ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF NOVEMBER 18, 2010[1]

CASE OF BÁMACA VELÁSQUEZ *V.* GUATEMALA

MONITORING COMPLIANCE WITH JUDGMENT

HAVING SEEN:

1. The Judgment on merits issued 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 issued by the Inter-American Court on February 22, 2002.

3. The Orders of the Court of November 27, 2003, March 3, 2005, July 4, 2006, July 10, 2007, and January 27, 2009, regarding compliance with the Judgments issued in the present case.

4. The communications of April 14 and June 24, 2009, January 29, February 22, March 16, August 12, September 9 and 29, October 16, and November 15, 2010, through which the State of Guatemala (hereinafter "the State" or "Guatemala") referred to compliance with the Judgments.

5. The briefs of May 13 and 26 and July 21, 2009; March 24, June 22, and September 16, 28, and 30, and November 12, 2010, through which the representatives of the victims (hereinafter "the

[1] Adopted during the 42nd Extraordinary Session of the Inter-American Court of Human Rights, held from November 14 through 19, 2010 in Quito, Ecuador.

representatives") presented their observations to the State's reports or in relation with the state of compliance of the Judgments.

6. The communications of June 8 and July 23, 2009, and June 3, September 17 and 30, 2010, through which the Inter-American Commission of Human Rights (hereinafter, "the Commission" or "the Inter-American Commission") presented its observations regarding the state of compliance with the Judgment.

CONSIDERING:

1. That Guatemala has been a State Party to the American Convention on Human Rights (hereinafter "the American Convention") since May 25, 1978, and that it accepted the contentious jurisdiction of the Court on March 9, 1987.

2. That monitoring compliance with its decisions is a power inherent to 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 a 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.[3]

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 jurisprudence, under which States are

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[2] *Cf. Case of Baena Ricardo et al. v. Panama. Competence.* Judgment of November 28, 2003. Series C No. 104, para. 131; *Case of Tristán Donoso v. Panama.* Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of September 1, 2010, Considering Clause three, and *Case of Kimel v. Argentina.* Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 15, 2010, Considering Clause three.

[3] *Cf. Case of Barrios Altos v. Peru.* Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 22, 2002, Considering Clause four; *Case of De la Cruz Flores v. Peru*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of September 1, 2010, Considering Clause four, and Case of *Tristán Donoso v. Panama*, *supra* note 2, Considering Clause four.

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 neglect their established international responsibility.[4] The treaty obligations of States Parties are binding on all State powers and organs.[5]

6. That the States Parties to the Convention are required to guarantee compliance with the provisions thereof and their effectiveness (*effet utile*) at a domestic level. This principle is not only applicable to the substantive provisions of human rights treaties (*i.e.* those dealing with the protected rights) but also 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 protected guarantee is truly practical and effective, bearing in mind the special nature of human rights treaties.[6]

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.[7]

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[4] *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, para. 35; *Case of Ivcher Bronstein v. Peru.* Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of August 27, 2010, Considering Clause four, and *Case of Tristán Donoso v. Panama, supra* note 2, Considering Clause three.

[5] *Cf. Case of Castillo Petruzzi et al. v. Peru. Monitoring Compliance with Judgment*. Order of the Court of November 17, 1999. Series C No. 59, Considering Clause three; *Case of Ivcher Bronstein v. Peru, supra* note 4, Considering Clause four, and *Case of Tristán Donoso v. Panama, supra* note 2, Considering Clause five.

[6] *Cf. Case of Ivcher Bronstein v. Peru*. *Competence*. Judgment of September 24, 1999, Series C No. 54, Para. 37*; Case of De la Cruz Flores v. Peru, supra* note 3, Considering Clause six and *Case of Tristán Donoso v. Panama, supra* note 2, Considering Clause six.

[7] *Cf. Case of Barrios Altos v. Peru.* Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of September 22, 2005, Considering Clause seven; *Case of Ximenes Lopes v. Brazil.* Monitoring Compliance with Judgment. Order of the Court of May 17, 2010, Considering Clause seven, and *Case of Cantos v. Argentina.* Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of August 26, 2010, Considering Clause five.

I. Analysis of the information regarding the operative paragraph eight of the Judgment on merits and the operative paragraphs one and two of the Judgment on reparations

8. With regard to the duty to locate the mortal remains of Efraín Bámaca Velásquez, exhume, and hand over, these remains in the presence of his widow and next-of-kin, as well as the obligation to investigate the facts that led to the violations, identify and eventually punish those responsible, as well as publicly diffuse the results of the corresponding investigation, the State presented information on: a) the obligation to investigate into the present case, and b) the situation regarding the safety of the public prosecutors and Mrs. Jennifer Harbury, who have promoted the case over the last year.

A) The obligation to investigate in light of the Judgments and Orders of the Court in the present case

1. Information on the reopening and subsequent closing of the investigation

1.1. Regarding the reopening of the investigation

9. The State reported that, with the objective of complying with Guatemala's commitments with relation to the judgments issued by the Court, it created a "human rights team" under the coordination of COPREDEH, and also conformed by the Supreme Court of Justice, the Public Prosecutors' Office, and the Procurator for Human Rights. This Team selected four cases "that put in evidence procedural impunity, among them the case of *Bámaca Velásquez,*" in order to "analyze and identify the operation of the Justice System through the revision of paradigmatic cases." The State indicated that the impact of the work carried out by this Team was reflected, *inter alia*, in the following:

a) on December 10, 2009, the "Public Prosecutors' Office, Prosecutor Section, Unit of Special Cases and Violation of Human Rights" (hereinafter "the Public Prosecutors' Office") requested before the Supreme Court of Justice (hereinafter "the Supreme

Court") the execution of the Judgments issued by the Inter-American Court in the present case, and, therefore, requested i) the nullity of the dismissal passed in favor of thirteen of the defendants brought before the First Instance Court for Criminal Activity, Drug Trafficking, and Crimes against the Environment, of the Department of Ratalhuleu (hereinafter "the Court of Retalhuleu") of March 8, 1999, and ii) "offer the Plaintiff," Mrs. Jennifer Harbury, "participation." Said First Instance Court had adopted the mentioned dismissal of 1998 after assessing a variety of evidence and considering that "there was not enough certainty that the defendants […] had participated in the accused crimes" and that "there was no reasonable possibility of including new evidence;"[8]

b) On December 11, 2009, the Supreme Court, upon ruling on the request filed by the Public Prosecutors' Office, took into account i) the principles of *pacta sunt servanda* and good faith in compliance with the treaties; ii) that the Inter-American Court "declared that the domestic Judgment issued violates the universal legal principles of justice;" and iii) that the State "under the pretext of domestic legislation cannot obstruct or prevent compliance with that ordered by the supranational Tribunal." Therefore, it declared, "it is necessary to execute the nullity of the national resolution mentioned" and "start a new proceeding and offer therein an unrestricted respect of the rules of due process." The Supreme Court indicated that the decision of the aforementioned First Instance Criminal Court "and all the actions within the criminal proceedings […] C-603-96" were "declared contrary to the essential processing rights and principles pursuant with the arguments held" by the Inter-American Court. Thus, the Supreme Court declared the "self-enforceability of the Judgment issued by the Inter-American Court" on November 25, 2000, and "the annulment of the judgment" of the Court of Retalhuleu of March 8, 1999, and "the judicial actions within the proceedings."

c) Thus the Supreme Court ordered that "the procedural actions be forwarded" to the Court of Retalhuleu, which "shall comply with": "[r]equesting from the Courts' General Archive, or

[8] *Cf.* decision C-603-99-2º.Jdo. issued on March 8, 1999 by the First Instance Court: Criminal Crimes, Drug Trafficking, and Crimes against the Environment of Retalhuleu (dossier of monitoring compliance, volume II, folios 1311 to 1315).

any other dependency, case file […] C-603-96" and "[e]nable the Public Prosecutors' Office to intervene, so as to carry out all investigations and promote the prosecution and criminal processing so as to effectively determine the people responsible for the violations" stated by the Inter-American Court "and, if applicable, facilitate the punishment […] by the competent jurisdictional body." The Supreme Court stated that since the State "was not able to use its domestic [l]aw" or "legislation to comply with the international judgment," "its implementing act has the effect of an extraordinary act of common proceedings," reason for which the case file was forwarded to the Court of Retalhuleu.

d) Based on this reopening of the investigation, the Public Prosecutors' Office "requested that the statement" offered by Mrs. Jennifer Harbury, wife of Mr. Bámaca Velásquez, "be accepted as a jurisdictional production of a foretaste of evidence." The State manifested that "through the resolution of March 22, 2010," issued by the Court of Retalhuleu, "it provisionally accepted" Mrs. Harbury as an "Adhesive Plaintiff." The State added, *inter alia,* that the Public Prosecutors' Office has been preparing "instructions," a "systematization of statements," specifying "the hypothesis that there are around 17 defendants," and that "[...] flow charts have been prepared of the chain of command of soldiers, with which it can be shown which members of the Guatemalan army participated in the disappearance" of Mr. Bámaca Velásquez —all of which coincide with the statements offered by witnesses before the Inter-American System and with the collaboration of the adhesive plaintiff." Additionally, the State informed that the Public Prosecutors' Office "holds coordinated meetings with the Plaintiff" to "determine the progress of the investigation and verify possible places where the exhumations can take place to locate the remains of Bámaca Velásquez."

10. The Court values positively the inter-institutional work of the "Human Rights Team" and considers that the actions of the Public Prosecutors' Office and the Supreme Court are a first step, ten years after the Judgment on Merits was issued, towards progressing with the investigations ordered by the Inter-American Court in the present case.

1.2. Regarding the closing of the investigation

11. However, the State manifested that, as a consequence of the order to reopen the investigation issued by the Supreme Court (*supra* Considering 9(c)), former army colonel Julio Roberto Alpírez filed a recourse for *amparo* before the Constitutionality Court arguing that since there is a dismissal in his favor "the proceeding cannot be reopened [nor] can he be subject to a new […] criminal prosecution." In said appeal, the accused argued that his "right to a defense, as well as the juridical principles of due process, imperativeness, equality, and basis" were not being recognized, since the decision that declared the dismissal of the criminal prosecution against him was not appealed or objected to by any of the parties, it used "proceedings that are not legally pre-established, varying the types of proceeding," and stated the Judgment of the Inter-American Court "can never be considered superior to the Constitution" and "it is not enforceable against legal precepts in force," such as those of the Code of Criminal Procedures. Upon resolving this recourse for *amparo*, on August 25, 2010, the Constitutionality Court of Guatemala considered that:

> there is evidence of a discrepancy between the Inter-American Court's decision […] and the Supreme Court's decision […] since in the content of [the judgment of the Inter-American Court] there is no clear notion that leads to the conclusion that the dismissal is fraudulent, as sustained by the Public Prosecutors' Office. Thus, there are no grounds to declare the nullity of the [dismissal], since in order to […] reach the conclusion that the decision of March eighth of nineteen ninety nine, which closed the […] case file, was issued in fraud of the law, it is necessary that there be a proceeding that provides enough evidence on the ineffectiveness of the order granted. To date such proceeding has not been executed. The "self-execution" of the annulment of the dismissal, without an express order, favors accusation in violation of the postulates of the right to a defense […].
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> This Tribunal highlights, as an example, as backgrounds facts related to the verdict issued in another case, how the Inter-American Court […] has clearly ordered in its operative paragraphs what the States must do, and thus in the case of "Raxcacó Reyes v. Guatemala" […] it ruled [that] the State nullify the judgment imposed […] and, without the need for a new process, issue another judgment that in no terms could be the death penalty" […], as can be assessed, the decision in the related judgment differs from that analyzed in this case, given that the other one orders the reopening of procedural phases carried out in the corresponding case file. It should be noted that the judgment […] in the case of "Bámaca Velásquez" […] lacks the effects ordered by the Supreme Court […] especially regarding the annulment of the dismissal order and the judicial actions, which thus makes it ineffective. The challenged authority does not have, at this time, any justification to grant the annulment of the […] order of dismissal; therefore that [ordered by the Supreme Court] is not a true basis or based on the same *ratio*, since offering grounds for a judicial ruling means giving the reason, explanation, or justification of the impulse based on which a decision is made in one sense or the other. By not acting in this way, the postulant's constitutional rights are violated [… since the] courts' obligation to justify its decisions has been acknowledged as a guarantee of the right to a due legal process […].
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> [T]he ruling of the Supreme Court […] without indicating […] the instance that promoted it, omitted in its grounds the legal causes for which said court assumed the jurisdiction and competence to issue it, indicating, also, why said decision did not correspond to the original court [the Court of Retalhuleu], which could have the jurisdiction pursuant [to the]

> Code of Criminal Proceedings, nor did it justify an *inaudita altera pars* proceeding, which could not be considered adequate pursuant to the articles […] of the mentioned Code […][9]

12. The Constitutionality Court added that "without failing in any way to acknowledge the authority of the Judgment issued by the Inter-American Court," "it is necessary that the challenged Court offer legal grounds for the decision regarding the *amparo*." Taking into account the aforementioned, the Constitutionality Court "[g]rant[ed] the *amparo*" and "definitively suspended, with regard to the petitioner, the decision issued by the Supreme Court" in which it declared the nullity of the dismissal (*supra* para. 9(b)). Additionally, the Constitutionality Court ordered that the Supreme Court issue a new ruling "taking into account [said] judgment" of the Constitutionality Court, indicating that "in case of non-compliance" the corresponding "legal responsibilities" would ensue.

13. The Supreme Court, taking into account the domestic legislation regarding the *amparo* recourse, according to which "the challenged authority must comply with the corresponding effects of the *amparo* that the Constitutional Court indicates in the operative paragraphs," decided "[t]o annul the ruling" issued on December 11, 2009 (*supra* Considering 9(b)) and declared "the request for Execution of the Judgment of the Inter-American Court," filed by the Public Prosecutors' Office,[10] to be "[u]nfounded" (*supra* Considering Clause 9(a)).

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[9] *Cf.* ruling issued on August 25, 2010, by the Constitutionality Court of Guatemala, case file 548-2010 (dossier on monitoring compliance, volume II, folios 1026 through 1028).

[10] The Criminal Chamber also "[lifted]" the order of September 17, 2010, issued by said Chamber, in which it stated that "[t]he self-execution order of this Chamber, clashes, according to the Constitutionality Court, with guarantees provided for in Article 8 of the American Convention […], which is prioritized by the Constitutional Court of the Nation; but we cannot ignore that the international judgment established the non-compliance by the State of Guatemala with the duty […] to effectively prosecute, which makes evident the interpretation conflict in the judgments described, and the need for clarification." The Criminal Chamber indicated that "given the different national rulings that motivated this judgment, in our opinion, they can only be solved by the supreme body that issued the judgment," since "the Constitutionality Court and the Criminal Chamber […] have acted in accordance with International Law." Therefore, the Criminal Chamber of the Supreme Court expressed in said lifted order that, "without promoting non-observance of the order of the Constitutionality Court, when confronted with the doubt caused by the question of which is the applicable solution and who should be given the due obedience, in order to solve the legal dilemma […], the Criminal Chamber is compelled to request an interpretation from the Inter-American Court […], prior to issuing the corresponding decision." The Criminal Chamber indicated that "[d]espite the aforementioned," "it acknowledges and it is aware of the terms indicated in Article 67 of the American Convention," however "the present case is exceptional in nature since [the Criminal Chamber], based on Article 2 of the mentioned Convention, considers that it has complied with that ordered by the Inter-American Court […] in the judgment on merits issued ten years ago, since the conditions necessary to obey it were not present." The order ended by requesting that the Presidential Commission in charge of Coordinating the Executive's Policies in Human Rights Matter (COPREDEH) "present, as part of the proceeding to monitor compliance with the judgment of the Inter-American Court […], the communication between the International Court and the Criminal Chamber of the Supreme court […], as well as creating mechanisms to make the request for interpretation requested viable." *Cf.* decision issued on September 17, 2010, by the Criminal Chamber of the

2. Inadmissibility of the closing of the investigation in the present case

14. Taking into account the domestic judicial decisions mentioned, the State requested that the Court "[…] consider the efforts made to comply with the investigation process […] prior to the Constitutionality Court's ruling" and "that it issue a decision on the ruling made by the Constitutionality Court," "that expands the criterion of the spirit of the [J]udgment," "since the ruling of [said Court] prevents the State of Guatemala from complying" with that ordered by the Inter-American Court.

15. The representatives requested that the Court ratify the "compulsory nature of the judgments […] on the understanding that a comprehensive part of such judgments are the orders […] to monitor compliance," the "general effects of all the Court's judgments" and "the extent of the obligation to investigate the forced disappearance" in the present case. They indicated that, "the recent decisions in the case" are "irrefutable evidence that there are still mechanisms that prevent" an "effective progress in the investigation, prosecution, and punishment of those responsible for these grave violations." They added that these decisions "violate regulations that have become *jus cogens* in nature" and that "it is absolutely incongruent that on one hand the State officially presented a position acknowledging responsibility in the different matters being processed" before the Court and "on the other it continues, through the actions of its different bodies, to systematically fail to comply with the reparation measures."

16. On its part, the Commission considered that "[…] the judgment of the Constitutionality Court represents a step back in the compliance with the Judgment and the international commitments made by Guatemala." Likewise, the Commission observed that "[…] the Order of the Inter-American Court is general in the sense that it orders to "investigate the facts that generated the violations" and it "covers the domestic proceedings in their entirety, thus it is not necessary that the Court […] "express each procedural step the States must take to conduct a complete and effective investigation." Additionally, the Commission

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Supreme Court of Justice (dossier of monitoring compliance with Judgment, volume II, folios 1131 through 1145).

argued that the States "cannot use domestic legislation as justification to not comply with its international commitments" and "it worryingly observed " the annulment of the declaration of self-execution of the Judgment issued by the Inter-American Court.

17. The Court has verified that the State, all be it late, has made progress in its compliance with the Judgments issued in the present case, through the aforementioned processes and orders given by the Public Prosecutors' Office and the Supreme Court (*supra* Considering 9(a) and 9(b)). However, the decision issued by the Constitutionality Court, later followed by the Supreme Court, resulted in the latter closing the investigation. Therefore, as a result of i) the fact that the progress prior to said closing was part of the limited steps to fight impunity almost ten years after the issuing of the Judgment, and ii) the request made by the State (*supra* Considering Clause 14), the Court considers it necessary to analyze if the resolution issued by the Constitutionality Court is compatible with the State's international obligations, taking into account, at the same time, that said High Court tried to adopt its decision "without failing to acknowledge, in any way, the authority of the Judgment issued by the Inter-American Court." Thus, the Tribunal, firstly (2.1) will recall the scope of the Judgments and Orders issued in the present case, in order to establish if the consideration of the Constitutionality Court is admissible in the sense that what this Tribunal has stated does not imply the annulment of the dismissals that have been ordered. Secondly (2.2), the Court will analyze the duties in its constant jurisprudence regarding the obligation to lift obstacles that prevent making progress in an investigation. For this, it will refer to the interaction between international law and domestic law that has been seen in the region regarding this matter. Thirdly (2.3), the Tribunal will make a deliberation between the defendant's guarantee of *ne bis in idem* and the victims' rights in the present case.

2.1. Origin of the State's obligation to reopen the investigation in the Judgments and Orders issued by the Court

18. In the Judgment on Merits, the Inter-American Court verified that in 1996 "the First Instance Military Court of Retalhuleu dismissed the case opened against 13 soldiers" for the crimes committed against Mr. Bámaca Velásquez. However, on November 22, 1995, the Eleventh

Chamber of the Court of Appeals of Retalhuleu revoked said decision because "the legal prerequisites necessary to justify the admissibility of the dismissal granted were not present."[11] The Court was not informed, upon issuing its Judgment in the year 2000, of the dismissal that occurred in 1999 (*supra* Considering 9(a)), it was only informed of the dismissal that occurred in 1995. Therefore, the Court could not rule on said dismissal that occurred in 1999.

19. On the other hand, the Court verified that the special prosecutor appointed to the case "tried to include Jennifer Harbury as a special prosecutor in the proceeding, but was not successful." Additionally, the Court established that on June 19, 1995, the Second First Instance Court for Criminal Activity, Drug Trafficking, and Crimes against the Environment of Coatepeque, Quetzaltenango, as a result of the appeal filed by Colonel Julio Roberto Alpírez, suspended the exhumation that was going to be carried out at Las Cabañas until the appeals court issued its ruling.[12] The special prosecutor indicated that in said investigation "no officer whatsoever was convicted." Said prosecutor "was subject to pressure, attacks, and threats because of its role" in the investigation of the present case.[13]

20. Likewise, the Inter-American Court considered that "even though in this case various domestic appeals ha[d] been filed to determine the whereabouts of Bámaca Velásquez, such as habeas corpus, a special inquiry proceeding, and criminal cases […], none of them were effective, and to date the whereabouts of Bámaca Velásquez is still unknown." Specifically, the Tribunal indicated that:

> Not only were these recourses not effective, but also direct actions from high-level State agents were carried out to prevent them from having positive results. These obstructions were especially evident in the multiple exhumation diligences that were attempted, which to date have not led to the identification of the remains of Efraín Bámaca Velásquez […]. It is unquestionable that the situation described prevented Jennifer Harbury and the next of kin of the victim from knowing the truth regarding his fate.

21. Taking into account the aforementioned, the Court verified that in Guatemala "there was and is a state of impunity regarding the facts of the present case," "since despite the State's obligation to prevent and investigate, it did not do so."[14] The Tribunal considered that, "it has been

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[11] *Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 85.

[12] *Case of Bámaca Velásquez v. Guatemala, supra* note 11, para. 88.

[13] *Case of Bámaca Velásquez v. Guatemala, supra* note 11, para. 89 and 93.

[14] *Case of Bámaca Velásquez v. Guatemala, supra* note 11, para. 211.

shown that, despite the different domestic recourses used to clarify the facts, they had not effectively prosecuted and, if it were applicable, punished those responsible."[15] The Court reiterated at that time that it understands impunity to be:

> the lack of investigation, persecution, capture, prosecution, and conviction of those responsible for the violations of the rights protected by the American Convention, provided that the State is obliged to fight said situation with all legal means available, since impunity favors the chronic repetition of the violations of human rights and the complete defenselessness of the victims and their next of kin.[16]

22. During Monitoring of Compliance of the present case, the Court received information from the State according to which "there was a dismissal of the case against Julio Roberto Alpírez and colleagues on March 8, 1999." With regard to said information, the representatives mentioned that the State "did not inform of the reasons for the discontinuance of the investigation […], or the reason for which it did not continue with the investigation and trial against Colonel Julio Alpírez and colleagues."[17]

23. In this regard, taking into account that eight years after the Judgment on Merits was issued in the present case the investigations had not been effectively impelled, the Court decided to issue an Order in January 2009, in which it considered that the investigations had been ineffective, which included, among other factors, the information on the dismissal that occurred in 1999.

24. In said Order of 2009 the Tribunal, referring once again to its jurisprudence regarding Guatemala, indicated that "impunity became an essential factor that forms part of systematic patterns that allowed grave human rights violations to be committed during the armed conflict." Specifically, the Court mentioned that its jurisprudence allowed it to state that "the Guatemalan justice administration system was ineffective in guaranteeing compliance with the law and the protection of the victims' rights in almost all the violations of human rights committed during that time" and that "[i]n this sense, the lack of investigation of such facts became a deciding factor in the systematic practice of violations of human rights."[18]

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15 *Case of Bámaca Velásquez v. Guatemala, supra* note 11, para. 134.

16 *Case of Bámaca Velásquez v. Guatemala, supra* note 11, para. 211

17 *Case of Bámaca Velásquez v. Guatemala.* Monitoring Compliance with Judgment. Order of the President of the Inter-American Court of Human Rights of November 11, 2008, Considering Clauses thirty-six and thirty-seven.

18 *Cf. Case of Bámaca Velásquez v. Guatemala.* Monitoring Compliance with Judgment. Order of the

25. The Court later specified that "in cases of […] forced disappearances and other grave human rights violations, […] the execution of a serious, impartial, and effective ex officio investigation, without delays, is a fundamental and conditioning element for the protection of certain rights that are affected or annulled by these situations, such as the right to personal liberty, humane treatment, and life." To this end, the Tribunal reiterated its jurisprudence, according to which, an investigation must not be started "as a mere formality which is set to be unfruitful before it has even begun," but rather "it must have a purpose and the State must adopt it as an inherent legal obligation and not a mere act of special interests that depends on the procedural initiative of the victim or its next of kin or the private presentation of evidence, without the public authority effectively seeking the truth. This is true regardless of the agent to whom the violation may be attributed to, even if they were individuals, since, if the facts are not seriously investigated they would in some way have been assisted by the public power, which would compromise the State's international responsibility." Likewise, the Court mentioned that an investigation must be carried out "through all legal means available" and within a reasonable period of time.[19]

26. Likewise, the Court reiterated that the prohibition of forced disappearance of persons and the correlated duty to investigate it and punish those responsible are regulations that "have become *jus cogens in nature.*"[20]

27. Additionally, in said Order issued in 2009, the Court reiterated that the State "has the obligation to fight [impunity] through all legal means available, since [said situation] promotes the chronic repetition of human rights violations and the complete lack of defense of the victims and their next of kin." The Tribunal stated that this obligation implies the duty of the States to organize the entire governmental apparatus and, in general, all the structures through which it manifests its exercise of public power so that they are capable of legally guaranteeing the free and full exercise of human rights.[21]

Inter-American Court of Human Rights of January 27, 2009, Considering Clause twenty-one.

[19] *Cf. Case of Bámaca Velásquez v. Guatemala, supra* note 18, Considering Clause twenty-eight.

[20] *Cf. Case of Bámaca Velásquez v. Guatemala, supra* note 18, Considering Clause twenty-six.

[21] *Cf. Case of Bámaca Velásquez v. Guatemala, supra* note 18, Considering Clause twenty-two.

28. The Court added that the International Convention for the protection of all persons against forced disappearances of 2007 states, in Article 12 thereof, that if a complaint has been filed, the competent authorities "will proceed without delay to carry out an exhaustive and impartial investigation," and "will take adequate measures, when necessary, to guarantee the protection of the complainant, the witnesses, the next of kin of the people missing, as well as their defenders." However, in the absence of a formal complaint, the authorities must start said investigation ex officio. Additionally, the States Parties shall make sure that the aforementioned authorities "[h]ave the powers and resources necessary to effectively carry out the investigation, including access to documents and other relevant information to the same." Finally, the States Parties shall take:

> the measures necessary to prevent and punish the acts that hinder the execution of the investigations. Specifically, they must guarantee that the people who have allegedly committed the crime of forced disappearance are not able to influence the course of investigations by pressurizing, intimidating or retaliating against the claimant, the witnesses, the next of kin of the missing person, and their defender, as well as those who participate in the investigation.[22]

29. Likewise, the Court indicated that the obligation to investigate could not be exercised in any way other than in accordance with the standards established by the international regulations and jurisprudence that characterize them as prompt, exhaustive, impartial, and independent investigations.[23]

30. Based on the aforementioned, which had been expressed by the Tribunal due to the lack of progress in the investigations and the impunity in the present case, in the Order issued in 2009, the Court clearly and specifically established that the State should, *inter alia*, inform it of the procedural acts i) aimed at investigating the systematic patterns and responsibility of the corresponding military chains of command, specifically related to the present case, ii) carried out as a consequence of the reevaluation of the testimonies and other procedural pieces already offered in the criminal proceeding carried out between 1992 and 2000, a year in which the Judgment on Merits of the Court was issued in the present case, as well as any relevant Judgments offered subsequently, and iii) carried out because of the reevaluation of

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[22] *Cf. Case of Bámaca Velásquez v. Guatemala, supra* note 18, Considering Clause thirty.

[23] *Cf. Case of Bámaca Velásquez v. Guatemala, supra* note 18, Considering Clause thirty-one.

the criminal situation of the members of the military detachments in which Mr. Bámaca Velásquez had been detained in 1992. Said acts should be based on the precision of codes and institutional units as well as on the corresponding line of command.[24] The Court also issued a ruling on different measures to promote the participation of victims, the protection of witnesses, and legal officials, among other aspects.[25]

31. It is important to emphasize that the representatives indicated that the State has not fully complied with any of the specific information requests made by the Court in the Order of January 27, 2009 (*supra* Considering Clause 22). A first step to assess the effectiveness of the investigations is having more specific information on these matters; therefore, the Court reiterates the information requests once again and regrets that the State's reports have not provided more documentation on the requests.

Conclusion of the Court

32. The Court considers that the previously explained information leads to the conclusion that the decisions adopted by the Public Prosecutors' Office –by requesting the annulment of the dismissal from 1999– and, firstly, by the Supreme Court –by accepting said request– clearly constitutes an initial step towards complying with the Court's orders. These decisions that aim to reopen the dismissed investigation are an application of the *pacta sunt servanda* principle, which guarantees the appropriate *effet utile* for the stipulations of a treaty within the domestic legislation of the States Parties.[26] Despite the fact that the Tribunal considers that many more acts from the judiciary to be necessary to eliminate impunity in the present case, the decisions of the Public Prosecutors' Office and the Supreme Court to promote the investigation are consistent with the Court's constant jurisprudence in the sense that:

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[24] *Cf. Case of Bámaca Velásquez v. Guatemala, supra* note 18, Considering Clause thirty-four.

[25] *Cf. Case of Bámaca Velásquez v. Guatemala, supra* note 18, Considering Clauses thirty-six and thirty-seven.

[26] *Cf. Case of Benavides Cevallos v. Ecuador. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 27, 2003, Considering Clause twelve; *Case of Cantoral Benavides v. Peru. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 27, 2003, Considering Clause seventeen, and *Case of Cantoral Benavides v. Perú. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 17, 2004, Considering Clause seventeen.

> amnesty provisions, prescription period provisions, and the creation of measures designed to eliminate responsibility so as to prevent the investigation and punishment of those responsible for extreme violations of human rights such as torture, summary, extralegal, or arbitrary executions, and forced disappearances, all of them prohibited since they violate non-revocable rights acknowledged by International Human Rights Law, are inadmissible.[27]

33. Basically, the Judgments and Orders issued by the Court in the present case were enough to restart or impel all types of criminal proceedings related with the investigation of the facts, through the necessary domestic legislation measures –including judicial orders– to overcome any obstacle that impedes the investigation or prevents it from being adequate or effective. Therefore, based on the obligation to investigate derived from the Judgments issued by the Court, the dismissal that occurred prior to the Judgments and Orders issued by the Court, which are the source which allow the Judiciary to appropriately "control conventionality between the domestic legal regulations that apply in the specific cases and the American Convention on Human Rights" cannot have any effect. The Tribunal has clearly stated that, "in this task, the Judiciary must take into consideration not only the treaty, but also the Inter-American Court's —the ultimate interpreter of the American Convention— interpretation of the treaty."[28]

2.2. From the constant jurisprudence of the Court and from the application of international law in the domestic legislation, it can be inferred that it was not necessary for the Court to issue a specific order to annul the dismissal that occurred in 1999

34. The Court considers that not only its constant jurisprudence, but also different practices in the region, related with the judicial implementation of its orders, make it possible to infer that specific broken down orders are not necessary for the domestic authorities to

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[27] *Cf. Case of Barrios Altos v. Peru. Merits.* Judgment of March 14, 2001. Series C No. 75, para. 41; *Case of Trujillo Oroza v. Bolivia. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 16, 2009, Considering Clause forty-seven, and *Case of Caballero Delgado and Santana v. Colombia. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 17, 2009, Considering Clause twenty-six.

[28] *Cf. Case of Raxcacó Reyes v. Guatemala. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of May 9, 2008, Considering Clause sixty-three; *Case of Fermín Ramírez v. Guatemala. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of May 9, 2008, Considering Clause sixty-three, and *Case of Five Pensioners v. Peru. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of November 24, 2009, Considering Clause thirty-five.

effectively implement judicial investigations and adopt the measures necessary to overcome the obstacles that generate impunity.

35. In this regard, even though it is true that each State has a specific institutional design related with the implementation of orders issued by the Inter-American bodies, the American Convention clearly states that the Tribunal's orders are obligatory. This implies that it is not necessary to have a specific domestic process to declare its obligatory nature or so that the specific order generate effects.

36. Therefore, in the present case it was not necessary for the Inter-American Court to refer expressly to the State's duty to adopt a specific measure regarding the annulment of a dismissal, since the Tribunal's Judgment implies the removal of any obstacle that impedes the investigation of the facts and, if necessary, the punishment of those responsible for the declared violations. In effect, in relation to the dismissal in the present case, it is possible to apply the Court's statements regarding the different measures designed to exclude responsibility and other procedural institutes that would prevent continuance with the investigation.

37. The application of international law in domestic law can be seen in a decision adopted by the Constitutional Court of Peru in which it was stated that the order to investigate and punish given by the Inter-American Court in the case of *Barrios Altos v. Peru* "includes the dismissal rulings issued by the instances of military jurisdiction, even those in which the amnesty laws have not been applied."[29] Likewise, said Constitutional Court manifested that:

> "the State's obligation to investigate the facts and punish those responsible for the violation of human rights declared in the Judgment of the Inter-American Court [...,] not only includes the nullity of those proceedings where the laws of amnesty were applied [...], after having declared that said laws do not have legal effects, but also **all practices** aimed at preventing the investigation and punishment of violations to the rights to life and humane treatment, among which we can find **the orders of definitive dismissal** such as those issued in favor of the appellant."[30] (bold added)

38. Additionally, it is important to recall some judgments from High Courts of the region regarding the inadmissibility of the prescription period guarantee to prevent investigations ordered by the Inter-American Court regarding serious violations to human rights. Thus,

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[29] Constitutional Court of Peru, Judgment of July 16, 2008 (Dossier Nº 03938-2007-PA/TC Lima). Considering Clause twenty-one.

[30] Constitutional Court of Peru, s*upra* note 29, Considering Clauses thirty, thirty-one, and thirty-two.

a) in the case of *Cantoral Benavides v. Peru*, the Tribunal analyzed a decision that, after the judgment issued by the Court, declared that, due to the prescription period of the criminal prosecution, the exercise of said action did not proceed. However, the investigation was later reopened in order to comply with the order to investigate issued by the Court.[31]

b) In another case related with the procedural guarantee of prescription periods, the case of *Trujillo Oroza v. Bolivia*, the Second Criminal Chamber of the Supreme Court of Justice of the Nation of Bolivia annulled the prescription periods ordered in said case on forced disappearance. The Second Criminal Chamber established that, taking into account the provision of the judgment issued by the Inter-American Court in said case, "the State has the obligation to eliminate the obstacle represented by the prescription period of the criminal action so that those responsible can be criminally punished on the charge of forced disappearance."[32]

c) In turn, as part of compliance in the case of *Gutiérrez Soler v. Colombia*, the Tribunal verified[33] that the Criminal Chamber of the Supreme Court of Justice of Colombia declared the review of the defendant in the case of the torture suffered by Mr. Gutiérrez Soler to be well founded. The Supreme Court valued the "binding" and "intangible" nature of the rulings made by the Inter-American Court of Human Rights, and considered that "[…] the order stating that the competent authority must effectively investigate the facts to identify and prosecute those responsible is unchallengeable, and must be complied with, without the possibility of opposing it." Regarding the prescription periods of the criminal action, it highlighted that in cases "[…] such as torture, prescription periods are not subject to common rules, but rather international instruments guidelines on human rights and the jurisprudence of international bodies of human rights […]." Additionally, said Criminal Chamber indicated that "according [to the judgment on merits, reparations, and costs of the Inter-American Court of Human Rights of September 12, 2005, it is] unquestionable that domestic proceedings that do not comply with so-called

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[31] *Cf. Case of Cantoral Benavides v. Peru. Monitoring Compliance with Judgment.* Order of the President of the Inter-American Court of Human Rights of December 14, 2007, Considering Clause ten.

[32] Second Criminal Chamber of the Supreme Court of Justice of the Nation of Bolivia, Judgment of June 2, 2010. Mentioned in: *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations, and. Costs.* Judgment of September 1, 2010. Series C No. 217, para. 206.

[33] *Cf. Case of Gutiérrez Soler v. Colombia. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of June 30, 2009, Considering Clause eleven.

international standards, especially the precepts included in the American convention, cannot be considered valid and, as stated by [the Inter-American Court], it is neither admissible or appropriate to resort 'to amnesty, pardon, prescription periods, or create measures to exclude responsibility."[34]

d) Additionally, in the case of *19 Tradesmen v. Colombia*, the Criminal Appeals Chamber of the Supreme Court of Justice of Colombia issued a decision regarding an appeal for review initiated by a Criminal Judicial Prosecutor, in which it decided to declare the invalidity of the actions of the military criminal justice and the decision to cease the proceeding, as well as to forward said process to the civil criminal jurisdiction (National Human Rights Unit and International Humanitarian Law) so it would continue with the investigations.[35] The request made by the Judicial Prosecutor and the Supreme Court were based on the provisions of the Judgment issued by the Inter-American Court.

39. As proven by the application of international law in domestic law, it is not essential to specify the measures that must be adopted by the different public authorities called upon in order to eliminate the obstacles that prevent compliance with the obligation to investigate. There is the possibility that in some cases the Tribunal has issued very specific orders, as mentioned by the Constitutionality Court regarding the case of *Raxcacó Reyes v. Guatemala*; however, the Tribunal need not adopt such detailed decisions. This Tribunal assumes that the State's good faith with regard to compliance with the obligations it has agreed to, and its commitment as a Party to the American Convention, guarantee subjection to the orders of those Judgments affecting Guatemala and the Court's jurisprudence that interprets and applies the rights contained in said treaty.

Conclusion of the Court

40. Based on all the aforementioned, it is clear that the decisions adopted by domestic authorities, especially prosecutors and judges, who are able to adequately and diligently promote the investigation in the present case, constitute a form of compliance with the Court's orders

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[34] Criminal Appeals Chamber of the Supreme Court of Justice of Colombia, Judgment of September 17, 2008 (Appeal for Review).

[35] *Cf. Case of 19 Tradesmen v. Colombia. Monitoring Compliance with Judgment.* Order of the President of the Inter-American Court of Human Rights of November 26, 2008, Considering Clause four.

and said actions must not only be supported by the highest authorities, but there should be the strictest of diligences regarding protection of any authority against harassment, punishments, or any other type of intimidation or court order related with the acts addressed to promote the execution of the Tribunal's judgments. The Court will refer to this matter again when analyzing the alleged harassment against the prosecutors who have impelled the present case (*infra* Considering Clause 58).

2.3. Deliberation between the guarantee of *ne bis in idem* and the victims' rights, with regard to the compliance of the obligations to investigate in the present case

41. Meanwhile, one of the inherent objectives of criminal investigations is to generate consequences on the rights of those accused of committing serious human rights violations. In this sense, the Court does not disregard, in the present case, the decision made by the Constitutionality Court concerning a recourse of *amparo* filed by a defendant to protect his rights, among them, the right to not be prosecuted twice for the same facts. This is an important guarantee in a democratic society. Therefore, a new deliberation should be convened regarding the criminal guarantees invoked to prevent the full applicability of the order to investigate issued by the Court vis-à-vis the rights of the victims of serious violations of human rights such as the present.

42. In this regard, one of the developments of the principle of legal certainty is constituted by creations such as *res judicata*, which allows judicial proceedings to solve conflicts by helping to put an end to controversies. The value of *res judicata* is even greater in criminal law in order to avoid a disproportionate exercise of the State's punitive power, by means of prosecuting the same defendant over and over for the same facts for which he has already been prosecuted. However, it is possible to set limits to the right to *ne bis in idem* in order to develop other values and rights that, in certain cases, could be more important.

43. To determine the extent to which these criminal guarantees are restricted, it is convenient to distinguish between punishable acts in general and grave violations of human rights. With regard to punishable acts in general, which do not involve grave violations of human rights,

there is a possibility that, in certain cases, some restrictions applied to the principle of *res judicata* are not valid if the respective facts do not include especially grave conduct, and the lack of outcome in a specific investigation holds no relationship with particular procedural actions or omissions, clearly carried out in bad faith or negligently, in order to favor or allow impunity.[36]

44. However, when dealing with grave and systematic violations to human rights, such as in the present case, the impunity of these behaviors due to the lack of investigation is a rather high infringement of the victims' rights. The extent of this infringement not only authorizes but also demands an exceptional limitation of the guarantee of *ne bis in idem*, in order to allow the reopening of these investigations when the decision argued as *res judicata* stems from the protuberant non-compliance of the duties to investigate and seriously punish grave violations. In such cases, the preponderance of the victims' rights over legal certainty and the *ne bis in idem* is even more evident, since the victims not only suffered atrocious behavior but they must also bear the State's indifference, which openly fails to comply with its obligation to clarify the acts, punish those responsible, and repair the affected parties.[37] The seriousness of the events of these cases is of such magnitude that it affects the essence of social coexistence and, at the same time, prevents any type of legal certainty. Therefore, when analyzing the legal appeals that may be filed by the defendants for grave violations of human rights, the Tribunal points out that judicial authorities are obliged to determine if the deviation in the use of a criminal guarantee can generate a disproportionate restriction of the victims' rights, where a clear violation of the right to access justice affects the criminal procedural guarantee of *res judicata*. In this regard, the "Set of updated principles for the protection and promotion of human rights by fighting impunity" states that:

> States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription periods, amnesty, right to asylum, refusal to extradite, *non bis in idem*, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity.[38]

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[36] In a similar sense, *Cf. Case of Ivcher Bronstein v. Peru*. *Monitoring Compliance with Judgment*. Order of the Inter-American Court of Human Rights of November 24, 2009, Considering Clause thirteen and seventeen and *Case of Las Palmeras v. Colombia. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of February 3, 2010. Considering Clause nineteen.

[37] In a similar sense, *Cf.* Constitutional Court of Colombia, Judgment C-004 of January 20, 2003 (Dossier D-4041).

[38] United Nations, *Set of Principles for the Protection and Promotion of Human Rights through actions to Combat Impunity* (E/CN.4/2005/102/Add.1), principle 22.

45. These restrictions on the principle of *res judicata* are applied with special importance when the scope of a dismissal is concerned, since this procedure is not related to a final judgment on the guilt or innocence of a person, even though in some cases it is capable of bringing a proceeding to a close.

46. In the present case all the aforementioned circumstances are present, taking into account the characteristics of the forced disappearance of Mr. Bámaca Velásquez, the impunity described (*supra* Considering Clauses 19 through 31), and the extreme negligence in complying with that ordered by the Court. It should be manifested that the dismissal occurred in 1999, even though not it was not reported at that time to the Court, but rather prior to the decisions issued by the Tribunal in 2000 and 2002. In those decisions the Court verified that the recourses that had been promoted were not effective, in part, because high-level State agents prevented some actions from having positive results (*supra* Considering Clause 20). Likewise, the special prosecutor that promoted the case at the time was subject to threats, harassments, and attacks (*supra* Considering Clause 19). Additionally, despite the availability of accurate information from different witnesses regarding the participation of some soldiers in the forced disappearance of Mr. Bámaca Velásquez, including accusations against Colonel Alpírez,[39] there was no evidence in the case file to show that a detailed investigation had been carried out against said soldiers (*supra* Considering Clause 19).

47. Besides these evident violations in the investigation, in its Judgment on Merits of 2000, the Tribunal "attribute[d] a high evidentiary value to the testimonial evidence in proceedings of this nature, that is to say, within the context and circumstances of forced disappearance cases —and all the difficulties that they produce— in which the main source of evidence is basically referential testimonies and circumstantial evidence due to the nature of this crime."[40] The Court considered that it had been proven that, "at the time of the facts of this case, the Army carried out an exercise in which it captured the members of the guerrilla, secretly detained them without informing the competent, independent, and impartial judicial authority, and physically and psychologically tortured them in order to obtain information, and,

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[39] *Cf.* Testimonies of Santiago Cabrera López, Jennifer Harbury, and other deponents mentioned in the Judgment on Merits in the present case, *supra* note 11, which refer to Mr. Alpírez.

[40] *Cf.* Case of *Bámaca Velásquez v. Guatemala*, *supra* note 11, para. 131.

possibly, they were even killed." Evidence was also found that "the disappearance of Efraín Bámaca Velásquez [was] linked to said practice," thus the Court consider[ed] that it to be proven.[41]

48. Based on these considerations of the Tribunal, the domestic courts are obliged to eliminate any practice, regulation, or procedural institution that are admissible for general punishable acts but are inadmissible in relation to clear violations of the duty to investigate grave violations of human rights. After ten years, there has been no concrete domestic decision to remove said obstacles. The Tribunal states that having received a request from the State in 2010, the Court provided a complete copy of the evidence available in its dossier.[42] The first steps to remove the obstacles that guaranteed impunity were strongly focused on the recently annulled actions (*supra* Considering Clauses 9(a) and 9(b)).

49. Similarly, the Court observes that different domestic judicial bodies have agreed to remove all procedural obstacles in order to reopen or continue with the corresponding investigations in cases of serious violations of human rights. Thus, for example, the defendants in the case of *Barrios Altos v. Peru* requested the dismissal of the case because the time period for the preliminary stage, or the investigation, had been exceeded, basing the request on a legislative decree that promoted that investigations be carried out within a reasonable period of time. In this regard, the Superior Court of Justice of Lima decided to declare the dismissal requests inadmissible and, therefore, continue with the proceedings against the defendants, without receiving an explicit or direct order from this Tribunal to do so.[43] The aforementioned decision was made, *inter alia,* taking into account the constant jurisprudence of the Inter-American Court regarding the incompatibility of laws on amnesty and other procedural obstacles with the Convention, which, at the same time, prevent compliance with the obligation to investigate. In this sense, said Superior Court considered that it was appropriate to not apply the regulation, even though it creates some type of restriction of the defendants' rights. Specifically, it indicated that "[b]ased on the

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41 *Cf.* Case of *Bámaca Velásquez v. Guatemala, supra* note 11, para. 132.

42 Through a brief of February 1, 2010, the State of Guatemala requested from the Inter-American Court a certified copy of "all testimonial statements and all documents presented by the soldiers, as well as a certified copy of the judgment on merits and reparations," in the present case. Through a note of the Secretariat of the Court of February 4, 2010, a certified copy of the Judgments issued in the present case and a certified copy of the entire dossier on merits was issued.

43 *Cf.* First Special Criminal Chamber of the Superior Court of Justice of Lime, Ruling of September 15, 2010 (Dossier 28-2001-1º SPE/CSJLI), page 26.

evident incompatibility with [certain] constitutional stipulations, [the mentioned legislative decree] cannot be applied, but this in no way is to disregard the constitutional recognition and ranking of the right to a reasonable time period."[44]

50. In turn, in a case related to a massacre, the Criminal Appeals Chamber of the Supreme Court of Justice of Colombia "[derogated] the acquittals" in favor of five defendants and ordered "to take the actions back to the investigation phase." The Supreme court reminded that there is "the possibility to overturn a decision that is *res judicata* in nature, issued in proceedings concerning violations of human rights or serious infringements of International Humanitarian Law," even in cases without new facts or evidence, and regardless of whether a judgment on merits, issued by an instance such as the Inter-American Court, exists or not. In said case, for the aforementioned Supreme Court, the declaration of the Inter-American Commission in its report on merits was sufficient, in which it concluded that "judicial and disciplinary instances abstained from collecting the appropriate evidence, they ruled against procedural reality, and committed other grave irregularities that prevented the identification and punishment of perpetrators," since "without greater knowledge, it applied the principle of *in dubio pro reo* due to unsubstantial inconsistencies in [a] testimony" when the truth was that "judicial experience states that the assessment of evidence in such bloody events requires greater deliberation and care, since they are not commonplace, but rather, due to the degree of cruelty and atrocity, they are only generally known by those who were directly involved. Furthermore, the witnesses and surviving victims are subject to threats from the same criminal organizations."[45]

51. In conclusion, both the jurisprudence of the Court as well as some decisions in comparative law make it possible to conclude that in the possible conflicts between the victims' right to access justice and the defendant's judicial guarantees there is a *prima facie* prevalence of the victims' rights in cases of serious violations of human rights and even more so when there is impunity. Thus, it is necessary that the corresponding judicial authorities analyze the circumstances and specific context of each case in detail to avoid generating a disproportionate restriction of the victims' rights. Therefore, for example, the Tribunal

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[44] *Cf.* First Special Criminal Chamber of the Superior Court of Justice of Lima, *supra note* 43, p. 18.

[45] *Cf.* Criminal Appeals Chamber of the Supreme Court of Justice of Colombia, Judgment of September 22, 2010 (Appeal for Review), approved through minutes No. 300, pages 81-82.

has stated that "even though prescription periods are a guarantee of the due process that must be duly observed by the judge of all those accused of a crime, its invocation and application is unacceptable when it has clearly been proven that the passing of time results from procedural actions or omissions which, with clear bad faith or negligence, attempt to favor or allow impunity.[46]"

Conclusion of the Court

52. Based on all the aforementioned, the Court concludes that it has not received proof that the decisions adopted by the Constitutionality Court and the Supreme Court of Justice –regarding the closing of the case- were made pursuant with that set forth by the Judgments and Orders of the Court in the present case. The decisions that led to the closing of the case have hindered initial progress in the compliance with the duty to investigate and create impunity in a case of a serious violation of human rights such as the present, failing to comply with that ordered by the Inter-American Court. In these types of cases, the prevalence of a dismissal over the victims' rights leads to a continuation of the proceedings with clear violations of the access to justice, prolonging impunity and making the Court's orders illusory. Therefore, the Tribunal decides that the State must carry out all the specific and appropriate processes to comply with said Judgments and Orders and adjust the corresponding judicial decisions, in such a way that the State continue with the investigation and it becomes impossible to introduce measures designed to eliminate responsibility and impede said investigation as well as the possible punishment of those responsible.

B. Harassment and threats against prosecutors, victims, and witnesses

53. The representatives informed of different facts that affected the victims and witnesses in the present case, namely that i) on May 5, 2009, Jennifer Harbury "was violently removed from her house" in Welasco, Texas, an incident "that occurred upon returning […] from a trip […] relate[d] with the search for justice in the case of her husband," ii) on May 17, 2009, Mr. Ángel Nery Urízar García "who was a key

[46] In a similar sense, *Cf. Case of Ivcher Bronstein v. Peru*, *supra* note 36, Considering Clauses thirteen and seventeen and *Case of Las Palmeras v. Colombia, supra* note 36, Considering Clause nineteen.

witness in the investigation" of the present case was murdered, iii) on April 13, 2009, Mr. Germán Aníbal de la Roca, witness in the investigation, was followed by subjects who were traveling in an automobile that "in previous months made an attempt on his life, ramming against the motorcycle he was driving," and iv) on March 8, 2009, the former Ombudsman, Julio Arango Escobar, who was in charge of the investigation in 1995, died in a "traffic accident." The representatives argued that "the proximity and characteristics of all these facts leads to the presumption that they are not isolated and that they are the result of the impulse and relevance given to the investigation into this case" in 2009.

54. Likewise, the representatives indicated that on March 21, 2010, a legislator and leader of the Patriot Party spoke out against Jennifer Harbury, while other press columnists have referred to her as a "liar, opportunist, and a manipulator." The representatives stated their deep concern for these "acts of aggression and discredit aimed at obstructing Mrs. Harbury's efforts to search for justice." To this they added two criminal accusations filed against Mrs. Harbury and the prosecutor Manuel Vásquez –prosecutor in charge of the present case-. Said accusations were filed by another defendant involved in the case, and they are accused of "colluding to surprise the judicial authority" using the Judgment issued by the Court in the present case. Specifically, the prosecutor is accused of abuse of office. Likewise, the prosecutors received "threats of false testimonies of corruption."

55. Additionally, the representatives stated that the Public Prosecutors' Office is "going through a serious institutional crisis" and that the prosecutor Manuel Vásquez Vicente and the assistant prosecutor José Rodolfo López, who promoted the investigations of the present case during the last year, have been "watched over and followed by strangers." The representatives stated that to receive protection, said prosecutors had to resign from their positions, accept a change of residence, and stop working, aspects that "are not viable for officials" and that "[would] lead to the suspension of the […] investigation."

56. The State argued that on March 29, 2010, "it appointed two agents of the National Civil Police Force to provide personal security services" to the prosecutor in charge of the case, Manuel Vásquez. On the other hand, the State mentioned that it convened a meeting for August 2, 2010, with two assistant prosecutors in charge of the investigations –José Rodolfo López and Sara Romero- whom are alleged

to have "currently been subject to intimidation and persecution by strangers."

57. The Commission argued that the information presented by the State was insufficient and it was still "waiting for further information" in order to "issue a more informed opinion regarding Mrs. Harbury's situation."

58. The Court observes that, in the present case, not only is it necessary to annul the 1999 dismissal (*supra* Considering Clause 9(a)) but it is also necessary to protect prosecutors and any other public authority that promoted the investigation of the present case from any threat, harassment, or intimidation. Among possible intimidations are those complaints that can be considered to have been made in bad faith as they seek to persecute authorities for trying to comply with the orders of the Judgments and Orders issued by the Inter-American Court in the present case. On the other hand, the protection against intimidations implies ensuring the continuity of the tasks that promote investigations, so that those officials committed to this task are not easily removed or transferred. This consideration is inherent to the Court's orders in the sense of removing all obstacles, both legal and de facto, that may generate impunity in the present case. In that sense, the Court also positively values the decision made at that time by the Supreme Court of Justice to transfer the case from the Court in Retalhuleu to a Court in Guatemala City, taking into account that the procedural subjects are in a specific situation of risk. The Tribunal is awaiting more information on the implementation of the transfer of the case.

II. Analysis of the information on operative paragraph four of the Judgment on reparations

59. With regard to the duty to adopt the measures to adjust the legal system to international human rights regulations and humanitarian law and to provide the full effectiveness of said regulations within the domestic realm (*operative paragraph four of the Judgment on reparations*), the State presented diverse information regarding the "Initiative of the National Commission for the Search of People who are Victims of Forced Disappearance and Other Forms of Disappearance," the possibility of "accessing confidential dossiers in the hands of the

security forces" through the "Law on Access to Public Information," and the "Law for the Protection of Procedural Subjects and People Linked to the Administration of Criminal Justice."

60. The representatives manifested the insufficiency of the information presented by the State and indicated that access to information in the army's case files "has not been materialized."

61. The Commission "value[d]" the adoption of measures "to clarify past disappearances," but mentioned that "it does not have enough elements" to issue a ruling on these measures.

62. The Court values the efforts made by the State in order to comply with this Operative Paragraph of the Judgment. However, it considers that it still requires more information on the different initiatives mentioned, especially regarding the measures of protection for procedural subjects and access to the information in the army's files.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercising its power to monitor compliance with its own decisions pursuant to Articles 33, 62(1), 63(2), 67 and 68(1) of the American Convention on Human Rights, 30 of its Statutes, and 31 and 69 of its Rules of Procedure,

DECLARES:

1. That the following obligations are pending compliance:

   a) To locate the mortal remains of Mr. Efrain Bámaca-Velásquez, exhume the remains in the presence of his widow and next of kin, and subsequently hand them over to them (*operative paragraph one of the Judgment on reparations*);

   b) To adopt legislative, and any other measure necessary, to adjust Guatemalan legal codes to international human rights regulations

and humanitarian law and in order to fully comply with said regulations domestically *(operative paragraph four of the Judgment on reparations*), and

c) To investigate of the facts that led to the violation of the American Convention and the CIPST, identification, and, possible, punishment of those responsible, as well as public disclosure of the results of the respective investigation (*operative paragraph eight of the Judgment on merits and operative paragraph two of the Judgment on reparations*).

2. That it will keep this monitoring process open until full compliance with the aforementioned obligations is achieved.

3. That the decisions of the Public Prosecutors' Office and the Criminal Chamber of the Supreme Court of Justice of Guatemala, which at that time tried to reopen the investigation into the present case, concur with the orders issued by the Court in the Judgments on the present case, taking into account Considering Clauses 14 through 52 of the present Order.

AND DECIDES:

1. To require that the State immediately adopt all the measures necessary to effectively and promptly comply with the matters pending compliance, pursuant with that stated in Article 68(1) of the American Convention.

2. To request that the State present, by no later than March 30, 2011, to the Inter-American Court, a detailed and updated report indicating all the measures adopted to comply with the reparations ordered by this Court that are pending compliance, pursuant with that stated in Considering Clauses 8 through 62 of the present Order.

3. To request that the representatives of the victims, as well as the Inter-American Commission, present observations on the aforementioned State report within a four and six week period, respectively, following receipt of said report.

4. To request that the Secretariat of the Court notify the present Order to the State, the Inter-American Commission, and the representatives of the victims and their next of kin.

Diego García-Sayán
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alesandri
Secretary

So directed,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI WITH THE ORDER OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS OF NOVEMBER 18, 2010, CASE OF BÁCAMA VELÁSQUEZ *V.* GUATEMALA, MONITORING COMPLIANCE WITH JUDGMENT

With my vote I concur with the approval of the Order mentioned in the title (hereinafter "the Order"); however, I consider it convenient to add some comments on the aspects involved thereof, which I indicate below.

1.- The information set forth in section A) 1. of the Order[1] is, in light of International Law and, therefore, for the Court, is nothing more than facts that prove that the State has not yet complied with the obligation to investigate the ordered by the Judgment in this case, which, is specifically evident in the grounds offered by the State when requesting that the Court "*issue the corresponding ruling with regard to the order issued by (its) Constitutional Court,"* "*to expand the criterion relating to the spirit of the"* mentioned judgment of orders, "*since with (its) ruling, the State of Guatemala is able to comply"* with the latter.[2]

2.- It is important to state that, at present, according to the information found in the dossier,[3] the domestic judicial act that definitively decreed the non-compliance with the Judgment of the present case, was a decision made by the Supreme Court of the State, although it must be stated that, with this, it complied with that ordered by the Constitutionality Court of the State in the processing an *amparo* recourse and thus appropriated the rulings of the Constitutionality Court. Therefore, currently, it is that decision that compromises the State's international responsibility for said non-compliance and reference should therefore be made to Constitutionality Court's decision in order to determine responsibility.

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1 Paragraphs 9, 11, 12, and 13 of the Order.

2 Paragraph 14 of the Order.

3 Paragraph 13 of the Order.

3.- Likewise, I must point out, on one hand, that the State's aforementioned petition does not correspond to that specified in Articles 67 of the Convention[4] and 62 of the Rules of Procedure of the Court, applicable to orders[5] to request an interpretation of a judgment, and, on the other hand, it is not of the nature of the reports provided for in Article 63 of the Rules of Procedure,[6] as an instrument in the procedure to monitor compliance with judgments.

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[4] Article 67: "*The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it upon request by any of the parties, provided the request is made within ninety days of the date of notification of the judgment.*"

[5] Article 62 of the Rules of Procedure of 2000, reformed in January 2009: "*Request for Interpretation.*
"1. The request for interpretation referred to in Article 67 of the Convention may be made in connection to judgments on merits or reparations and shall be filed with the Secretariat of the Court, precisely stating questions relating to the meaning or scope of the judgment for which interpretation is requested…."

[6] Article 63: "*Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court.*
1. The procedure for monitoring compliance with judgments and other decisions of the Court shall be carried out through the submission of State reports and observations on those reports by the victims or their legal representatives. The Commission shall present observations on the State's reports and on the observations of the victims or their representatives."
2. The Court may request, from other sources of information, relevant data on the case in order to evaluate compliance therewith. To that end, the Tribunal may also request any expert opinions or reports that it deems appropriate."
3. When it deems it appropriate, the Tribunal may convene the State and the victims' representatives to a hearing to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at the hearing.
4. Once the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders."

4.- We must also consider that, taking into consideration that, pursuant with International Law, "*no State may invoke its domestic legislation to avoid complying with an international obligation,"*[7] the State cannot enforce a decision made by any of its national or domestic courts —even indirectly— as justification for the violation of its international obligation to comply with the Court's Judgments or as a reason to exclude the illegality incurred through said non-compliance, especially if this results from the State's conduct.[8]

5.- Likewise, I should mention that even though the obligation to investigate ordered by the Judgment in this case is, in the perspective of International Law, a behavioral obligation, it does not state the means through which it must be achieved, thus not only the State must —in accordance with its internal, domestic, or exclusive jurisdiction— determine such means, but they may also consist of, if necessary, previous, complementary, or substituting acts of a legislative, administrative, or any other nature to allow the execution of the judicial proceedings and not only the latter.[9]

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[7] Article 32 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts: "*Irrelevance of Internal Law.*
The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations in accordance with this part." *Cf.* International Law Commission of the UN. Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in its 53rd Session (A/56/10) and annexed by the AG in its Decision 56/83, of December 12, 2001.
On its part, Article 27 of the Vienna Convention on the Law of Treaties: "*Internal law and observance of treaties.*
A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

[8] It is important to recall that in the mentioned Draft Articles on the Responsibility of States for Internationally Wrongful Acts, that summarizes customs, not only does it not include a situation such as the one described as one of the causes that excludes the illegality, but it expressly states the State may not be invoked those causes which in some way it been responsible for. Examples: Articles 23, force majeure, 24 extreme danger, and 25, necessity. *Cf.* International Law Commission of the UN. Draft Articles on Responsibility of States … (*supra* note 7).

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[9] Article 29 of the mentioned Project: "*Continued duty of performance.*
The legal consequences of an internationally wrongful act in accordance with that set forth in this part do not affect the continued duty of the responsible State to perform the obligation breached."
On its part, Article 2 of the American Convention on Human Rights: *"Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."*

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

So ordered,

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary