not as a mere pursuit of private interests, dependent on the initiative of the victim or their next of kin or upon evidence provided by private individuals, without an effective search for the truth by the public authority. This is true regardless of what agent is eventually found responsible for the violation and applies even to private individuals insofar as, if their acts are not seriously investigated, the State would be, in a sense, aiding and abetting those crimes, thereby incurring international responsibility."²² Furthermore, the Court has stated that an investigation must be conducted "using all legal means available"²³ and "within a reasonable time."²⁴

29. That the 2007 International Convention for the Protection of All Persons from Enforced Disappearance has embodied the standards set out in the Court's case law

¹⁹ Cf. *Case of Goiburú et al. v. Paraguay*. Merits, Reparations, and Costs. Judgment of September 22, 2006. Series C No. 153, para. 84.

²⁰ Cf. *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 110.

²¹ Cf. *Case of Velásquez-Rodríguez v. Honduras*, *supra* note 16, para. 177; *Case of Heliodoro-Portugal v. Panama*. Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, paras. 144 and 145; and *Case of Valle-Jaramillo et al. v. Colombia*. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 192, para. 100.

²² Cf. *Case of Velásquez-Rodríguez v. Honduras*, *supra* note 18, para. 174; *Case of Godínez-Cruz v. Honduras*. Merits. Judgment of January 20, 1989. Series C No. 5, para. 188.

²³ Cf. *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 143; *Case of Heliodoro-Portugal v. Panama*, *supra* note 21, para. 144; and *Case of Valle-Jaramillo et al. v. Colombia*, *supra* note 21, para. 101.

²⁴ Cf. *Case of the Ituango Massacres v. Colombia*, *supra* note 17, para. 319; *Case of Heliodoro-Portugal v. Panama*, *supra* note 20, para. 157, and *Case of Ticona-Estrada et al. v. Bolivia*. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 191, para. 79.

and international decisions. In Article 12, said International Convention sets forth that, in the event a report is filed with the relevant authorities, they “shall undertake without delay a thorough and impartial investigation,” and “appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel [...] are protected.”²⁵ Furthermore, in the absence of a formal complaint, the authorities shall undertake an investigation *ex officio*.²⁶ In addition, States Parties must ensure that the aforesaid authorities “[h]ave the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation.”²⁷ Finally, each State Party must take:

the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. It shall ensure, in particular, that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.²⁸

30. That the obligation to investigate may not be performed rashly; rather, it must be conducted in accordance with the standards set by international laws and precedents, according to which investigations should be prompt, thorough, impartial and independent.

31. That, in light of the foregoing, the Court considers that it is essential for the State to provide specific information regarding the measures adopted in order to promptly and fully comply with its obligations to locate the mortal remains of Mr. Bámaca-Velásquez and to investigate the facts of this case, identify and punish those responsible for the violations and, specifically, in relation to the matters described below.

32. That, firstly, within two months, the State must provide information about the status and content of the criminal file concerning the forced disappearance of Efraín Bámaca-Velásquez.

33. That, secondly, and in light of the allegations made during the private hearing as well as the findings set forth in the Judgments delivered by the Court in the instant case, the State must inform the Tribunal the number and characteristics of the procedural steps being taken in order to investigate systematic patterns and the responsibility of the respective military chains of command, specifically in relation to the *Case of Bámaca-Velásquez*. To that end, in the relevant report, the State must refer, *inter alia*, to:

- a) the measures adopted to conduct the exhumation at Las Cabañas military detachment, in the hamlet of La Montañita, Municipality of Tecún Umán, Department of San Marcos;

²⁵ Cf. International Convention for the Protection of All Persons from Enforced Disappearance, Art. 12(1).

²⁶ Cf. International Convention for the Protection of All Persons from Enforced Disappearance, Art. 12(2).

²⁷ Cf. International Convention for the Protection of All Persons from Enforced Disappearance, Art. 12(3)(a).

²⁸ Cf. International Convention for the Protection of All Persons from Enforced Disappearance, Art. 12(4).

- b) the procedural steps taken as a result of the review of the witness statements and other procedural documents already produced in the criminal proceeding conducted between 1992 and 2000, in which year the Court rendered its Judgment on the merits in the instant case, as well as any subsequent and relevant documents,
- c) the procedural steps taken as a result of the reevaluation of the criminal status of the members of the military detachments in which Mr. Bámaca-Velásquez was reportedly detained in 1992. Such procedural steps should be based on the determination of institutional codes and units as well as the respective line of command.

34. That, thirdly, the State must submit a report on the policies developed so that the investigation of the *Case of Bámaca-Velásquez* is conducted so as to take into account all the evidence from the investigations of other systematic patterns of human rights violations attributed to the military detachments in which Mr. Bámaca-Velásquez was illegally detained during 1992.

35. That, fourthly, within four months, the State must submit the information requested by the Court regarding the measures adopted to make the required financial resources available so that the prosecutors and other officers in charge of this case have the necessary means to conduct the investigation and receive adequate protection.

36. That, fifthly, in consultation with the representatives of the victim and his next of kin, the State must submit, within four months, a global report containing the goals and mechanisms established for the protection of judicial officers, the victims' next of kin or the witnesses. It is the duty of the State to identify *ex officio* the risk facing any interested party or person involved in the investigation as well as to handle in a diligent manner any concerns raised in that regard by the persons involved in the proceedings. The State must warn every witness about such risk, assess the level of risk regularly and adopt appropriate measures accordingly.

37. That the Court understands that such measures require the joint effort of several authorities. However, it is necessary that, within a period of four months and in relation to the Bámaca case, specific short, medium and long-term goals are established regarding compliance with these orders. In addition, the State must ensure the participation of the representatives of the victim and his next of kin in the criminal proceeding as well as in the implementation of the measures ordered herein.

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38. That, with respect to the adoption of measures to adapt the Guatemalan legal system to international human rights and humanitarian law standards, and to effectively enforce said standards at the domestic level (*fourth operative paragraph of the Judgment on reparations*), the State referred to the adoption of the following measures:

- a) the enactment of the "Law on the National Institute of Forensic Science" (INACIF), as an auxiliary institution of the administration of justice [...] with national jurisdiction and responsibility for technical expert opinions;"
- b) the creation of the "International Commission against Impunity in Guatemala" (CICIG);

- c) "Executive Decision 64-2007 on the Withdrawal of the Reservations to the Vienna Convention in relation to Articles 11 and 12;"
- d) "Decree 31-2007 of the Congress of Guatemala", ratifying "the Convention on Protection of Children and Co-operation in respect of Inter-country Adoption;"
- e) the creation of the "National Reparations Program" designed to provide "individual and collective redress to the civilian victims of human rights violations and crimes against humanity committed during the internal armed conflict [...]. Such redress includes dignified treatment of victims, cultural redress, psychosocial treatment and rehabilitation, restitution and economic redress."
- f) the enactment of the "Law against Femicide and Other Forms of Violence against Women;"
- g) the enactment of the "Access to Public Information Law;"
- h) "Decree 53-2007," ratifying the "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;"
- i) "Decision 948-99," "creating the Guatemalan Commission for the Application of International Humanitarian Law" (COGUADIH), which "drafted a bill to amend the Criminal Code in order to include gross violations of international humanitarian law." Said bill is under review by the relevant committee of the Congress of Guatemala;"
- j) the "Organized Crime Control Law," modeled on the United Nations Convention against Transnational Organized Crime, and
- k) the ratification of a "Protocol Additional to the Geneva Conventions."

39. That the State also mentioned "some initiatives that have been submitted and are under review" such as the Committee on the Search for Victims of Enforced Disappearance and Other Forms of Disappearance. The State added that "in relation to the witnesses that are at risk" "decree 70-96" was passed "creating the Law on the Protection of Persons Participating in Criminal Proceedings and Persons engaged in the Administration of Criminal Justice, which seeks to provide protection to officers and employees of the Attorney General's Office, as well as to lay and expert witnesses, consultants, complainants and other persons that are at risk due to their participation in criminal proceedings." In addition, "an office for the protection of persons participating in criminal proceedings that operates under the Attorney General's Office" was created, in which "the Ministry of the Interior is also participating."

40. That the representatives considered that "the Court should define the framework for compliance with this obligation, particularly, in order to allow follow-up, and [that] the aspects to be taken into account should be related to the case." They stated that, in order to conduct an effective investigation, there should be "a law to ensure witness protection" and "court officers' safety" and, in relation to the access to information law, "it should allow access to confidential files kept by security forces." In particular, it should be required that "the authorities [provide] the information contained in the military and police files pertaining to the Bámaca-Velásquez case." They added that it was necessary "to enact legislation in order to properly implement the decisions of the [Inter-American] System."

41. That the Court appreciates the efforts made by the State to comply with this aspect of the Judgment. However, the Court believes that additional information should be provided in relation to:

- a) the Bill on the creation of the Committee on the Search for Victims of Enforced Disappearance and Other Forms of Disappearance, specifically whether it has been passed by Congress and the specific results of the application of said law to the case of Mr. Bámaca-Velásquez,
- b) the Access to Public Information Law, specifically whether it allows access to confidential files kept by security forces; and
- c) the Law on the Protection of Persons Participating in Criminal Proceedings and Persons engaged in the Administration of Criminal Justice, specifically whether said law is being applied and, if not, whether there is a specific law or any other mechanism available to ensure the protection of witnesses.

B) *Provisional Measures*

42. That Article 63(2) of the American Convention sets forth that “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons,” the Court may “adopt such provisional measures as it deems pertinent” in matters it has under consideration.

43. That Article 25(1) of the Court’s Rules of Procedure provides that “[a]t any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.”

44. That Article 1(1) of the Convention establishes the duty of the States Parties to respect the rights and freedoms enshrined therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. This duty becomes even more apparent in relation to those involved in proceedings before the supervisory bodies of the American Convention.²⁹

45. That, under International Human Rights Law, provisional measures are not only precautionary in the sense that they preserve a legal situation, but fundamentally protective in that they safeguard human rights, insofar as they seek to prevent irreparable damage to persons. Provisional measures are applicable provided that the basic requirements of extreme gravity and urgency and the need to prevent irreparable damage to persons are met. This way, provisional measures become a true preventive judicial guarantee.³⁰

²⁹ Cf. *Matter of Luisiana Ríos et al.* Provisional Measures regarding Venezuela. Order of the Court of September 8, 2004, Considering clause No. 6.; *Matter of Colotenango*. Provisional Measures regarding Guatemala. Order of the Court of July 12, 2007, Considering clause No. 4; *Case of the Mayagna (Sumo) Awas Tingni Community*. Provisional Measures regarding Nicaragua. Order of the Court of November 26, 2007, Considering clause No. 4.

³⁰ Cf. *Case of Herrera Ulloa*. Provisional Measures regarding Costa Rica. Order of the Court of September 7, 2001, Considering clause No. 4; and *Matter of Urso Branco Prison*. Provisional Measures regarding Brazil. Order of the Court of May 2, 2008, Considering clause No. 4; and *Matter of Carlos Nieto et al.* Provisional Measures regarding Venezuela. Order of the Court of August 5, 2008, Considering clause No. 4.

46. That it is essential that the provisional measures are maintained in full force and effect until the Court orders their discontinuance and serves notice thereof upon the State.³¹

47. That, in accordance with the Orders issued by the Court between 1998 and 2005 (*supra* Having Seen clause No. 8), the State is under the obligation to adopt such measures of protection as may be necessary to protect the life and safety of Santiago Cabrera-López, Alfonso Cabrera-Viagres, María Victoria López, Blanca Cabrera, Carmenlinda Cabrera, Teresa Aguilar-Cabrera, Olga Maldonado, Carlos Alfonso Cabrera, José León Bámaca-Hernández, Egidia Gebia Bámaca-Velásquez, Josefina Bámaca-Velásquez, Alberta Velásquez, Rudy López-Velásquez and all other members of the Bámaca-Velásquez family who are permanently residing in Guatemala, Emerita Mendoza, Wendy Pérez-Álvarez, Sulni Madeli Pérez-Álvarez, José Oswaldo Pérez-Álvarez, Jacobo Álvarez, José Pioquinto Álvarez, Alez Javier Alvarez, Germán Aníbal de la Roca-Mendoza, Kevin Otoniel de la Roca-Mendoza, Blanca Noelia Meléndez, Aron Álvarez-Mendoza and his family and all other members of Mr. Otoniel de la Roca-Mendoza's family who are permanently residing in Guatemala.

48. That the Court considers that the hearing held to consider the current status of the provisional measures ordered in the instant case has been very useful.

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49. As regards the implementation of the provisional measures, the State informed the Court that:

- a) Santiago Cabrera, Alonso Cabrera-Viagres, María Victoria López, Blanca Cabrera, Carmenlinda Cabrera, Teresa Aguilar-Cabrera, Olga Maldonado and Carlos Alfonso Cabrera "are protected by police escort and perimeter security services through regular patrolling of Mr. Cabrera-López's workplace in the city of Quetzaltenango
- b) according to the information provided by National Civil Police Station 41, located in the Department of Quetzaltenango, "to this date, personal protection has been provided to Mr. Cabrera López by two police officers of the Substation of the Concepción Chiquirichapa Municipality" and "the services are provided under a 5 x 5 day plan from 8 to 10 p.m.;"
- c) "unfortunately, the implementation of the provisional measures for the benefit of Efraín Bámaca-Velásquez's family was at a standstill because they still maintain their anonymity, i.e., their whereabouts or location was unknown given that they had stated that they did not want the measures of protection that the State could provide;"
- d) on February 22, 2008, an attempt was made to "interview and determine the protection needs of Aníbal de la Roca and Blanca Meléndez, but it was unsuccessful." In addition, Emerita Mendoza, Aracelly Álvarez and Aron Álvarez were informed of the adoption of provisional measures to protect their lives and

³¹ Cf. *Matter of Lilliana Ortega et al.* Provisional Measures regarding Venezuela. Order of the Court of March 1, 2005; Considering clause No. 10; *Matter of Yare I and Yare II Capital Region Penitentiary Center.* Provisional Measures regarding Venezuela. Order of the Court of November 30, 2007, Considering clause No. 17; *Case of Caballero-Delgado and Santana v. Colombia.* Provisional Measures regarding Colombia. Order of the Court of February 6, 2008, Considering clause No. 6.

safety; however, "they said that some of their relatives had chosen to leave the country." Reportedly, those relatives were: José Álvarez, Linda Álvarez, Erlinda Álvarez, Wendy and Sulni Pérez-Álvarez. Furthermore, the State reported that de la Roca Mendoza family "have stated that they wish no police escort whatsoever," and

- e) "the representatives of the petitioners will arrange a meeting to define, on a separate and individual basis, the way in which the measures will be implemented and who will act as interlocutor(s) with the State, focusing on building trust and creating communication channels for each of the three family groups."

50. That the State requested the Court to disregard the petition to lift the measures filed on February 29, 2008 given that the investigation in this case has been reopened. As regards the coordination of the measures ordered for the benefit of the families of Messrs. Bámaca-Velásquez, Otoniel de la Roca and Santiago Cabrera, Guatemala informed the Court that it will work in coordination with Jennifer Harbury and the representatives, with Mr. Otoniel de la Roca's son, Kevin Otoniel, and with Mr. Cabrera himself, respectively.

51. That the representatives expressed their gratitude to the State for having withdrawn its request to lift the measures and requested that the same be maintained given that they believed "that the investigation will pose a risk to the beneficiaries of these measures, who are witnesses in the investigation or relatives that are pushing the investigation forward." Jennifer Harbury made reference to "the upsurge in violence and constant reprisals against all the witnesses and other people involved in this case as well as their next of kin," and described the case of Otoniel de la Roca and his next of kin as "especially appalling" given that "four of his cousins had been violently murdered" since this Court's Judgment was entered in 2000. In addition, the representatives stated that, with respect to the measures related to the sisters of Mr. Bámaca-Velásquez specifically, their implementation should be coordinated through Mrs. Harbury or the CEJIL. Furthermore, they requested that the State be required to provide information regarding the investigations that gave rise to the provisional measures and, in particular, in relation to the death of Mr. Otoniel de la Roca's relatives.

52. That the Commission valued the existence of "an action plan regarding the implementation of the provisional measures [...] that the action plan has been devised taking into account the circumstances of the beneficiaries of the provisional measures" and stated that it is expecting the information to be provided by the State concerning these matters.

53. That the Court notes that, since the last Order of Provisional Measures rendered in the instant case on March 11, 2005, no more threats have been made against Mr. Cabrera and his family or against the Bámaca-Velásquez family. The parties have not provided new information in that connection at the private hearing. However, the Court takes note of the State's withdrawal of the request to lift the measures and takes into consideration the comments of the parties concerning the alleged reopening of the investigation into the facts of the case, which may pose new risks and, therefore, would warrant the maintenance of these measures. Based on the foregoing, the Court deems it appropriate to maintain the provisional measures in favor of Santiago Cabrera and his next of kin as well as of the Bámaca-Velásquez family.

54. That, in relation to the next of kin of Mr. Otoniel de la Roca-Mendoza, the Court notes that incidents of harassment took place in November 2006 and June 2007. This, together with the statements made by the representatives at the private hearing, provides sufficient grounds to warrant maintaining the provisional measures in favor of Mr. de la Roca's next of kin.

55. That the Tribunal notes that, during the time these provisional measures were in effect, the State has failed to fully comply with them even though the main purpose of the adoption of such measures is the effective protection of the life and safety of the persons in favor of whom they are ordered.

56. That, within four months, the State must submit information about the steps taken to plan and effectively implement these provisional measures as well as about the participation of the beneficiaries in such planning and implementation process.

57. That, in addition, the State has four months to submit a report containing a detailed evaluation, conducted by the relevant internal agencies, of the situation of extreme gravity and urgency facing each one of the beneficiaries of the provisional measures.

58. That, in relation to the obligation of the State to investigate, forthwith, the facts that led to the adoption of these provisional measures (*second operative paragraph of the Order of March 11, 2005*), the Court notes that the State has recognized that it has experienced difficulty with the investigation and that the representatives and the Commission have pointed out that an effective investigation and ensuing punishment of those responsible for the violations are necessary measures to protect the life and safety of the beneficiaries.

59. That the Court deems it pertinent to analyze the relationship between the lack of investigation and the situation of extreme gravity and urgency, for which purposes, the State and the representatives are required to submit information to prove or disprove that the lack of investigation places the beneficiaries of the provisional measures under circumstances of extreme gravity and urgency to avoid irreparable damage to their lives or safety.

THEREFORE,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

by virtue of its authority to monitor compliance with its own decisions pursuant to Articles 33, 62(1), 63(2), 67 and 68(1) of the American Convention, and Articles 25(1) and 25(2) of its Statute and 25(1) and 29(2) of its Rules of Procedure,

DECLARES,

1. That the State has partially complied with its obligation to adopt such legislative and other measures as may be necessary to adapt the Guatemalan legal system to international human rights and humanitarian law standards, and to effectively enforce said standards at the domestic level (*fourth operative paragraph of the Judgment on reparations*); therefore the Court will keep the monitoring process open until full compliance with said obligation is achieved.
2. That the following obligations have not been fulfilled:
 - a) location of the mortal remains of Mr. Bámaca-Velásquez, their exhumation in the presence of his widow and next of kin, and subsequent release to them (*first operative paragraph of the Judgment on reparations*), and
 - b) investigation of the facts that gave rise to the violations of the American Convention and of the IACPPT and, eventually, punishment of those responsible therefor as well as public disclosure of the results of the respective investigation (*eighth operative paragraph of the Judgment on the merits and second operative paragraph of the Judgment on reparations*);
3. That it will keep this monitoring process open until full compliance with the abovementioned obligations is achieved.

AND DECIDES:

1. To call upon the State to immediately adopt all such measures as may be necessary to effectively and promptly comply with any pending measures ordered by the Court, in accordance with Article 68(1) of the American Convention.
2. To request the State to submit to the Inter-American Court up-to-date and detailed reports specifying all such measures as may have been adopted to comply with the reparations ordered by this Court and which have not been fulfilled, as set out in paragraphs 32 to 37 and 41 of this Order.
3. To request the representatives of the victims and the Inter-American Commission to submit comments on the State report mentioned in the preceding operative paragraph within a period of four and six weeks respectively, following receipt thereof.
4. To call upon the State to maintain the provisional measures ordered in the Order of March 11, 2005.
5. To request the State, pursuant to paragraphs 56 and 57 hereof, to submit, within four months following receipt of this Order, information regarding the implementation of the provisional measures and an evaluation of the situation of extreme gravity and urgency facing each beneficiary of the provisional measures.
6. To request the representatives and the State, pursuant to paragraph 59 hereof, to submit information to prove or disprove that the lack of investigation places the

beneficiaries of the provisional measures under circumstances of extreme gravity and urgency to avoid irreparable damage to their lives and safety.

7. To request the Inter-American Commission to submit comments on the reports to be filed by the State and by the representatives, as specified in operative paragraphs *supra* number five and six above, within a period of four weeks following receipt thereof.

8. To request the Secretariat of the Court to notify this Order to the State, the Inter-American Commission and the representatives of the victims and their next of kin and of the beneficiaries of the provisional measures.

Cecilia Medina-Quiroga
President

Diego García-Sayán

Sergio García-Ramírez

Manuel E. Ventura-Robles

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu-Blondet

Pablo Saavedra-Alessandri
Secretary

So ordered,

Cecilia Medina-Quiroga
President

Pablo Saavedra-Alessandri
Secretary