

X

FORCED DISAPPEARANCE OF PERSONS

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

the arbitrary detention, solitary confinement, isolation and torture of the victim are followed, in most cases, by the execution of the victim and the concealment of his corpse, accompanied by an official silence, denials and obstruction; the family, friends and companions remain anxious and uncertain about the fate of the victim. Forced disappearance attempts to erase any trace of the crime in order to ensure the total impunity of those who committed it.

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

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

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

124. According to the Commission, at the time of the facts of this case, there was, in Guatemala, a State policy under which captured guerrillas were used to obtain information on the organization and activities of the rebel group of which they formed part. To achieve this, the agents who captured them kept their detention secret and submitted them to torture.

This situation constituted the phenomenon of forced disappearance, which often culminated with the execution of the person captured. This practice, which also sought to prevent any possibility of proving it, was applied to Efraín Bámaca Velásquez.

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

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

However, during the same hearing, the State added that

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

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

the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

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

[t]he person who, with the authorization or support of State authorities, shall, for political motives, in any way, deprive one or more persons of their liberty, concealing their whereabouts, refusing to reveal their fate or acknowledge their detention, and also the public official or employee, whether or not he is a member of a State security agency, who orders, authorizes, supports or acquiesces to such actions, shall commit the crime of forced disappearance⁸⁰.

128. Involuntary or forced disappearance constitutes a multiple and continuing violation of a number of rights protected by the Convention⁸¹, because not only does it produce an arbitrary deprivation of liberty, but it also endangers personal integrity, safety and the very life of the detainee. Moreover, it places the victim in a state of complete defenselessness, resulting in other related crimes.

129. This phenomenon also presumes "a disregard of the duty to organize the apparatus of the State in such a manner as to guarantee the rights recognized in the Convention"⁸². Therefore, when it implements or tolerates actions tending to execute forced or involuntary disappearances, when it does not investigate them adequately and does not punish those responsible, when applicable, the State violates the obligation to respect the rights protected by the Convention and to guarantee their free and full exercise⁸³, of both the victim, and of his next of kin to know his whereabouts⁸⁴.

80 *Cf. Blake Case, supra* note 52, para. 64.

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

82 *Ibid.*

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

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

130. According to the jurisprudence of this Court, forced disappearance "frequently involves secret execution [of those detained], without trial, following by concealment of the corpse in order to eliminate any material evidence of the crime and to ensure the impunity of those responsible"⁸⁵. Due to the nature of the phenomenon and its probative difficulties, the Court has established that if it has been proved that the State promotes or tolerates the practice of forced disappearance of persons, and the case of a specific person can be linked to this practice, either by circumstantial or indirect evidence⁸⁶, or both, or by pertinent logical inference⁸⁷, then this specific disappearance may be considered to have been proven⁸⁸.

131. Taking this into account, the Court attributes a high probative value to testimonial evidence in proceedings of this type, that is, in the context and circumstances of cases of forced disappearance, with all the attendant difficulties, when, owing to the very nature of the crime, proof essentially takes the form of indirect and circumstantial evidence⁸⁹.

132. This Court has considered proven, on the basis of both the circumstantial evidence and the direct evidence, that, as the Commission has indicated, at the time of the facts of the case, the Army had a practice of capturing guerrillas, detaining them clandestinely without advising the competent, independent and impartial judicial authority, physically and

85 Cf. *Godínez Cruz Case*, *supra* note 53, para. 165; and *Velásquez Rodríguez Case*, *supra* note 53, para. 157.

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

87 Cf. *Blake Case*, *supra* note 52, para. 49.

88 Cf. Similarly, *Blake Case*, *supra* note 52, para. 49; *Godínez Cruz Case*, *supra* note 53, paras. 127 and 130; and *Velásquez Rodríguez Case*, *supra* note 53, para. 124.

89 Cf. *Blake Case*, *supra* note 52, para. 51.

mentally torturing them in order to obtain information and, eventually, killing them (*supra* 121f). It can also be asserted, according to the evidence submitted in this case, that the disappearance of Efraín Bámaca Velásquez is related to this practice (*supra* 121 h, i, j, k, l), and therefore the Court deems it to have been proved.

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

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

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

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

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

- a) the detention of Efraín Bámaca Velásquez by agents of the Guatemalan armed forces and his captivity in a clandestine center, without presenting him before the judicial authorities, violated the right established in Article 7 of the Convention and Article 6 of the Guatemalan Constitution. This is concluded from the statements of various witnesses who describe military installations where Velásquez was detained;

b) on other occasions, the Commission has reached the conclusion that agents of the State have abducted persons and kept them prisoner in clandestine detention centers, located in installations of the armed forces, and this situation constitutes "a particularly serious form of arbitrary deprivation of liberty". These actions of State agents are beyond the law and, due to their secret nature, may not be examined; and

c) from the evidence in this case, it is proved that Bámaca Velásquez was alive in the hands of the Army up until at least May 1993, or even until August that year, without knowing the cause of his detention and in a place that was not "legally and publicly (destined to that end)", which proves that he "was not detained in accordance with the laws of Guatemala, and this implies that Article 7.2 of the Convention has been violated."

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

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

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

3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

[...]

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

[a]ccording to the first of these regulatory provisions, no one shall be deprived of his physical liberty, except for reasons, cases or circumstances specifically established by law (material aspect), but, also, under strict conditions established beforehand by law (formal aspect). In the second provision, we have a condition according to which no one shall be subject to arrest or imprisonment for causes or methods that - although qualified as legal - may be con-

sidered incompatible with respect for the fundamental rights of the individual because they are, among other matters, unreasonable, unforeseeable or out of proportion⁹⁰.

140. Both this Court⁹¹ and the European Court⁹² have considered that the prompt judicial supervision of detentions is of particular importance in order to prevent arbitrariness. An individual who has been deprived of his freedom without any type of judicial supervision should be liberated or immediately brought before a judge, because the essential purpose of Article 7 of the Convention is to protect the liberty of the individual against interference by the State. The European Court has stated that, although the word "immediately" should be interpreted according to the special characteristics of each case, no situation, however, grave, grants the authorities the power to unduly prolong the period of detention without affecting Article 5(3) of the European Convention⁹³. That Court emphasized that failure to acknowledge the detention of an individual is a complete denial of the guarantees that must be granted and an even greater violation of the Article in question⁹⁴.

141. In the same way, this Court has indicated that, by protecting personal liberty, a safeguard is also provided for

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

91 Cf. *Villagrán Morales et al. Case* (the "Street Children" Case), *supra* note 52, para. 135.

92 Cf. *Eur. Court HR*, *Aksoy v. Turkey*, *Judgment of 18 December 1996*, *Reports of Judgments and Decisions 1996-VI*, para. 76; *Eur. Court H.R.*, *Brogan and Others*, *Judgment of 29 November 1988*, *Series A* no. 145-B, para. 58; and *Eur. Court HR*, *Kurt v. Turkey*, *Judgment of 25 May 1998*, *Reports of Judgments and Decisions 1998-III*, para. 124.

93 Cf. *Castillo Petrucci et al. Case*, *supra* note 50, para. 108; and *Eur. Court H. R.*, *Case of Brogan and Others*, *supra* note 92, paras. 58-59, 61-62.

94 Cf. *Eur. Court HR*, *Kurt v. Turkey*, *supra* note 90, para. 124.

both the physical liberty of the individual and his personal safety [...], in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those arrested of the minimum legal protection.⁹⁵

142. In cases of forced disappearance of persons, the Court has stated that this represents a phenomenon of "arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention."⁹⁶

143. This Court has established as proven in the case being examined, that Efraín Bámaca Velásquez was detained by the Guatemalan army in clandestine detention centers for at least four months, thus violating Article 7 of the Convention (*supra* 121 I, j, k, l). Although this is a case of the detention of a guerrilla during an internal conflict (*supra* 121 b), the detainee should have been ensured the guarantees that exist under the rule of law, and been submitted to a legal proceeding. This Court has already stated that, although the State has the right and obligation to guarantee its security and maintain public order, it must execute its actions "within limits and according to procedures that preserve both public safety and the fundamental rights of the human person."⁹⁷

144. In view of the foregoing, the Court concludes that the State violated Article 7 of the American Convention to the detriment of Efraín Bámaca Velásquez.

95 *Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra* note 52, para. 135.

96 *Cf. Godínez Cruz Case, supra* note 53, paras. 163 and 196; *Fairén Garbi and Solís Corrales Case, supra* note 53, para. 148; and *Velásquez Rodríguez Case, supra* note 53, paras. 155 and 186.

97 *Cf. Durand and Ugarte Case, supra* note 56, para. 69; *Castillo Petrucci et al. Case, supra* note 50, paras. 89 and 204; *Godínez Cruz Case, supra* note 53, para. 162; and *Velásquez Rodríguez Case, supra* note 53, para. 154.

XII
VIOLATION OF ARTICLE 5
(RIGHT TO HUMANE TREATMENT)

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

- a) the forced disappearance of Efraín Bámaca Velásquez and his confinement in a clandestine detention center constitute violations of Article 5 of the Convention, because they represent cruel and inhuman forms of treatment that, according to the jurisprudence of this Court, injure the physical and moral integrity of the person and his dignity;
- b) the interrogations of Bámaca Velásquez by agents of the armed forces, during which his feet and hands were bound and he was tied to a bed, while he received death threats, constitute cruel, inhuman or degrading treatment, contrary to Articles 5(1) and 5(2) of the Convention;
- c) the acts of violence and physical abuse against the person of Bámaca Velásquez in San Marcos, presumably to punish him for his activity as a guerrilla and to obtain information on the guerrilla strategy, correspond to the figure of torture established in Article 5(2) of the American Convention;
- d) the fact that the State agents tried to conceal his corpse was designed "to eliminate any evidence of torture. Consequently, the fact that the body was concealed, leads to the presumption of torture". Moreover, the Army had the practice of torturing the guerrillas they captured, which was proved very exactly in the testimonies of Cabrera López, Urízar García and de la Roca, and also in the reports prepared by both the Commission for Historical Clarification and the REMHI;
- e) in the same way that the Court has established the inversion of the burden of proof with regard to the right to life in cases of

the forced disappearance of persons, the same reasoning must be applied to the violation of the right to humane treatment "and, in particular, [to] the torture of the victim, particularly in view of the characteristics of forced disappearance";

f) the State violated the right to humane treatment of the next of kin of Bámaca Velásquez as a result of "the anxiety and suffering that [they underwent as] a consequence of the forced disappearance of Efraín Bámaca Velásquez". The uncertainty caused by the lack of effectiveness of the remedies under domestic jurisdiction constituted cruel treatment. Furthermore, the fact that the remains of Bámaca Velásquez were not given proper burial has profound repercussions in the Mayan culture to which he belonged, "due to the fundamental importance of its culture and the active relationship that unites the living and the dead, [thus t]he lack of a sacred place where this relationship could be nurtured constitutes a profound concern that emerges from the testimonies of many Mayan communities"; and

g) the "Guatemalan public authorities not only obstructed the investigation into the fate of Mr. Bámaca [Velásquez] with a blanket of silence, [but] they also began a campaign of harassing Mrs. Harbury"; for example, through press campaigns, the legal action for jactitation, and her exclusion from the criminal proceedings. In view of the foregoing, the Commission requested the Court to declare that this article had been violated with regard to the next of kin of Bámaca Velásquez, who are: Jennifer Harbury, José de León Bámaca Hernández, the victim's father, and Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez, the victim's sisters.

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

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147. Article 5 of the Convention establishes that:

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

[...]

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

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

150. As this Court has already established, a "person who is unlawfully detained is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated"⁹⁸. We should add to the foregoing

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

that: "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being"⁹⁹. Solitary confinement produces moral and psychological suffering in the detainee, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in detention centers¹⁰⁰. Therefore, the Court has stated that, "in international human rights law [...] incommunicado detention is considered to be an exceptional instrument and [...] its use during detention may constitute an act against human dignity."¹⁰¹

151. With regard to the treatment of Bámaca Velásquez by the State authorities during his detention, the Court has taken into account a series of testimonial evidence given by former guerrillas, which may be classified as direct evidence, which indicates that Bámaca Velásquez was tortured by State agents at the various military bases where he was kept captive. The witness, de la Roca Mendoza, declared that Bámaca Velásquez was beaten and he heard his cries in the night (*supra* 93 C h); while the witness, Cabrera López, saw him swollen, tied up and with bandages on his extremities and his body (*supra* 93 C a).

152. As this Court has often repeated, in cases of forced disappearance, the State's defense cannot rely on the impossibility of the plaintiff to present evidence in the proceedings since, in such cases, it is the State that controls the means to clarify the facts that have occurred in its jurisdic-

99 Cf. *Fairén Garbi and Solís Corrales Case*, *supra* note 53, para. 149; *Godínez Cruz Case*, *supra* merits, paras. 164 and 197; and *Velásquez Rodríguez Case*, *supra* note 53, paras. 156 and 187.

100 Cf. *Castillo Petrucci et al. Case*, *supra* note 50, para. 195; and *Suárez Rosero Case*, *supra* note 53, para. 90.

101 Cf. *Cantoral Benavides Case*, *supra* note 56, para. 82; and *Suárez Rosero Case*, *supra* note 53, para. 90.

tion and, therefore, in practice, it is necessary to rely on the cooperation of the State itself in order to obtain the required evidence¹⁰².

153. In the same way, the United Nations Human Rights Committee has indicated that

the burden of proof cannot fall solely on the author of the communication, considering, in particular, that the author and the State Party do not always have equal access to the evidence and that, frequently, it is only the State Party that has access to the pertinent information [...]. In cases when the authors have presented charges supported by attesting evidence to the Committee [...] and in which subsequent clarification of the case depends on information that is exclusively in the hands of the State Party, the Committee may consider that those charges are justified unless the State Party presents satisfactory evidence and explanations to the contrary¹⁰³.

154. The probative elements gathered while processing this case lead the Court to consider proved the abuses that, it is alleged, were committed against Bámaca Velásquez during his reclusion in various military installation. The Court must now determine whether such abuses constitute torture or cruel, inhuman or degrading treatment. Clearly, it is important to state that both types of acts are strictly prohibited under any circumstance¹⁰⁴.

102 *Cf. Cantoral Benavides Case*, *supra* note 56, para. 55; *Neira Alegria et al. Case*. Judgment of January 19, 1995. Series C No. 20, para. 65; *Caso Gangaram Panday*, *supra* note 86, para. 49; *Godínez Cruz Case*, *supra* note 53, paras. 141 and 142; and *Velásquez Rodríguez Case*, *supra* note 53, paras. 135 and 136.

103 Communication *Hiber Conteris v. Uruguay*, No. 139/1983, paras. 182-186; [17th to 32nd sessions (October 1982 to April 1988)]. Selection of Decisions of the Human Rights Committee adopted in accordance with the Optional Protocol, Vol. 2, 1992.

104 *Cf. Cantoral Benavides Case*, *supra* note 56, para. 95.

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

[... a]ny use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person [...] in violation of Article 5 of the American Convention¹⁰⁵.

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

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

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

and adds:

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

105 *Cf. Cantoral Benavides Case, supra* note 56, para. 96; *Castillo Petrucci et al. Case, supra* note 50, para. 197; and *Loayza Tamayo Case, supra* note 52, para. 57.

158. The Court considers that the acts denounced in the present case were deliberately prepared and inflicted, in order to obtain information that was relevant for the Army from Efraín Bámaca Velásquez. According to the testimonies received in this proceeding, the alleged victim was submitted to grave acts of physical and mental violence during a prolonged period of time for the said purpose and, thus, intentionally placed in a situation of anguish and intense physical suffering, which can only be qualified as both physical and mental torture.

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

160. This Court has indicated on other occasions, that the next of kin of the victims of human rights violations may, in turn, become victims¹⁰⁶. In a case involving the forced disappearance of a person, the Court stated that the violation of the mental and moral integrity of the next of kin is precisely a direct consequence of the forced disappearance. In particular, the Court considered that the "circumstances of such disappearances generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate."¹⁰⁷

161. This Court has even stated, in the recent "*Street Children*" case, that the mothers of the victims suffered due to the negligence of the authorities in establishing the latter's identity; because the said State agents "did

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

107 Cf. *Blake Case*, *supra* note 52, para. 114.

not make the necessary efforts to immediately locate the relatives" of the victims and notify them of their death, delaying the opportunity to give them "burial according to their traditions"; because the public authorities abstained from investigating the corresponding crimes and punishing those responsible. In that case, the suffering of the victims' next of kin also arose from the treatment of the corpses, because they appeared after several days, abandoned in an uninhabited place with signs of extreme violence, exposed to the inclemency of the weather and the action of animals. Such treatment of the victims' remains, "which were sacred to their families and, particularly, their mothers, constituted cruel and inhuman treatment for them."¹⁰⁸

162. The jurisprudence of the European Court of Human Rights has also accepted that, when fundamental human rights are violated, such as the right to life or the right to humane treatment, the persons closest to the victim may also be considered victims. That Court had the occasion to go on record on the condition of victim of cruel, inhuman or degrading treatment of a mother due to the detention and disappearance of her son and, to this end, it evaluated the circumstances of the case, the gravity of the ill-treatment and the fact that she did not receive official information to clarify the facts. In view of these considerations, the European Court concluded that this person had also been a victim and that the State was responsible for violating Article 3 of the European Convention¹⁰⁹.

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

108 Cf. *Villagrán Morales et al. Case (the "Street Children" Case)*, *supra* note 52, para. 174.

109 Cf. *Eur. Court HR, Kurt v. Turkey*, *supra* note 90, paras. 130-134.

disappearance of the victim and the State's response to the steps undertaken¹¹⁰.

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

it understood the profound grief and anguish that the author of the communication suffered owing to the disappearance of her daughter and the continued uncertainty about her fate and her whereabouts. The author has the right to know what has happened to her daughter. In this respect, she is also a victim of violations of the [International] Covenant on Civil and Political Rights], in particular article 7 (corresponding to Article 5 of the American Convention], suffered by her daughter¹¹¹.

165. The Court has evaluated the circumstances of this case, particularly the continued obstruction of Jennifer Harbury's efforts to learn the truth of the facts and, above all, the concealment of the corpse of Bámaca Velásquez and the obstacles to the attempted exhumation procedures that various public authorities created, and also the official refusal to provide relevant information. Based on these circumstances, the Court considers that the suffering to which Jennifer Harbury was subjected clearly constitutes cruel, inhuman or degrading treatment, violating Article 5(1) and 5(2) of the Convention. The Court also considers that ignorance of the whereabouts of Bámaca Velásquez caused his next of kin the pro-

110 Cf. Eur. Court HR, *Timurtas v. Turkey*, Judgment of 13 June 2000; para. 95; and Eur. Court HR, *Çakıcı v. Turkey*, Judgment of 8 July 1999, para. 98.

111 Cf. United Nations Human Rights Committee, *Quinteros v. Uruguay*, 21 July 1983 (19th session) Communication N° 107/1981, para. 14; [17th to 32nd sessions (October 1982 to April 1988)]. Selection of Decisions of the Human Rights Committee adopted in accordance with the Optional Protocol, Vol. 2, 1992.

found anguish mentioned by the Committee and, therefore, considers that they, too, are victims of the violation of the said Article.

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

XIII **VIOLATION OF ARTICLE 4** **(RIGHT TO LIFE)**

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

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

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

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

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

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

171. The Court has already made it clear that

any person deprived of liberty has the right to live in conditions of detention that are compatible with his personal dignity, and the State must guarantee his right to life and to humane treatment. Consequently, the State, as the body responsible for detention establishments, is the guarantor of such rights of those detained¹¹².

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

[t]he protection against arbitrary deprivation of life that is explicitly required by the third phrase of Article 6(1) [of the International Covenant on Civil and Political Rights] is of paramount importance. The Committee considers that States Parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, [the State] must strictly control and limit the circumstances in which [a person] may be deprived of his life by such authorities¹¹³.

112 *Cf. Neira Alegria et al. Case*, *supra* note 102, para. 60.

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

173. In this case, the circumstances in which the detention by State agents of Bámaca Velásquez occurred, the victim's condition as a guerrilla commander, the State practice of forced disappearances and extrajudicial executions (*supra* 121 b, d, f, g) and the passage of eight years and eight months since he was captured, without any more news of him, cause the Court to presume that Bámaca Velásquez was executed¹¹⁴.

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

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

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

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

- a) the disappearance of Efraín Bámaca Velásquez by agents of the Guatemalan armed forces resulted in his exclusion from the legal and institutional system of the State, denying recognition of his very existence as a human being and, therefore, violated his right to be recognized as a person before the law; and
- b) according to Article 1(2) of the Declaration on the Protection of All Persons from Forced Disappearances, the phenomenon of

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

forced disappearance is defined as a violation of the rules of international law that guarantee, *inter alia*, the right to be recognized as a person before the law (Resolution 47/133 of the General Assembly of the United Nations, 18 December 1992).

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

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

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

180. In this respect, the Court recalls that the Inter-American Convention on Forced Disappearance of Persons (1994) does not refer expressly to the juridical personality among the elements that typify the complex crime of forced disappearance of persons. Naturally, the arbitrary deprivation of life suppresses the human being and, consequently, in these circumstances, it is not in order to invoke an alleged violation of the right to juridical personality or other rights embodied in the American Convention. The right to the recognition of juridical personality established in Article 3 of the American Convention has its own juridical content, as do the other rights protected by the Convention¹¹⁵.

115 Cf. *Durand and Ugarte Case*, *supra* note 56, para. 79.

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

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

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

- a) neither Bámaca Velásquez nor his wife received the judicial protection that the State must grant them, according to Articles 8, 25 and 1(1) of the Convention, not only because they did not have access to a simple recourse before a competent, independent and impartial authority, but also because the right of the next of kin of Bámaca Velásquez to know his fate and, then, the whereabouts of his remains, was violated;
- b) the State did not fulfill its obligation to conduct the pertinent investigations to save the life of Bámaca Velásquez, despite the contradictions established between the descriptions given by the magistrate and the coroner of the body found after the armed encounter. Moreover, the exhumation of May 20, 1992, was cancelled based on various obstacles that sought to "cover up the fact that Mr. Bámaca Velásquez was not buried in the Retalhuleu cemetery". If an investigation had been initiated at the time of the exhumation planned for May 20, 1992, that is, if the right to judicial protection of Bámaca Velásquez had been guaranteed, his life might have been saved. Although it was possible to conduct an exhumation in August 1993, and it was determined that the corpse exhumed was not that of Bámaca Velásquez, no other exhumation could be conducted;
- c) by keeping Bámaca Velásquez in clandestine detention, the State denied his right to file a judicial recourse by his own means;

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

- d) with regard to the special pre-trial investigation initiated by the Ombudsman in 1994, the Commission stated that, although it "constituted [...] the first serious investigation effort", during which members of the armed forces who were allegedly involved in the facts were questioned (*supra* 81), this process "was begun too late to save [the] life" of Bámaca Velásquez. Moreover, the armed forces obstructed the investigation, both by not telling the truth when questioned and also by not presenting the evidence required by the Attorney General; therefore, it cannot be considered that adequate judicial protection was provided;
- e) the number of judicial proceedings filed in this case without results "constitute[s] an omission of the right to judicial protection and a way of tormenting Mrs. Harbury", and the acts of violence that have occurred, have prevented the execution of a valid investigation, which offers due judicial protection. The State has not fulfilled the obligation to conduct a serious investigation and, "instead of seeking the truth, the Government [has attempted] to defend itself and to defend its agents against any claim owing to an illegal action". The Commission added that the "procedures initiated at the end of [19]94 were not [directed] to clarifying the case, but rather to distracting public attention and harassing Mrs. Harbury";
- f) Jennifer Harbury has cooperated with the domestic procedures in Guatemala; the State "cannot renounce its responsibility to conduct the necessary investigations, in fulfillment of the provisions of Article 1(1) of the Convention, and transfer to Mrs. Harbury the obligation to ensure that the process moves forward". To

the contrary, the case history shows that Government agents have harassed Jennifer Harbury in reprisal for her attempts to obtain justice in the Guatemalan tribunals; and

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

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

* * *

184. Article 8 of the American Convention establishes:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

- b) prior notification in detail to the accused of the charges against him;
- c) adequate time and means for the preparation of his defense;
- d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- g) the right not to be compelled to be a witness against himself or to plead guilty; and
- h) the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

185. Article 25 de la American Convention provides that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for

protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b) to develop the possibilities of judicial remedy; and
- c) to ensure that the competent authorities shall enforce such remedies when granted.

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

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

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

187. With regard to Bámaca Velásquez, the State expressly left outside its recognition of responsibility (*supra* 24) "the Commission's assertion in numeral II, subparagraph 2" of the application, that is to say, that the

alleged victim "disappeared after an exchange of fire between the Army and the guerrilla near the Ixcucua River [...and] that the Guatemalan armed forces captured Mr. Bámaca alive after the skirmish and imprisoned him secretly in several military detachments, where they tortured and, eventually executed him". Therefore, it does not recognize the detention, torture and disappearance of Bámaca Velásquez, nor does it state that it has accepted the violation of his guarantees embodied in Article 8 and the judicial protection established in Article 25 of the Convention, so that it corresponds to the Court to analyze this alleged violation based on the elements presented by the parties.

188. This Court has recently indicated that

[i]n order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceedings¹¹⁶.

189. Likewise, the European Court has indicated that the procedures should be considered as a whole, including the decisions of the appeals tribunals, and that the function of the international tribunal is to determine if all the procedures, and the way in which the evidence was produced, were fair¹¹⁷.

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

116 Cf. *Villagrán Morales et al. Case (the "Street Children" Case)*, *supra* note 52, para. 222.

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

191. This Court has repeated that it is not sufficient that such recourses exist formally, but that they must be effective¹¹⁸; that is, they must give results or responses to the violations of rights established in the Convention. In other words, every person has the right to a simple and prompt recourse or to any effective recourse before competent judges or tribunals that protects him against the violation of his fundamental rights¹¹⁹. This guarantee "constitutes one of the basic pillars, not only of the American Convention, but also of the rule of law in a democratic society according to the Convention"¹²⁰. Moreover, as the Court has also indicated,

[t]hose remedies which prove illusory, due to the general situation of the country or even the particular circumstances of any given case, cannot be considered effective¹²¹.

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

118 *Cf. Caso Cesti Hurtado*. Judgment of September 29, 1999. Series C No. 56, para. 125; *Caso Paniagua et al.*, *supra* note 50, para. 164; *Suárez Rosero Case*, *supra* note 53, para. 63; *Godínez Cruz Case*, *supra* note 53, paras. 66, 71 and 88; and *Velásquez Rodríguez Case*, *supra* note 53, paras. 63, 68 and 81.

119 *Cf. Cantoral Benavides Case*, *supra* note 56, para. 163; *Durand and Ugarte Case*, *supra* note 56, para. 101; *Caso Cesti Hurtado*, *supra* note 118, para. 121; *Castillo Petrucci et al. Case*, *supra* note 50, para. 185; and *Judicial Guarantees in States of Emergency* (Articles 27(2), 25 and 8, American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.

120 *Cf. Cantoral Benavides Case*, *supra* note 56, para. 163; *Durand and Ugarte Case*, *supra* note 56, para. 101; *Villagrán Morales et al. Case (the "Street Children" Case)*, *supra* note 52, para. 234; *Caso Cesti Hurtado*, *supra* note 118, para. 121; *Castillo Petrucci et al. Case*, *supra* note 50, para. 184; *Paniagua Morales et al. Case*, *supra* note 50, para. 164; *Blake Case*, *supra* note 52, para. 102; *Suárez Rosero Case*, *supra* note 53, para. 65 and *Castillo Pérez Case*, *supra* note 52, para. 82.

121 *Cf. Judicial Guarantees in States of Emergency* (Articles 27(2), 25 and 8, American Convention on Human Rights), *supra* note 117, para. 24.

nation of his place of detention, and also to protect the individual from torture or other to cruel, inhuman or degrading punishment or treatment¹²².

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

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

taking all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees. Any State which tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is consequently in violation of Article 1(1) of the Convention¹²³.

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

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

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

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

XVI **RIGHT TO THE TRUTH**

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

198. The State limited its defense to stating that "it has still not been possible to identify the persons or person criminally responsible for the unlawful acts against Mr. Bámaca [Velásquez] and, thus, clarify his disappearance" and, consequently, it did not put forward any defense in relation

to the alleged violation of the right to the truth, either at the procedural opportunity of the answer to the application or in its final arguments.

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

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

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

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

XVII

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

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

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

204. With regard to applying international humanitarian law to the case, in its final oral arguments the State indicated that, although the case was

instituted under the terms of the American Convention, since the Court had "extensive faculties of interpretation of international law, it could [apply] any other provision that it deemed appropriate."

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

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

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

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

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

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[...]

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

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

209. Indeed, there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the *Las Palmeras Case* (2000), that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention¹²⁴.

210. Based on Article 1(1) of the American Convention, the Court considers that Guatemala is obliged to respect the rights and freedoms

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

recognized in it¹²⁵ and to organize the public sector so as to guarantee persons within its jurisdiction the free and full exercise of human rights¹²⁶. This is essential, independently of whether those responsible for the violations of these rights are agents of the public sector, individuals or groups of individuals¹²⁷, because, according to the rules of international human rights law, the act or omission of any public authority constitutes an action that may be attributed to the State and involve its responsibility, in the terms set out in the Convention¹²⁸.

211. The Court has confirmed that there existed and still exists in Guatemala, a situation of impunity with regard to the facts of the instant case (*supra* 134, 187 and 190), because, despite the State's obligation to prevent and investigate¹²⁹, it did not do so.. The Court understands impunity to be

the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human right violations, and total defenselessness of victims and their relatives¹³⁰.

125 *Cf. Caballero Delgado and Santana Case*. Judgment of December 8, 1995. Series C No. 22, paras. 55 and 56; *Fairén Garbi and Solís Corrales Case*, *supra* note 53, para. 161; and *Velásquez Rodríguez Case*, *supra* note 53, para. 165.

126 *Cf. Caballero Delgado and Santana Case*, *supra* note 125, paras. 55 and 56; *Godínez Cruz Case*, *supra* note 53, paras. 175 and 176; and *Velásquez Rodríguez Case*, *supra* note 53, paras. 166 and 167.

127 *Paniagua Morales et al. Case*, *supra* note 50, para. 174.

128 *Cf. Caballero Delgado and Santana Case*, *supra* note 125, para. 56; *Godínez Cruz Case*, *supra* note 53, para. 173; and *Velásquez Rodríguez Case*, *supra* note 53, para. 164.

129 Understanding this figure as established in reiterated jurisprudence, *Castillo Páez Case*, *supra* note 52, para. 90; *Caballero Delgado and Santana Case*, *supra* note 125, para. 58; and *Velásquez Rodríguez Case*, *supra* note 53, paras. 174-177.

130 *Paniagua Morales et al. Case*, *supra* note 50, para. 173.

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

in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government¹³¹.

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

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

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

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

a) this Convention, ratified by Guatemala on January 29, 1987, develops the principles contained in Article 5 of the American

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

Convention in greater detail and, therefore, constitutes an auxiliary instrument to the Convention;

- b) the treatment that Bámaca Velásquez suffered at the hands of Government agents constitutes torture in the terms of the said Convention; and
- c) based on Article 8 of the Inter-American Convention against Torture and 29 of the American Convention, the Court is competent to directly apply that instrument.

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

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

1. The States Parties undertake to prevent and punish torture in accordance with the terms of the Convention.

[...]

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

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

[...]

6. In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman or degrading treatment or punishment within their jurisdiction.

[...]

8. The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by the State.

218. This Court has had the occasion to apply the Inter-American Convention against torture and to declare the responsibility of a State owing to its violation¹³².

132 *Cf. Cantoral Benavides Case*, *supra* note 56, para. 185; *Villagrán Morales et al. Case (the "Street Children" Case)*, *supra* note 52, para. 249; and *Paniagua Morales et al. Case*, *supra* note 50, para. 136.

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

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

221. Article 8 of the Inter-American Convention against Torture expressly embodies the State's obligation to proceed immediately *de oficio* in cases such as this one. Therefore, the Court has stated that "in proceedings on human rights violations, the State's defense cannot rest on the impossibility of the plaintiff to obtain evidence that, in many cases, cannot be obtained without the State's cooperation"¹³³. However, in this case, the State did not act in accordance with these provisions.

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

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

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

XIX

ARTICLE 63(1)

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

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

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

[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

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

228. In view of the nature of the instant case, although the Court is unable to order that the injured parties should be guaranteed the enjoy-

ment of the rights and liberties violated, by means of the *restitutio in integrum*, it must, instead, order the reparation of the consequences of the violation of the rights mentioned and, consequently, the establishment of fair compensation. The amounts and form of this will be determined during the reparations stage.

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

XX **OPERATIVE PARAGRAPHS**

230. Therefore,

THE COURT,

unanimously,

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

unanimously,

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

unanimously,

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

unanimously,

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

unanimously,

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

unanimously,

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

unanimously,

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

unanimously,

8. decides that the State should order an investigation to determine the persons responsible for the human rights violations referred to in this

Judgment, and also to publicly disseminate the results of such investigation and punish those responsible.

unanimously,

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

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

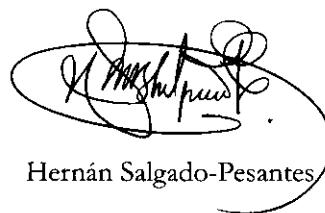
Done in Spanish and English, the Spanish text being authentic, at San José, Costa Rica, on November 25, 2000.



Antônio A. Cançado Trindade
President



Máximo Pacheco-Gómez



Hernán Salgado-Pesantes



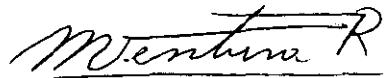
Alirio Abreu-Burelli



Sergio García-Ramírez



Carlos Vicente de Roux-Rengifo



M. Ventura R

Manuel E. Ventura-Robles
Secretary

So ordered,



AA Cançado Trindade

Antônio A. Cançado Trindade
President



M. Ventura R

Manuel E. Ventura-Robles
Secretary