

**Inter-American Court of Human Rights**

**Case of *Bámaca-Velásquez v. Guatemala***

**Judgment of February 22, 2002  
(Reparations and Costs)**

In the *Bámaca Velásquez* case,

The Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), composed of the following judges<sup>1</sup>:

Antônio A. Cançado Trindade, President  
Alirio Abreu Burelli, Vice-President  
Hernán Salgado Pesantes, Judge  
Oliver Jackman, Judge  
Sergio García Ramírez, Judge and  
Carlos Vicente de Roux Rengifo, Judge;

also present,

Manuel E. Ventura Robles, Secretary, and  
Pablo Saavedra Alessandri, Deputy Secretary,

pursuant to Articles 29, 55, 56(1) and 57 of the Rules of Procedure of the Court<sup>2</sup> (hereinafter "the Rules of Procedure"), in connection with Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and considering the provisions of operative paragraphs eight and nine of the November 25, 2000 judgment, delivers the instant Judgment on reparations.

**I  
COMPETENCE**

1. Pursuant to Articles 62 and 63(1) of the Convention, the Court is competent to decide on reparations, costs and expenses in the instant case, in view of the fact that the Republic of Guatemala (hereinafter "Guatemala" or "the State") ratified the American Convention on May 25, 1978, and on March 9, 1987 recognized the obligatory jurisdiction.

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<sup>1</sup> Judge Máximo Pacheco-Gómez informed the Court that for reasons of *force majeure*, he was unable to attend the LIV Regular Session of the Court, for which reason he did not participate in the deliberation and signing of the instant Judgment.

<sup>2</sup> In accordance with the March 13, 2001 Court Order on Temporary Provisions of the Rules of Procedure of the Court, the instant Judgment on reparations is rendered under the terms of the Rules of Procedure adopted in the September 16, 1996 Court Order.

## II BACKGROUND

2. The instant case was filed with the Court by the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) in its August 30, 1996 application. On October 31, 1996, the State filed a preliminary objection that it subsequently withdrew.<sup>3</sup> On November 25, 2000, the Court rendered its judgment on the merits of the case, unanimously ruling that it:

1. [found] 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.

...

2. [found] 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 [...] León Bámaca Velásquez, Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez.

...

3. [found] 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.

...

4. [found] 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.

...

5. [found] that the State violated the right to fair trial 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 [...] León Bámaca Hernández, Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez.

...

6. [found] 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 [the aforementioned] Judgment.

...

7. [found] 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.

...

8. decide[d] that the State should order an investigation to determine the persons responsible for the human rights violations referred to in [the aforementioned]

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<sup>3</sup> In its April 16, 1997 Order, the Court stated that “the preliminary objection filed by the State has been withdrawn by the State [and the Court ordered that] the case proceedings on the merits should continue”. The Court also deemed, in its February 5, 1997 Order, “[t]hat in examining the briefs filed by Guatemala the Court cannot conclude that the facts stated in the application have been accepted and, therefore, it must continue to hear the matter”.

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

...

9. decide[d] that the State should remedy the damages caused by the violations indicated in decisions 1 to 7, and to this effect authorize[d] its President to duly order the opening of the reparations stage.

### **III PROCEEDING AT THE REPARATIONS STAGE**

3. On February 9, 2001, in compliance with operative paragraph nine of the judgment on the merits, the President of the Court (hereinafter "the President") decided:

1. To grant the next of kin of the victim or their representatives, the Inter-American Commission on Human Rights and the State of Guatemala 60 days time, starting when notice of this ruling is served, to file their arguments and the evidence they deem[ed] appropriate for the determination on reparations.

2. To summon the next of kin of the victim or their representatives, the Inter-American Commission on Human Rights and the State of Guatemala, in a timely manner, to a public hearing, once the written stage of the proceedings has concluded.

4. On April 5, 6 and 10, 2001, the victims, as well as next of kin and representatives of the victims (hereinafter "the representatives of the victims"), the Inter-American Commission and the State, respectively requested extensions of the period to file their briefs on reparations. These extensions were granted by the President to all intervening parties, until May 8 of that year.

5. On May 8, 2001, the representatives of the victims, the Commission and the State filed their arguments and evidence regarding reparations.

6. On August 28, 2001, the Secretariat requested that the Commission and the representatives of the victims submit the definitive list of witnesses and expert witnesses to be heard at the public hearing on reparations. On September 11, 2001, those representatives sent the list that had been requested as well as the *curriculum vitae* of the expert witness proposed. That same day the President granted the State up to September 17, 2001 to file its observations on the proposed expert witness, and the State filed no observations in this regard.

7. On September 24, 2001, the President called the representatives of the victims, the Commission and the State to a public hearing on reparations to begin on November 28, 2001, at the seat of the Court.

8. On November 20, 2001, Mrs. Jennifer Harbury sent a brief to the Court reporting the existence of a sister of Mr. Efraín Bámaca Velásquez, on his mother's side.

9. On November 28 and 29, 2001, the Court heard the testimony of the witnesses and the expert witness offered by the Commission and the representatives of the victims, at a public hearing, as well as their final conclusions on reparations in the instant case.

There appeared before the Court:

for the next of kin of the victims:

Viviana Krsticevic;  
Juan Carlos Gutiérrez; and  
Sol Blanchard.

for the Inter-American Commission:

Claudio Grossman, delegate; and  
Elizabeth Abi-Mershed, attorney.

for the State of Guatemala:

Cruz Munguía Sosa, advisor;  
Carlos Roberto Sandoval Aldana, advisor; and  
Olmedo España, advisor.

Witnesses proposed by the representatives of the victims and by the Commission:

Jennifer Harbury;  
José León Bámaca Hernández (Interpreter: Carlos Juárez);  
Juan José Monterroso;  
Manuela Alvarado;  
Emily Jones; and  
Patricia Davis<sup>4</sup>.

Expert witness proposed by the representatives of the victims and by the Commission:

Ana Deutsch.

10. On December 4, 2001, following instructions by the Court and pursuant to Article 44 of its Rules of Procedure, the Secretariat requested that the State file certain documents as evidence to facilitate adjudication of the case. On January 10 and 18, 2002, the State forwarded the documentation requested (*infra* 19). On January 21, 2002, the Secretariat forwarded the documentation gathered as evidence to facilitate adjudication of the case.

#### **IV EVIDENCE PERTAINING TO REPARATIONS**

11. Before analyzing the evidence received, in this chapter the Court will specify the general criteria for evidence assessment, it will examine them, carry out an evaluation and consider certain aspects pertaining to the specific case, most of which have previously been developed in case law by this Court.

12. Article 43 of the Rules of Procedure of the Court states that

[i]tems of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto [...]. Should

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<sup>4</sup> Although the Court summoned Patricia Davis, she did not appear to render testimony.

any of the parties allege *force majeure*, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing parties are guaranteed the right of defense.

13. Article 44 of the Rules of Procedure states that at any stage of the proceedings the Court may:

1. Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.
2. Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful.
3. Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorization of the Court.

[...]

14. As the Court has repeatedly pointed out, in the reparations stage the parties must state the evidence they wish to submit, when they are given the opportunity to make their written statement on said reparations, and the Court in turn can exercise its discretionary powers, when it deems it appropriate to do so, in connection with obtaining evidence to facilitate adjudication of the case, without this representing a new opportunity for the parties to expand or complete their arguments or to offer other evidence on reparations, unless the Court decides to allow this.<sup>5</sup>

15. The Court has also stated repeatedly that the procedures it follows are not subject to the same formalities as those under domestic jurisdiction, and that inclusion of certain items to the body of evidence must be done paying special attention to the circumstances of the specific case and bearing in mind the limits given by respect for legal certainty and for procedural balance among the parties.<sup>6</sup> International case law has established that courts have the power to appraise and assess evidence according to the rules of competent analysis<sup>7</sup> and it has always

<sup>5</sup> See the *Cantoral Benavides Case. Reparations (Art. 63(1) of the American Convention on Human Rights)*. December 3, 2001 Judgment. C Series No. 89, para. 21; *Cesti Hurtado Case. Reparations (Art. 63(1) American Convention on Human Rights)*. May 31, 2001 Judgment. C Series No. 78, para. 20; *Villagrán Morales et al. Case. Reparations (Art. 63(1) American Convention on Human Rights)*. May 26, 2001 Judgment. C Series No. 77, para. 39; and *Paniagua Morales et al. Case. Reparations (Art. 63(1) American Convention on Human Rights)*. May 25, 2001 Judgment. C Series No. 76, para. 50.

<sup>6</sup> See the *Cantoral Benavides Case. Reparations, supra note 5*, para. 22; *Cesti Hurtado Case, Reparations, supra note 5*, para. 21; *Villagrán Morales et al. Case, Reparations, supra note 5*, para. 40; *Paniagua Morales et al. Case, Reparations, supra note 5*, para. 51; *Ivcher Bronstein Case*. February 6, 2001 Judgment. C Series No. 74, para. 65; *"The Last Temptation of Christ" Case (Olmedo Bustos et al.)*. February 5, 2001 Judgment. C Series No. 73, para. 49 and 51; *Ricardo Baena et al. Case*. February 2, 2001 Judgment. C Series No. 72, para. 71 and 76; *Case of the Constitutional Court*. January 31, 2001 Judgment. C Series No. 71, para. 45; *Bámaca Velásquez Case*. November 25, 2000 Judgment. C Series No. 70, para. 96; *Castillo Petruzzi et al. Case*. May 30, 1999 Judgment. C Series No. 52, para. 61; *Castillo Páez Case. Reparations (Art. 63(1) American Convention on Human Rights)*. November 27, 1998 Judgment. C Series No. 43, para. 38; *Loayza Tamayo Case. Reparations (Art. 63(1) American Convention on Human Rights)*. November 27, 1998 Judgment. C Series No. 42, para. 38; *Paniagua Morales et al. Case*. March 8, 1998 Judgment. C Series No. 37, para. 70; *Certain Functions of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights)*. Advisory Opinion OC-13/93 of July 16, 1993. A Series No. 13, para. 43; and *Cayara Case, Preliminary Objections*. February 3, 1993 Judgment. C Series No. 14, para. 42.

<sup>7</sup> See *Cantoral Benavides Case, Reparations supra note 5*, para. 23; *Mayagna (Sumo) Awas Tingni Community Case*. August 31, 2001 Judgment. C Series No. 79, para. 88; *Cesti Hurtado Case, Reparations, supra note 5*, para. 21; *Villagrán Morales et al. Case, Reparations, supra note 5*, para. 40; *Paniagua*

avoided rigid determination of the *quantum* of evidence necessary to substantiate a decision.<sup>8</sup>

16. These principles apply to the merits of this matter and equally so to the reparations stage, for which reason, in accordance with said principles, the Court will now examine and assess the evidence filed in the instant case, following the rules of competent analysis and within the applicable legal framework.

*a) DOCUMENTARY EVIDENCE*

17. As appendices to the brief on reparations, the representatives of the victims filed copies of 383 documents included in 26 appendices (*supra* 5)<sup>9</sup>.

18. In its observations on reparations on May 8, 2001, the Commission endorsed the evidence submitted by the representatives of the victims. The State did not submit any evidence in its brief with observations on the reparations.

19. On January 10 and 18, 2002, the State filed two documents in compliance with a request made by the Court as a measure to facilitate adjudication of the case, pursuant to Article 44 of its Rules of Procedure.<sup>10</sup>

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*b) TESTIMONIAL EVIDENCE*

20. At the public hearing on November 28 and 29, 2001, the Court heard the testimony of the witnesses offered by the representatives of the victims and the Inter-American Commission, summarized below in the order it was rendered:

**a) Testimony of Jennifer Harbury, attorney, a United States citizen, and the widow of Efraín Bámaca Velásquez**

Efraín Bámaca Velásquez was an intelligent person, with an interest in learning, humble and kind to his people. Due to his Mayan principles, he was always concerned about providing financial support to his family at all times. He talked, for

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*Morales et al. Case, Reparations, supra* note 5, para. 51; *Ivcher Bronstein Case, supra* note 6, para. 69; "The Last Temptation of Christ Case" (*Olmedo Bustos et al.*), *supra* note 6, para. 54; *Baena Ricardo et al. Case, supra* note 6, para. 70 and 72; *Case of the Constitutional Court, supra* note 6, para. 49; *Bámaca Velásquez Case, supra* note 6, para. 100; *Cantoral Benavides Case*. August 18, 2000 Judgment. C Series No. 69, para. 52; *Durand and Ugarte Case*. August 16, 2000 Judgment. C Series No. 68, para. 53-56; *Villagrán Morales et al. Case*. November 19, 1999 Judgment. C Series No. 63, para. 71; *Castillo Páez Case, Reparations, supra* note 6, para. 40; *Loayza Tamayo Case, Reparations, supra* note 6, para. 57; and *Paniagua Morales et al. Case, supra* note 6, para. 76.

<sup>8</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para. 60.

<sup>9</sup> See File "Appendices with evidence submitted by the representatives of the victims together with the brief on Reparations", at the Secretariat of the Inter-American Court of Human Rights, Volume I, fs. 1-171; and file "invoices pertaining to air travel expenses, hotel expenses, land transportation expenses, gasoline, car rental, phone call charges, faxes, photocopies, notary public services, courier, authentications and translations, and payment for legal services under domestic jurisdiction", at the Secretariat of the Inter-American Court of Human Rights, Volume II, fs. 172-479.

<sup>10</sup> See *Legal provisions on economic advantages for workers of the public and private sector sent by the State and table on reference exchange rates for the year 2001*, Volume II of the file on Reparations at the Secretariat of the Inter-American Court of Human Rights, fs. 253-269 and 276.

example, of how his mother had died when he was still small; he mentioned that he had sisters and he was concerned about them, about how they lived, because he knew they suffered hunger, and about this situation and their malnutrition and health, as well as the repression and dangers they faced. He spoke a lot about his father, and remembered that they always worked together.

While he was militant in the guerrilla forces, he stopped communicating with his relatives so as to protect them and prevent their being persecuted because he was a guerrilla fighter. He was concerned about their situation, and he often remembered the time when they lived together, and he thought that, as the war was gradually ending, he would be able to arrange a meeting with them, perhaps on the other side of the Mexican border, perhaps in Tapachula, but he feared for their safety.

His personal qualities as an indigenous leader led him to participate with the Commanders of the Unidad Revolucionaria Nacional Guatemalteca (hereinafter "URNG") in the Peace Process in Guatemala, beginning in 1991, primarily in the area of indigenous rights. He also felt an obligation and responsibility to participate as a leader in the public life of his country during the transition toward peace, and possibly once the conflict ended he would have begun to work through the Toriello Foundation, an organization in charge of various social projects, where other former members of the URNG and friends of Efraín Bámaca Velásquez are working. "[H]e was always concerned, he remembered the hunger and poverty of his people and he was fond of them, and it is also the Mayan culture, [...] in which of course all the family is one".

The expectations of the witness regarding her future life with Efraín Bámaca Velásquez were like those of any person involved in a war. She thought that their personal life would be rather difficult. She knew there would be periods of separation and although there was the possibility of his dying, they had the hope of having children and living together in Guatemala, once peace was attained in that country. The hope of being together and having a normal life after the peace accord gave them energy.

Her life changed completely as a consequence of her husband's disappearance. She felt forced to abandon her professional obligations as an attorney, as well as to sell her belongings. The search for her husband affected her quite a lot financially.

With the purpose of determining his whereabouts, she went before various administrative authorities, filed several *habeas corpus* remedies before the competent courts, talked to congressmen, and took steps with international organizations. At that time, she received psychological pressure from State agents, and there was a defamation campaign against her. She even went on hunger strikes, "but no, [she] was not able to save his life, he was murdered". The hunger strikes were useful to find out the truth about what had happened to him, and they had important physical consequences, such as a drastic loss of weight, neurological damage to one of her eyes, problems with her metabolism and her heart.

Capture and disappearance of her husband, as well as obstruction and lack of administration of justice regarding steps taken within the country to search for her husband caused her great emotional suffering, especially due to previous experience with victims of human rights violations in Guatemala, as she was aware of the situation of torture that he might suffer. "[T]his meant amputation of genitals, amputation of hands [...], burning with cigarettes, cutting [of] tongue, [asphyxia]

with a hood full of *gamesán* to avoid convulsions; [being] hung from behind by the hands and [...] being in a hole under ground [...]; electric shocks were quite common.”

In this regard, the search process caused contradictory feelings in her, because although she still hoped to find him alive, she was also convinced that for him to remain alive in the hands of the army meant more torture and more suffering for him, a situation that worsened with the steps she was carrying out.

When she found out that her husband was dead she fell into a deep depression, and she felt guilty of not having done enough to avoid that happening. The possibility of being a couple and of having a future until their natural death, the possibility of having children with him and the possibility of having a family ended with the news of the death of Efraín Bámaca Velásquez. However, afterwards she was able to handle the pain better and she felt that she could not abandon the struggle for human rights and against impunity. The main consequence she suffers today is having nightmares about what happened to her husband while he was detained by State agents.

As regards the next of kin of Mr. Bámaca Velásquez, she expressed that she is very fond of them and meets often with them. She stated that “when [she] hear[s] the father[,] [she] hear[s] exactly the voice of Everardo, [...] he has the same accent, the same manner, the same expressions”. She also stated that she is very fond of her husband’s sisters and nephews and gives them financial support, which they use to improve their nutrition and to repair their homes.

Receiving economic compensation from the Inter-American Court of Human Rights is important to contribute to combating impunity in Guatemala, and it also has a symbolic value to compensate for the suffering of her husband. She emphasized that once that compensation has been granted, she wishes to give it in full to the next of kin of Mr. Bámaca Velásquez.

She believes it is very important to have the mortal remains of her husband, as she does not want them “to remain in the hands [of the army]” and she also feels the need to “have him in [her] arms once again”. However, she has not attempted to look for her husband’s body again due to lack of protection, to threats and to fear for her safety and that of those who help her. However, she still believes that her participation in the disinterments is fundamental to ensure that the authorities do not commit another act of deceit with his body. In this regard, she stated that she “[does] not agree with the army [continuing] this fraud that [Mr. Bámaca Velásquez was] dead [...] there in the pit in Retalhuleu, [when actually] they had him with all his body in a cast, under drugs, suffering torture, injected with a gas until they make him swell horribly [...]. [She does] not want him [to have undergone] and suffer[ed] all this and for them to have the right to throw him below, perhaps, their military base, under their latrines, inside a trench or anonymous, [...] as if he were Indian garbage, according to their mentality, as a symbol that no human being, no Indian had the right to claim their rights. What they want [is to keep him] under [their] boot”.

She stated that what she has left of her husband is “his uniform, his backpack and his boots, the clothes that he normally use[d] [...], [she has] his letters, [...] her memories of him, the ideals they shared, and [she has his] good name”.

Finally, she pointed out that she seeks “compensation because it is the only way to put an end to impunity, [...] in Guatemala; [she] want[s] that so [that] the family can also have better, more opportunities for the young ones, the nephews and nieces [...]. [She] also want[s] [...] the freedom [to be able to speak] openly in [Guatemala], without censorship, without the truth being distorted in this case, and also to put an end to impunity. [She] want[s] the next of kin [...] to suffer no more attacks, for there to be no more harassment, [...] and for [herself she] want[s] his remains.”

**b) Testimony of José Leon Bámaca Hernández, father of Efraín Bámaca Velásquez, the victim**

He is seventy-eight years old, and his occupation is that of stevedore. He and Cornelia Velásquez had four children: Efraín was the elder son, then came Egidia Gebia, Josefina, and another boy who died. The witness also stated that he is the stepfather of Alberta Velásquez.

As a child, Efraín Bámaca Velásquez was very intelligent and had learned how to read and write with his grandmother, because where they lived there were no teachers. He also worked picking coffee on the farm called El Tablero, where he earned half the salary of a regular worker. He gave half the money he received for wages to his parents, to help buy food for the household; however, when he turned 18 he went to Guatemala City to try to get another job, and for this reason he left his home, and was never seen again.

All the family loved Efraín very much, and for this reason they felt deeply sad when they heard of his death. They still do not know where the mortal remains of Efraín Bámaca Velásquez are, and therefore they want to receive those remains to be able to bury them appropriately at the cemetery in Santa Elena, where other relatives of the victim were buried. For this, he requested help from the Inter-American Court.

**c) Testimony of Juan José Monterroso, a Guatemalan anthropologist specializing in rural development**

As part of the Human Rights Program of the Bishopric of San Marcos, he has helped provide financial support to the father and sisters of Efraín Bámaca Velásquez since 1996. He stated that recently a sister of his, Alberta, has reentered the family nucleus, and Egidia Gebia Bámaca Velásquez mentioned that there was a very close relationship between Alberta and Efraín, as a result of the death of their mother.

The financial situation of the Bámaca Velásquez family has been very precarious. José León Bámaca Velásquez is retired, and as such he receives a minimal financial support of Q320,00 (three hundred and twenty quetzales). Beyond that, he has no “regular job other than at harvest time”, on the farm called El Tablero, in El Tumbador. Both Josefina and Egidia Gebia, who in turn have children who are economically dependent on them, work during the harvest at the same place as their father, even though “they are paid half the salary that is sometimes paid to men”, while the latter salary does not always reach the legal minimum.

The fact that a member of the family belonged to the guerrilla forces placed the rest of the family at risk, since they could be tortured as a means to apply pressure for the member involved in a revolutionary organization to be forced to “give up that type of actions”. Lack of contact between Efraín Bámaca Velásquez and his family,

during the conflictive period, was to “avoid creating any risk to the family that might endanger the life of any of them”.

Lack of due administration of justice has caused a feeling of frustration in the family, one “of fear and uncertainty about [what] is happening”.

The witness highlighted that for the family it is very important to obtain the body of the deceased person and to conduct funeral ceremonies, for the spirit of that person to rejoin its body, to complete the process of reuniting with his ancestors and to “close [for the deceased person and for the community] the cultural cycle: life and death”. In this regard, burials signify a space for festivity and joy, in which the relatives entrust things to the deceased person, add food for him to take to the relatives who have died before and to continue enjoying a relationship with his family. The witness stressed the existence of “a pedagogical circle [...] in these meetings with the ancestors and this revitalizes and [...] allows the continuation of an integrated culture, and for ethical and moral values to be internalized by grandchildren and children, [who...] are now to [...] be nurtured by all that experience”.

“[T]he serious damage is to the surviving family”, since the projection of Efraín Bámaca Velásquez in the surviving relatives has been hindered. The loss of Efraín as the elder son of a family of the Mayan culture, of the Mam ethnic group, has deprived his family of an economic mainstay and a figure of authority.

**d) Testimony of Manuela Alvarado, a Maya Quiché indigenous leader and former congresswoman in Guatemala**

Since early 1980, she was the head nurse in several health posts in the country, for which reason she was in close touch with what was happening in Guatemala.

As a leader, her condition was similar to that of Mr. Bámaca Velásquez, since both started out from a “very adverse reality” as members of an indigenous people, for whom opportunities were not the same and language difference made it difficult to understand State policies that affected them, as well as to understand their rights.

The peace processes were a “respite for Guatemalan society”, one that allowed many people to renew productive activities. In her case, in 1995 she was nominated as a congressional candidate in Quetzaltenango for the Frente Democrático Nueva Guatemala, and she was elected as a congresswoman for the 1996-2000 term.

Although she did not personally meet Efraín Bámaca Velásquez, she was aware that he was involved in the political discussion of the peace process and that he was a leader of the guerrilla forces.

Furthermore, based on her personal experience, she considered that “Mr. Bámaca could have attained a position in the political or productive life of the country or have played a leadership role in this process after the signing of the peace accord”, because he already had opted politically and the social causes that originated the war and the impunity continue to exist in Guatemala. She also knows that guerrilla leaders in similar circumstances to those of Mr. Bámaca Velásquez have been elected by the people as members of Congress.

She considered that the judgment by the Inter-American Court in this case will have a very favorable impact for the indigenous peoples, as they "will have the hope that justice is applied equally to all citizens", and that physical, moral, and political reparations will be obtained.

**e) Testimony of Emily Jones, attorney and PhD in Education, a United States citizen**

She has had a close friendship with Jennifer Harbury for over 20 years, and she described her as a happy person during her relationship with Mr. Efraín Bámaca Velásquez. She stated that the disappearance and subsequent search for him deeply affected her emotionally. As a consequence of what happened, Mrs. Harbury had to temporarily interrupt her professional career as an attorney and, although she received support from her family, she had to sell all her belongings, even her home, and become indebted to obtain funds to continue the search for her husband.

*c) EXPERT EVIDENCE*

21. At the public hearing on November 28 and 29, 2001, the Court heard the expert opinion offered by the representatives of the victims and the Inter-American Commission, summarized as follows:

**Expert opinion of Anna Deutsch, with a licenciante degree in clinical psychology and a masters degree in transcultural psychotherapy and evaluation and treatment of the psychological consequences of trauma; she is the clinical director of a program for torture victims in Los Angeles, United States of America.**

The expert witness stated that forced disappearance of a person has a profound psychological impact on his or her next of kin, because not knowing what happened to that person, they are unable to begin the emotional process of dealing with that death and being able to "adjust to the absence of the beloved one", and this results in psychic imbalance or destructuring. Furthermore, during this process the next of kin attempt to find out the truth about what happened, and when those responsible are not found "this does not allow them to process it either, nor to grieve".

In this type of situations, the pain never goes away, and despite the passing of time, "minimal things that remind them of the missing person, or of the fact or circumstances, suffice to renew absolutely all the prior suffering".

When the next of kin know that a person is suffering torture, their "suffering is even greater than the real suffering of physical torture", as it is a *long-lasting psychological torture*. The possibility that the detainee is subject to torture is "an unbearable suffering for the persons who know this", and even though it may be less painful to assume that he or she has died, this is an unacceptable thought, because "in thinking this person dead [they are] killing him or her". Therefore, they go back to considering that the detainee is alive, which means that he or she is being tortured, and this generates "a vicious circle of torturing thoughts".

As regards Jennifer Harbury, the expert witness was able to ascertain that disappearance of her husband has profoundly affected her psychological state. When she learned that something had happened to Efraín Bámaca Velásquez, the level of emotional pain, general tension, and anxiety was extreme, to the point that

it had physical repercussions, such as muscular pain or gastric problems. Some of the consequences, such as retaining vivid images, insomnia –caused by the wish not to sleep and thus to avoid nightmares-, a deep depression and fatigue, and the “impossibility of feeling happy, of enjoying the things that she used to enjoy very much”, continue to date, in a set of symptoms called a *post-traumatic disorder*. Furthermore, when she heard that Efraín Bámaca Velásquez was dead, she went into “a quite significant depression that caused concern”. Today, Mrs. Harbury feels remorse for not having done more to search for her husband, even if that is not true.

As regards the sisters of Efraín Bámaca Velásquez, they continue to have a feeling of powerlessness and great sadness, and they still wish and hope that Mr. Bámaca Velásquez shows up. Even though they know that their brother is dead, “there is still some doubt, because they do not have the remains”, they have not seen his dead body.

There are close ties of affection in the Bámaca Velásquez family, especially because they belong to an indigenous culture where there is much family cohesion. Even the already deceased members of the group are still “in the current constellation of the family”, because there has been no rupture of emotional family ties. Nevertheless, because they do not have his body, they have not been able to hold a special ceremony to honor Efraín Bámaca Velásquez. It is important to recover his mortal remains “to be able to honor Efraín, to have him close by and to return him or take him to live with the ancestors”, as well as for the new generations to be able to share and learn about his life, as is the tradition in his indigenous culture. Identification and criminal punishment of those responsible for the violations are also necessary for the psychological process of acceptance of the loss of the family member.

In her professional opinion, it should be recommended that the next of kin and Mrs. Harbury receive professional psychological treatment, which would help in their process of recovery.

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#### d) EVIDENCE ASSESSMENT

22. The body of evidence in a case, as a unique totality, is formed by the evidence submitted during all stages of the proceedings<sup>11</sup>; thus, evidence submitted by the parties during the merits stage is also part of the evidence to be considered during the current stage.<sup>12</sup>

23. The representatives of the victim have filed an ECLAC mortality table,<sup>13</sup> and though this provides a parameter to carry out calculations of pecuniary damages,

<sup>11</sup> See *Cantoral Benavides Case, Reparations*, supra note 5, para. 34; *Mayagna (Sumo) Awas Tingni Community Case*, supra note 7, para. 98; and *Villagrán Morales et al. Case, Reparations*, supra note 5, para. 53.

<sup>12</sup> See *Bámaca Velásquez Case*, supra note 6, para. 91-120.

<sup>13</sup> See *Summarized tables on mortality in Guatemala 1995-2000, Table 21 of ECLAC, Appendix 6 to the brief of the representatives of the victims in Volume I, Evidence, at the Secretariat of the Inter-American Court of Human Rights*, f. 019.

they are not documents with official data. Therefore, within the context of the instant case, this Court admits into evidence, in accordance with the powers vested in this Court by Article 44 of the Rules of Procedure, the life expectancy tables submitted in the *Paniagua Morales et al. and Villagrán Morales et al.* cases, both against Guatemala, to conduct the respective calculations, as well as the criteria given in those cases regarding the issue of life expectancy.<sup>14</sup>

24. Regarding the tables on exchange rates from November, 2000 to February, 2001, filed as appendices by the representatives of the victims, the Court admits them into evidence under the terms stated therein.

25. The videotape "Dirty Secrets: Jennifer, Everardo, and the CIA in Guatemala" submitted by the representatives of the victims is admitted into evidence insofar as it complements the evidence contributed in the instant case.

26. In the instant case, as in others, the Court recognizes the evidentiary value of the documents filed by the parties at the appropriate procedural times or as evidence to facilitate adjudication of the case that were neither disputed nor objected, when their authenticity was not questioned.

27. Regarding testimony rendered in the instant case, the Court evaluates such testimony insofar as it is in accordance with the purpose of the proposed examination. In this regard, the Court deems that statements by next of kin and persons having a direct interest in this case cannot be assessed in an isolated manner but rather within the body of evidence of the proceedings. In connection with reparations, testimony of next of kin is useful insofar as it may provide further information on the consequences of the violations committed.<sup>15</sup>

28. Regarding the expert opinion given by Ana Deutsch, this Court assesses it in accordance with the proposed purpose of the report.

## V PROVEN FACTS

29. With the aim of determining the appropriate measures of reparation in the instant case, the Court will base itself on the facts admitted as proven in the November 25, 2000 Judgment. During the current stage of the proceedings, the parties have also contributed new evidence with the aim of proving the existence of supplementary facts that are relevant to the aforementioned measures. The Court has examined the evidence and the respective arguments of the parties on the declarations and, as a result of this examination, declares that the following facts have been proven.

### A) With respect to Efraín Bámaca Velásquez:

- a) that Efraín Bámaca Velásquez was born on June 18, 1957,<sup>16</sup> and he was a commander of the URNG at the time of the events;<sup>17</sup>

<sup>14</sup> See *Villagrán Morales et al. Case, Reparations*, supra note 5, para. 81; and *Paniagua Morales et al. Case, Reparations*, supra note 5, para. 68.

<sup>15</sup> See *Villagrán Morales et al. Case, Reparations*, supra note 5, para. 55; and *Paniagua Morales et al. Case, Reparations*, supra note 5, para. 70.

<sup>16</sup> See *Bámaca Velásquez Case*, supra note 6, para. 121, subparagraph a).

- b) that before he entered the URNG, the victim worked in agriculture, together with other members of his family, and he contributed financially to household expenses;<sup>18</sup>
- c) that starting in 1991, he was involved in the peace accord negotiations in Guatemala on behalf of the URNG;<sup>19</sup> and that the "Agreement on the definitive cease fire" was reached in December, 1996<sup>20</sup>
- d) that on March 12, 1992, when there was a clash between the guerrilla forces and the army, Bámaca Velásquez was approximately 35 years old. He was detained and his forced disappearance began on that same date;<sup>21</sup>
- e) that there was a practice in the army of capturing guerrilla fighters and keeping them in clandestine imprisonment and they were tortured at different military facilities, for the purpose of obtaining information useful to the army.<sup>22</sup> In the case of Mr. Bámaca Velásquez, he was transferred to at least three military posts for the aforementioned purpose;<sup>23</sup>
- f) that during his detention, Efraín Bámaca Velásquez was tortured and treated in cruel, inhuman, and degrading ways;<sup>24</sup>
- g) that Efraín Bámaca Velásquez was last seen in the infirmary of Military Zone No. 18 in San Marcos where, tied to a metal bed, he was being questioned and tortured;<sup>25</sup>
- h) that the victim had the aspiration of becoming involved in productive activities in his country, once the conflict ended;<sup>26</sup> and

<sup>17</sup> See *Bámaca Velásquez Case*, *supra* note 6, para. 121, subparagraph d).

<sup>18</sup> See *Death certificate of Mr. Efraín Bámaca Velásquez; Testimony of Jennifer Harbury rendered at the Court on November 28, 2001; and Testimony of José León Bámaca Hernández rendered at the Court on November 28, 2001.*

<sup>19</sup> See *Testimony of Jennifer Harbury rendered at the Court on November 28, 2001.*

<sup>20</sup> See *Agreement on the basis for the definitive cease fire, Volume I on Reparations, at the Secretariat of the Inter-American Court of Human Rights, Appendix 7, fs. 22-28.*

<sup>21</sup> See *Bámaca Velásquez Case*, *supra* note 6, para. 121, subparagraphs a) and h).

<sup>22</sup> See *Bámaca Velásquez Case*, *supra* note 6, para. 121, subparagraph f).

<sup>23</sup> See *Bámaca Velásquez Case*, *supra* note 6, para. 121, subparagraphs i), j), k) and l).

<sup>24</sup> See *Bámaca Velásquez Case*, *supra* note 6, para. 121, subparagraphs i) and l).

<sup>25</sup> See *Bámaca Velásquez Case*, *supra* note 6, para. 121, subparagraph l).

<sup>26</sup> See *Testimony of Jennifer Harbury rendered at the Court on November 28, 2001.*

- i) that to date the whereabouts of the mortal remains of Mr. Bámaca Velásquez is not known.<sup>27</sup>

**B) with respect to the next of kin of Efraín Bámaca Velásquez:**

- a) that José León Bámaca Hernández is his father, and his sisters are Egidia Gebia and Josefina Bámaca Velásquez and Alberta Velásquez, and that they as well as their father are members of the Mayan culture, Mam ethnic group. His wife was Jennifer Harbury;<sup>28</sup>
- b) that Jennifer Harbury suffered pecuniary and non-pecuniary damage as a result of the detainment, torture, forced disappearance, and death of Efraín Bámaca Velásquez;<sup>29</sup>
- c) that the father and sisters suffered non-pecuniary damage as a result of the detainment, torture, forced disappearance, and death of Efraín Bámaca Velásquez;<sup>30</sup>
- d) that Jennifer Harbury began to search at various police stations and took relevant legal steps, in accordance with domestic legislation, as well as steps at an international level to find him, which caused various expenses;<sup>31</sup>

<sup>27</sup> See *Testimony of Jennifer Harbury rendered at the Court on November 28, 2001; Testimony of José León Bámaca Hernández rendered at the Court on November 28, 2001; Testimony of Juan José Monterroso rendered at the Court on November 28, 2001; March 19, 2001 note signed by José León Bámaca Hernández, Josefina and Egidia Bámaca Velásquez, Appendix 15 of the brief on Reparations filed by the representatives of the victims (supra para. 5); and video tape under the title "Dirty Secrets: Jennifer, Everardo, and the CIA in Guatemala".*

<sup>28</sup> See *Bámaca Velásquez Case, supra note 6, para. 121, subparagraph c).*

<sup>29</sup> See *Testimony of Jennifer Harbury rendered at the Court on November 28, 2001; Testimony of Juan José Monterroso rendered at the Court on November 28, 2001; Testimony of Emily Jones rendered at the Court on November 28, 2001; expert opinion rendered by Ana Deutsch at the Court on November 28, 2001; Testimony of Jennifer Harbury rendered at the Court on June 16, 1998; Testimony of Patricia Davis rendered at the Court on June 18, 1998; medical certificate on treatment given to Mrs. Jennifer Harbury during her hunger strike in October-November, 1994, issued by Peter R. Kerndt, Director of the Health Research Association, STD Program, and Associate Clinical Professor of Medicine, University of Southern California, United States of America, Appendix 4 of the brief on Reparations filed by the representatives of the victims (supra para. 5); brief by Kimberly H. Pappas addressed to the Inter-American Court on March 24, 2001, as nurse during Mrs. Jennifer Harbury's hunger strike in October-November, 1994, Appendix 5 of the brief on Reparations filed by the representatives of the victims (supra para. 5); April 18, 2001 certificate by Elizabeth Desimone, addressed to the Court in connection with the health condition of Mrs. Jennifer Harbury during the hunger strike in November, 1994, Appendix 5 of the brief on Reparations filed by the representatives of the victims (supra para. 5); and video tape under the title "Dirty Secrets: Jennifer, Everardo, and the CIA in Guatemala", submitted by the representatives of the victims (supra para. 5).*

<sup>30</sup> See *Testimony of Juan José Monterroso rendered at the Court on November 28, 2001; Testimony of José León Bámaca Hernández rendered at the Court on November 28, 2001; expert opinion rendered by Anna Deutsch at the Court on November 28, 2001; and video tape under the title "Dirty Secrets: Jennifer, Everardo, and the CIA in Guatemala", submitted by the representatives of the victims (supra para. 5).*

<sup>31</sup> See *Bámaca Velásquez Case, supra note 6, para. 71-90, 121, subparagraph m); payment of plane tickets, Appendix 22 of the brief on Reparations filed by the representatives of the victims (supra para. 5); payment of hotels in Guatemala, Costa Rica and other countries, Appendix 23 of the brief on Reparations filed by the representatives of the victims (supra para. 5); payments for ground transportation expenses, payment of gasoline and car rentals, Appendix 24 of the brief on Reparations*

- e) that the continuing impunity in this case still makes his next of kin suffer;<sup>32</sup>
- f) that to date the whereabouts of the mortal remains of Mr. Bámaca Velásquez is unknown, and this continues to cause suffering to his next of kin;<sup>33</sup> and
- g) that Jennifer Harbury worked as an attorney for *Texas Rural Legal Aid, Inc.* until 1992, with an annual salary of US\$ 42,000 (forty-two thousand United States dollars), a practice she interrupted to devote herself to searching for her husband. She renewed that work activity in January, 1997.<sup>34</sup>

**C) with respect to other facts**

- a) that the life expectancy of a man who was roughly 35 years old in Guatemala in 1992 was approximately 34 additional years, that is, a total of 69 years;<sup>35</sup> and

**D) with respect to representation of the next of kin before the inter-American system for the protection of human rights and expenses pertaining to this representation**

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*filed by the representatives of the victims (supra para. 5); payment for phone calls, faxes, photocopies, notary public services, courier, authentications and translations, Appendix 25 of the brief on Reparations filed by the representatives of the victims (supra para. 5); payments for legal services under domestic jurisdiction, Appendix 26 of the brief on Reparations filed by the representatives of the victims (supra para. 5); and video tape under the title "Dirty Secrets: Jennifer, Everardo, and the CIA in Guatemala".*

<sup>32</sup> See *Testimony of Jennifer Harbury rendered at the Court on November 28, 2001; Testimony of José León Bámaca Hernández rendered at the Court on November 28, 2001; Testimony of Juan José Monterroso rendered at the Court on November 28, 2001; Testimony of Emily Jones rendered at the Court on November 28, 2001; March 19, 2001 note signed by José León Bámaca Hernández, Josefina and Egidia Bámaca Velásquez, Appendix 15 of the brief on Reparations filed by the representatives of the victims (supra para. 5); and videotape under the title "Dirty Secrets: Jennifer, Everardo, and the CIA in Guatemala".*

<sup>33</sup> See *Testimony of Jennifer Harbury rendered at the Court on November 28, 2001; Testimony of José León Bámaca Hernández rendered at the Court on November 28, 2001; Testimony of Juan José Monterroso rendered at the Court on November 28, 2001; Testimony of Emily Jones rendered at the Court on November 28, 2001; March 19, 2001 note signed by José León Bámaca Hernández, Josefina and Egidia Bámaca Velásquez, Appendix 15 of the brief on Reparations filed by the representatives of the victims (supra para. 5); and video tape under the title "Dirty Secrets: Jennifer, Everardo, and the CIA in Guatemala".*

<sup>34</sup> See *Certificate issued by Susan Law, Director of Collaborative Services of Texas Rural Legal Aid, Inc., Appendix 13 of the brief filed by the representatives of the victims, in Volume I Evidence Volume I, at the Secretariat of the Inter-American Court of Human Rights, f. 86; and Testimony of Emily Jones rendered at the Court on November 28, 2001.*

<sup>35</sup> *Based on the abridged tables on mortality in Guatemala by the Instituto Nacional de Estadística (1990-1995 period), Appendix 8 of the brief filed by the representatives of the victims; and foldout by the Instituto Nacional de Estadística, "Indicadores Sociales de Guatemala", in the Paniagua Morales et al. Case.*

That the *Centro para la Justicia y el Derecho Internacional* (hereinafter "CEJIL"), representing the victims or their next of kin, incurred certain expenses in the process of resorting to the inter-American human rights system.<sup>36</sup>

## VI BENEFICIARIES

30. The court will now determine the person or persons who in the instant case are the "injured party", pursuant to Article 63(1) of the American Convention. In view of the fact that the violations of the American Convention determined by the Court in its November 25, 2000 Judgment were committed against Efraín Bámaca Velásquez, Jennifer Harbury, José León Bámaca Hernández, Egidia Gebia Bámaca Velásquez, and Josefina Bámaca Velásquez, all of them –as victims- must be included in that category and be entitled to the reparations decided by the Court, both in connection with pecuniary damages, when appropriate, and in connection with non-pecuniary damages. With respect to the deceased victim, it will also be necessary to determine which of the reparations that may be decided in his favor can be transmitted through inheritance to his next of kin, and to which of them.

31. In the case of Mrs. Jennifer Harbury, the State has objected to her being entitled to possible reparations, both in her own right and through inheritance, as a consequence of her own statement that this reparation will be delivered, in full, to the relatives of Bámaca Velásquez, and it is therefore the opinion of the State that this is "an explicit waiver of the right declared in her favor by the Court, one that is full evidence because it was made during the contentious phase of the case before the Court". The Court does not share the interpretation of the State regarding that statement, as it does not issue from the terms of that statement that such was Mrs. Harbury's intention, and for these reason the Court believes that a determination of the compensation due to her is in order, and she can freely dispose of it.

32. As regards which compensations in favor of the victim can be inherited, the Court has pointed out that:

[i]t is a common rule in most legislation that a person's successors are his or her children. It is also generally accepted that the spouse participates in the assets acquired during the marriage, and some legislation also grants the spouse a succession right together with the children. If there are no children nor any spouse, common private law recognizes the ascendants as heirs. These rules, generally accepted in the community of nations, must be applied, in the opinion of the Court, in the instant litigation to determine the successors of the victims as regards compensation.<sup>37</sup>

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<sup>36</sup> See *Power of Attorney granted by José León Bámaca to CEJIL in San Jose, Costa Rica, on June 19, 1998, Appendix 1 of the brief on Reparations filed by the representatives of the victims (supra para. 5); power of attorney granted by Jennifer Harbury to CEJIL in Texas, United States, on March 27, 2001, Appendix 2 of the brief on Reparations filed by the representatives of the victims (supra para. 5); power of attorney granted by Josefina and Egidia Gebia Bámaca Velásquez to José León Bámaca Hernández in San Marcos, Guatemala, on June 11, 1998, Appendix 3 of the brief on Reparations filed by the representatives of the victims (supra para. 5); power of attorney granted by José León Bámaca Hernández and Josefina and Egidia Gebia Bámaca Velásquez to CEJIL in San Marcos, Guatemala, on June 22, 1998, Appendix 3 of the brief on Reparations filed by the representatives of the victims (supra para. 5).*

<sup>37</sup> See *Villagrán Morales et al. Case, Reparations, supra note 5, para. 67; Paniagua Morales et al. Case, Reparations, supra note 5, para. 84; and Neira Alegría et al. Case. Reparations (Art. 63(1) American Convention on Human Rights). September 19, 1996 Judgment. C Series No. 29, para. 60.*

In view of the above, it is the opinion of the Court that Jennifer Harbury is a victim of the violations of Articles 5, 8, and 25 of the Convention, as declared in the judgment on the merits, and also that she must be considered as a beneficiary of the reparation that would have been due to Efraín Bámaca Velásquez, as his successor.

33. Likewise, claims can be made regarding the damage caused by the death of a victim to his next of kin or to third parties, based on a right of their own.<sup>38</sup> However, the Court has pointed out that there must be certain circumstances, such as that of a relationship of effective and regular dependence having existed between the claimant and the victim, so that it can be reasonably assumed that the benefits received by the former would have continued if the victim had not died; and that the claimant had an economic need that was covered on a regular basis by the assistance provided by the victim.<sup>39</sup>

34. As regards these claimants, the *onus probandi* rests on the next of kin of the victim,<sup>40</sup> the term "next of kin" being understood in accordance with Article 2(15) of the Rules of Procedure<sup>41</sup> of the Court, adopted in its November 24, 2000 Order, that entered into force on July 1, 2001, as a broad concept that covers all persons having close kinship, including children, parents, and siblings, who may be considered as next of kin and have the right to receive compensation, insofar as they fulfill the requirements set forth in case law by this Court.<sup>42</sup> For purposes of the *sub judice* case, this type of reparations will be analyzed in the respective section under the circumstances of each one of the victims and of the body of evidence supplied to this Court by the next of kin.

35. As regards José León Bámaca Hernández, Jennifer Harbury, Egidia Gebia Bámaca Velásquez and Josefina Bámaca Velásquez, it must be highlighted that the death of Efraín Bámaca Velásquez caused them non-pecuniary damage.<sup>43</sup>

36. In this regard, during the public hearing (*supra* 9), the representatives of the victims and the Inter-American Commission requested that the Court include Alberta Velásquez, a sister of Efraín Bámaca Velásquez on his mother's side, as a beneficiary of possible reparations granted to the next of kin in the instant case, taking into account the close relationship of Mrs. Velásquez with Efraín Bámaca Velásquez

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<sup>38</sup> See *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 68; *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 85; and *Castillo Páez Case, Reparations*, *supra* note 6, para. 59.

<sup>39</sup> See *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 68; *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 85; and *Aloeboetoe et al. Case. Reparations (Art. 63(1) American Convention on Human Rights)*. September 10, 1993 Judgment. C Series No. 15, para. 67 and 68.

<sup>40</sup> See *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 68; *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 86; and *Aloeboetoe et al. Case, Reparations*, *supra* note 40, para. 71.

<sup>41</sup> Pursuant to Article 2 of the Rules of Procedure, the term "next of kin" means "the immediate family, that is, the direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable".

<sup>42</sup> See *Loayza Tamayo Case, Reparations*, *supra* note 6, para. 92, and in this same regard, *Villagrán Morales et al. Case. Reparations*, *supra* note 5, para. 68; *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 86.

<sup>43</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 37; *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 66 and 68; and *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 108 and 110.

during their childhood. The representatives and the Commission argued that they had not mentioned her before because they were not aware of the existence of Mrs. Velásquez due to the language and communication difficulties with the Bámaca Velásquez family, which is a Mam family, "much more closed in its manner of communicating certain things concerning their daily life", and due to the distance between their places or residence, as "she had to leave the farm where they were and go to Guatemala city, due to the harassment [to] her husband [whom] they almost tried to kidnap". In this regard the Court notes that while this case has been before the inter-American system for the protection of human rights since 1992, it is not until November 20, 2001 (*supra* 8), shortly before the public hearing on reparations, when the existence of this sister of Mr. Bámaca Velásquez is brought to the attention of the Court. Nevertheless, this Court takes into account the special circumstances of the conflict and poor communications in Guatemala at the time of the events, and it accepts the argument regarding the characteristics of the Mayan culture, Mam ethnic group, that the Bámaca Velásquez family was a member of, which was referred to at the public hearing. Therefore, the Court includes Alberta Velásquez at this stage of the proceedings as a beneficiary of possible reparations, something to which the State did not object. Thus, her compensation shall be set in accordance with the abovementioned criteria, taking into account her relationship as a sister of the victim on his mother's side.

## VII OBLIGATION TO REPAIR

37. In operative paragraph nine of the November 25, 2000 Judgment, the Court decided that Guatemala "must repair damage caused by the violations mentioned in operative paragraphs 1 to 7" (*supra* 2). In this Judgment, the Court will decide the controversy on these issues.

38. As regards Article 63(1) of the American Convention, the Court has stated that this provision reflects a common-law norm that is one of the fundamental principles of contemporary international law regarding the responsibility of the States. Thus, when an illicit act is committed by a State, its international responsibility for the violation of an international norm arises immediately, with the consequent duty of providing reparation and making the consequences of the violation cease.<sup>44</sup>

39. Reparation of the damage caused by infringement of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), and this consists of reestablishing the previous situation. If this is not possible, as in the instant case, the international court must determine a set of measures that, in addition to guaranteeing the rights that were infringed, should repair the consequences caused by the infringements, as well as establish payment of an indemnification as compensation for damage caused.<sup>45</sup> This obligation to provide reparation is

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<sup>44</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 40; *Cesti Hurtado Case, Reparations*, *supra* note 5, para. 35; and *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 62.

<sup>45</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 41; *Durand and Ugarte Case, Reparations* (Art. 63(1) American Convention on Human Rights). December 3, 2001 Judgment. C Series No. 88, para. 25; and *Barrios Altos Case, Reparations* (Art. 63(1) American Convention on Human Rights). November 30, 2001 Judgment. C Series No. 87, para. 25.

regulated in all its aspects by international law (scope, nature, manner, and determination of beneficiaries) and cannot be modified by the State nor can it refuse to comply by invoking domestic legal provisions.<sup>46</sup>

40. Regarding the violation of the right to life and other rights (personal liberty and humane treatment, right to fair trial and to judicial protection), if *restitutio in integrum* is not possible and given the nature of the right infringed, reparation is made, *inter alia*, according to international case law, by means of just indemnification or monetary compensation, to which positive measures by the State must be added to ensure that damaging acts such as those of the instant case do not take place again.<sup>47</sup>

41. Reparations, as their name suggests, are measures that tend to make the effects of violations that were committed disappear. Their nature and amount depend on the damage caused both on a pecuniary and on a non-pecuniary level. Reparations cannot involve enrichment nor impoverishment of the victim or his successors.<sup>48</sup> In this regard, reparations to be determined in this Judgment must be in relation to the violations declared in the judgment on the merits rendered by the Court on November 25, 2000 (*supra* 2).

### **VIII REPARATIONS**

42. In accordance with the probatory elements gathered during the various stages of the proceedings and in light of the criteria set forth by this Court in its case law, the Court will now analyze the claims filed by the parties during this stage of the proceedings, so as to determine the measures of reparation pertaining to the pecuniary and non-pecuniary damages and other forms of reparation.

#### *A) PECUNIARY DAMAGE*

43. In this section, the Court will now decide on pecuniary damages, which involve the loss of or detriment to the victims income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the *sub judice* case.<sup>49</sup> For this, the Court will set an amount of indemnification that will seek to compensate for the patrimonial consequences of the violations that were declared in the November 25, 2000 Judgment.

#### *Arguments of the representatives of the victims*

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<sup>46</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 41; *Cesti Hurtado Case, Reparations*, *supra* note 5, para. 34; and *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 61.

<sup>47</sup> See *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 80; *Castillo Páez Case, Reparations*, *supra* note 6, para. 52; and *Garrido and Baigorria Case. Reparations* (Art. 63(1) American Convention on Human Rights). August 27, 1998. C Series No. 39, para. 41.

<sup>48</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 42; *Cesti Hurtado Case, Reparations*, *supra* note 5, para. 36; and *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 63.

<sup>49</sup> See *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 99 and 169; and *Castillo Páez Case, Reparations*, *supra* note 6, para. 76.

44. The representatives of the victims requested that the Court consider the following elements to determine the compensatory indemnification:

- a) loss of the income that Efraín Bámaca Velásquez would have obtained as a consequence of his entry into regular work activities, once the peace accord was signed.<sup>50</sup> For this, they determined a monthly income<sup>51</sup> that the victim would have received over the years of his life expectancy.<sup>52</sup> They made an estimate of this income in dollars,<sup>53</sup> added the Christmas bonus and thirteenth month set forth by law, subtracted 25% for personal expenses, and finally added the accrued interest;<sup>54</sup>
- b) the expenses incurred by Jennifer Harbury with the aim of obtaining information on the whereabouts of Efraín Bámaca Velásquez, and subsequently the search for his body, as well as her expenses due to steps regarding investigation and the search for justice under the domestic and international jurisdictions;<sup>55</sup>
- c) the loss of income by Jennifer Harbury during the years in which she sought to determine the whereabouts of Bámaca Velásquez and the search for justice en connection with the facts in the instant case, for

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<sup>50</sup> This entry would have taken place since March, 1997, when the Peace Accord was signed and the Unidad Revolucionaria Nacional Guatemalteca (URNG) turned in its weapons.

<sup>51</sup> As reference to establish an income for the victim, the representatives of the victims used an average of the income of persons in similar circumstances to those of the victim, as combatants or social leaders, who continued with economic activities after the signing of the Peace Accord, as well as the leadership qualities and proven experience of the victim in community work, for which reason they estimated a monthly income of Q16.250,00.

<sup>52</sup> Life expectancy was 71 years, according to statistics of the Economic Studies Center for Latin America and the Caribbean (ECLAC).

<sup>53</sup> The exchange rate on November 20, 1991, according to the Bank of Guatemala was Q7.752645 per dollar.

<sup>54</sup> This estimate would represent the amount of US\$590,463.00 (five hundred ninety thousand four hundred and sixty-three United States dollars); however, for lack of exact references, the representatives of the victims requested the amount of US\$300,000.00 (three hundred thousand United States dollars).

<sup>55</sup> The representatives of the victims included among these expenses the purchase of air tickets by Mrs. Harbury, the witnesses, and international observers who traveled to Guatemala for steps taken between 1992 and 1998, for a total sum of US\$21,167.00 (twenty-one thousand ninety-six United States dollars), payment of Hotels in Guatemala, fir a total sum of US\$10,896.00 (ten thousand eight hundred and ninety six United States dollars), expenses in connection with exhumation procedures for the sum of US\$2,051.00 (two thousand fifty-one United States dollars), ground transportation expenses in Guatemala for the amount of US\$4,070.00 (four thousand and seventy United States dollars), steps before the Human Rights Committee of the United Nations for a total of US\$880,00 (eight hundred and eighty United States dollars) and other expenses, including phone calls, faxes, adds in the press, photocopies, and legal proceedings, adding up to US\$6,000.00 (six thousand United States dollars). However, the amount requested in equity by the representatives of the victims was US\$25,000.00 (twenty-five thousand United States dollars).

which reasons she interrupted her professional practice,<sup>56</sup> and from this amount they deducted 25% for personal expenses; and

- d) compensation, in equity, for the expenses incurred by Mrs. Harbury as a consequence of the health detriment she suffered due to the facts of the instant case, both from not knowing the whereabouts of her husband and from the ineffectiveness of the domestic investigative processes.

45. As a consequence of the above, the representatives of the victims requested that the State pay the amounts stated in the following table:

<b>Reparation for pecuniary damage</b>		
<b>Victim</b>	<b>Expenses incurred</b>	<b>Lost earnings</b>
Efraín Bámaca Velásquez		US\$300,000.00
Jennifer Harbury	US\$25,000.00	US\$141,750.00

46. During the public hearing, the representatives of the victims argued that at the time of his entry into the workforce, after the signing of the "Peace Accord", Mr. Bámaca Velásquez would not only have contributed financial resources to the household he had established with Mrs. Harbury, but also to his father and sisters, as he did before entering the URNG and due to his position as elder brother in the Mayan culture, Mam ethnic group, as explained by witness Juan José Monterroso.

#### *Arguments of the Commission*

47. The Commission stated its agreement with the criteria of the representatives of the victims to set compensation for pecuniary damages.

#### *Arguments of the State*

48. With the aim of "establishing parameters and enlightening the Court in connection with the quantities and amounts to be set in the judgment on reparations". the State put forth the following arguments in its May 8, 2001 brief. Nevertheless, it requested that the Court "grant the parties the necessary mechanism to determine, by mutual agreement, the way in which the State must repair the violations" declared in the judgment on the merits.

- a) As regards the lost income of Efraín Bámaca Velásquez, the State argued that the Court should use the income of a person who carried out agricultural activities, because since the victim was 18 years old he had been a member of the guerrilla organizations until the time of his death, at the age of 35, and there was no evidence that he had received any income during his membership in that group, or that he had any labor relationship. Calculations should be based on the concept of life expectancy, "resulting from the difference between life expectancy at the time of the event [...] and the years

<sup>56</sup> Mrs. Harbury worked as an attorney for the "Texas Rural Legal Aid" law firm, and in the period from March, 1992 to the end of 1996, in the course of 54 months, she would have received a monthly income of US\$3,500.00 (three thousand five hundred United States dollars).

lived by that person". In the instant case, the victim would have enjoyed 25 additional years of life.<sup>57</sup>

- b) Regarding expenses due to the search for Mr. Bámaca Velásquez, the State expressed its willingness to recognize those that "arose from the contingency situation affecting the next of kin", insofar as they could document them. In this regard, the State pointed out that José León Bámaca Hernández expressed that the household had not suffered any expenses as a consequence of the facts of the case and that Mrs. Harbury had waived reimbursement of said expenses.

49. The State made the following observations on the persons who would have the right to a compensation:

- a) As regards Mrs. Harbury, the State argued that her marriage with Mr. Bámaca Velásquez had not been registered with the competent Guatemalan authorities, for which reason "an important element of legal certainty has not been fulfilled" and that, in any case, Mrs. Harbury explicitly waived compensation, including the expenses derived from the disappearance of the victim.
- b) Since it was not proven that the victim provided any financial support to his sisters, the only beneficiary on account of lost income would be his father, José León Bámaca Hernández, because "if Mr. Bámaca Velásquez contributed to his family it should be understood that this contribution was made to his parents", in accordance with the circumstances of the case and Guatemalan norms regarding succession.

#### *Considerations of the Court*

50. The Court, taking into account the information it has received during the various stages of the proceedings, the facts considered to be proven in each of these, and its case law, determines that the compensation for pecuniary damages in the instant case must include the items that will be stated in this section.

51. The representatives of the victims and the Inter-American Commission requested a compensation that is to be determined as of March, 1997, when the "Cease fire agreement in Guatemala" was "finally and definitively established". In this regard, the Court deems it necessary to distinguish two periods:

- a) the first period goes from March 12, 1992, when Efraín Bámaca Velásquez was captured alive in Nuevo San Carlos, until March, 1997, when the "Peace Accord" entered into force (*supra* 29.A)c) and d), at which time the victim would presumably have undertaken a work activity in his country. During that period, the victim would have continued to be a guerrilla commander in the URNG. Given the characteristics of that activity, the Court does not deem it appropriate to establish a compensation regarding the income of the victim during that period.

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<sup>57</sup> The State argued that the life expectancy for the years from 1990 to 1995 was 60 years, according to the Instituto Nacional de Estadística de Guatemala (INE).

- b) the second period, beginning in the month of March, 1997, covers the remaining years in the victim's life expectancy. In this connection, the Court recognizes that it is not possible to establish with certainty what the occupation and income of Mr. Bámaca Velásquez would have been when he undertook a work activity in his country. Bearing in mind the lack of certain probatory elements on the possible income the victim could have earned, the Court decides in equity to set the amount to be paid as compensation for the loss of income during that period as US\$100,000.00 (one hundred thousand United States dollars).

52. This Court has pointed out in previous cases that, according to the rules of succession, the lost income of a direct victim should be given first of all to his spouse (*supra* 32). In the instant case, the Court takes into account the request made by the representatives of the victims and by the Commission regarding inclusion as beneficiaries of the compensation due to Mr. Bámaca Velásquez, in addition to Mrs. Harbury, of José León Bámaca Hernández as well as Egidia Gebia and Josefina, both Bámaca Velásquez, based on the statement by witness Monterroso regarding the Mayan custom that the elder son usually contributes to the sustenance of his parents and siblings. It should be added that the juridical nature of this Courts enables it to weigh the effects of its judgments as a function of the factual framework of the *sub judice* case. The Court deems that due to the position of Bámaca Velásquez as elder brother, a significant fact in the Mam culture, Mam ethnic group, as well as the socio-economic conditions of his family, the victim once involved in work activities after the "Pease Accord" signed between the guerrilla forces and the Guatemalan army, would have contributed financially to the sustenance of his father and sisters, as has been stated by Mrs. Harbury, since he was fond of them as is usual in the Mayan culture where the whole family is one.

53. In view of the aforementioned considerations, this Court deems it appropriate to divide the total amount of US\$100,000.00 (one hundred thousand United States dollars) to be distributed, in equal parts, between Jennifer Harbury, José León Bámaca Hernández, and Egidia Gebia and Josefina Bámaca Velásquez.

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54. In view of the information received, case law, and proven facts, the Court declares that compensation for pecuniary damages in the instant case must also include the following:

- a) a sum of money in accordance with the income not earned by Mrs. Harbury during the period from March 12, 1992 to January, 1997. As was proven in the merits stage, during that period Mrs. Harbury spent much of her time taking steps to determine the whereabouts of her husband as well as struggling against the obstructions and acts of denial of justice, which did not allow her to practice her profession. This Court has maintained in its case law that compensation should be granted for detriment to a victim of a human rights violation who, during a given period, was unable to work, whether due to actions or omissions by agents of the State. The Court deems that it has been proven that Mrs. Harbury had income that she lost as a consequence of the facts in this case, and sets as compensation in equity, taking

into account the specific circumstances of the instant case, US\$80,000.00 (eighty thousand United States dollars).

- b) since it has been proven that Mrs. Harbury's health suffered as a consequence of the facts in the instant case,<sup>58</sup> the Court deems it appropriate to set as compensation US\$25,000.00 (twenty-five thousand United States dollars).
- c) an amount of money in accordance with the expenses incurred by Jennifer Harbury to determine the whereabouts of Mr. Bámaca Velásquez.<sup>59</sup> This Court notes that while not all the necessary receipts have been supplied to corroborate the total amount of said expenses, the facts of the case show, and the State itself has accepted, that Mrs. Harbury incurred a number of monetary expenses in searching for the whereabouts of her husband, for which reason this Court deems it equitable to grant her US\$ 20,000.00 (twenty thousand United States dollars).

55. Based on the above, the Court sets as compensation for pecuniary damages caused by the violations declared in the November 25, 2000 judgment, the following amounts:

<b>Reparation for pecuniary damages</b>					
	<b>Lost income</b>	<b>Search expenses</b>	<b>Medical expenses</b>	<b>Total</b>	
Efraín Bámaca Velásquez	US\$100,000.00			US\$100,000.00	
Jennifer Harbury	US\$80,000.00	US\$20,000.00	US\$25,000.00	US\$125,000.00	
<b>TOTAL</b>	<b>US\$ 225,000.00</b>				

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#### *B) NON PECUNIARY DAMAGES*

56. The Court will now consider the prejudicial effects of the facts of the case that are not economic or patrimonial. Non pecuniary damages can include the suffering and affliction caused to the direct victims and their relatives, detriment to values that are very significant for individuals, as well as non-monetary alterations in the conditions of existence of the victim or the victim's family. As it is not possible to assign a precise monetary equivalent to non-pecuniary damages, for purposes of

<sup>58</sup> See *Cantoral Benavides Case, Reparations, supra* note 5, para. 51.a); *Villagrán Morales et al. Case, Reparations, supra* note 5, para. 80; and *Paniagua Morales et al. Case, Reparations, supra* note 5, para. 138.

<sup>59</sup> See *Paniagua Morales et al. Case, Reparations, supra* note 5, para. 98; *Blake Case, Reparations* (Art. 63(1) American Convention on Human Rights). January 22, 1999 Judgment. C Series No. 48, para. 48 and 49; and *Castillo Páez Case, Reparations, supra* note 6, para. 77.

integral reparation to the victims all that can be done is for them to receive compensation, and this in two ways. First, by means of the payment of an amount of money or by providing goods or services that can be appraised in monetary terms, to be determined by the Court through reasonable use of judicial discretion and in terms of equity. Secondly, by carrying out acts or public works whose scope or public repercussion have an effect in terms of the remembrance of the victims, recovery of their dignity, consolation to their relatives or issuing a message of official reproof of the violations of human rights involved and of commitment to avoid their repetition.<sup>60</sup> The first aspect of reparation of non-pecuniary damages will be discussed in this section, and the second aspect will be addressed in the following one (*infra* 68 and ff.).

*Arguments of the representatives of the victims*

57. The representatives of the victims stated that compensation for non pecuniary damages must consider:

- a) the suffering of Bámaca Velásquez, caused by his capture and protracted clandestine detention, and the physical and psychological tortures inflicted by State authorities in the course of 4 months, as well as the moral detriment to his relatives as a result of those same facts;
- b) the denial of justice faced by the families and the defenselessness this caused for them, because despite Jennifer Harbury's efforts to obtain information about what happened, "the State has not yet satisfied their right to find out what happened and to know the truth". Furthermore, they pointed out the existence of State activities tending to guarantee impunity of those responsible of the facts in this case and to obstruct steps to determine the whereabouts of Bámaca Velásquez, all of which intensified the pain suffered by Mrs. Harbury and the other relatives;
- c) non compliance by the State with its obligation to prevent, investigate, punish, and repair the consequences of the violations and, furthermore, the threats and harassment campaign suffered by Jennifer Harbury as a consequence of the steps she took to attempt to clarify the facts in this case. This harassment campaign was prejudicial to her image and attacked her credibility in society, "all of this with the aim of ensuring impunity and perpetuating Mrs. Harbury's pain"; and
- d) the uncertainty of the next of kin of Bámaca Velásquez because they did not know his whereabouts while he was detained, and after his death the fact that his mortal remains were hidden, has not allowed them to "rebuild the future based on truth about the past", and this has worsened their suffering.

Therefore, they requested that the Court set the amount of US\$100,000.00 (one hundred thousand United States dollars) for the moral damages suffered by Efraín

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<sup>60</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 53; and *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 84.

Bámaca Velásquez, this amount to be distributed among Jennifer Harbury, José León Bámaca Hernández, Egidia Gebia and Josefina, both Bámaca Velásquez. They further requested US\$80,000.00 (eighty thousand United States dollars) for moral damages to Jennifer Harbury, US\$50,000.00 (fifty thousand United States dollars) for those to José León Bámaca Hernández, and US\$30,000.00 (thirty thousand United States dollars) to each of the sisters of the victim.

#### *Arguments of the Commission*

58. The Commission agrees with the essence of the arguments of the representatives of the victims, as well as with the amounts requested.

#### *Arguments of the State*

59. The State expressed that it shared the view of the Commission that it is difficult to calculate the moral detriment to the victims; nevertheless, it argued that, as there was no strong emotional tie between Mr. Bámaca Velásquez and his next of kin, compensation should be set at Q50,000.00 (fifty thousand quetzales) for "the direct victims" and Q25,000.00 (twenty-five thousand quetzales) for the father and sisters of the victims, for a total sum of Q125,000.00 (one hundred and twenty-five thousand quetzales).

#### *Considerations of the Court*

60. International case law has repeatedly stated that conviction is *per se* a form of reparation.<sup>61</sup> However, due to the grave circumstances of the instant case, the intensity of the suffering that the respective facts caused to the victim, Efraín Bámaca Velásquez, and also to his next of kin, alterations of the conditions of existence of the victim and his next of kin, and other non pecuniary or non monetary consequences caused to the latter, the Court deems that it must order payment of compensation for non-pecuniary damages, in accordance with equity.<sup>62</sup>

61. In the *sub judice* case, the representatives of the victims and the Commission referred to various types of non pecuniary damages caused by the facts in the instant case to Mr. Bámaca Velásquez and his next of kin: the physical and psychological suffering of the deceased victim; the phenomenon of forced disappearance and its aftermath of detention, torture, denial of justice, lack of investigation of the facts and of punishment of those responsible, and not knowing the whereabouts of the mortal remains of Mr. Bámaca Velásquez, have caused

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<sup>61</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 57; *Mayagna (Sumo) Awás Tingni Community Case*, *supra* note 7, para. 166; *Cesti Hurtado Case, Reparations*, *supra* note 5, para. 51; *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 88; and *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 105. In this same sense, see *Eur. Court HR, Ruiz Torija v. Spain judgment of 9 December 1994, Series A no. 303-A, para. 33*; *Eur. Court HR, Boner v. the United Kingdom judgment of 28 October 1994, Series A no. 300-B, para. 46*; *Eur. Court HR, Kroon and Others v. the Netherlands judgment of 27 October 1994, Series A no. 297-C, para. 45*; *Eur. Court H.R., Darby judgment of 23 October 1990, Series A no. 187, para. 40*; *Eur. Court H.R., Wassink judgment of 27 September 1990, Series A no. 185-A, para. 41*; *Eur. Court H.R., Koendjibiharie, judgment of 25 October 1990, Series A no. 185-B, para. 34*; and *Eur. Court H.R., McCallum judgment of 30 August 1990, Series A no. 183, para. 37*.

<sup>62</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 57; *Mayagna (Sumo) Awás Tingni Community Case*, *supra* note 7, para. 167; and *Cesti Hurtado Case, Reparations*, *supra* note 5, para. 51.

various types of suffering among the members of his family: wife, father, and sisters of the victim.

62. As was proven, Mr. Bámaca Velásquez suffered, among the actions carried out by the armed forces with respect to guerrilla fighters who were captured, hostile and restrictive detainment conditions used to obtain information;<sup>63</sup> he was tortured and subject to various cruel, inhuman, and degrading forms of treatment.<sup>64</sup> It is obvious, as it is part of human nature, that any person suffering torture, aggression, and maltreatment,<sup>65</sup> as Bámaca Velásquez did, will feel bodily pain and deep suffering. In this regard, paragraph 158 of the November 25, 2000 judgment of the Court on the merits, stated:

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.

63. These sufferings extend equally to the closest members of the family, especially those who had close emotional contact with the victim. The Court deems that evidence is not required to reach this conclusion,<sup>66</sup> even though in the instant case the suffering caused to them has been proven.

64. Impunity prevailing in this case has also caused and continues to cause suffering among the next of kin, making them feel vulnerable and in a constant state of defenselessness *vis-à-vis* the State, a situation that causes deep anguish. In this regard, in the judgment on the merits of the instant case, the Court referred to:

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 relative.<sup>67</sup>

65. In light of the above, the considerations of the Court regarding the next of kin of Mr. Bámaca Velásquez are as follows:

- a) as regards Mrs. Harbury, this Court pointed out that the State continuously obstructed her efforts to determine the truth about the events and about the hiding of her husband's body and, also, that the

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<sup>63</sup> *Bámaca Velásquez Case*, *supra* note 6, para. 132.

<sup>64</sup> *Bámaca Velásquez Case*, *supra* note 6, para. 150-151 and 158.

<sup>65</sup> *Bámaca Velásquez Case*, *supra* note 6, para. 220.

<sup>66</sup> See *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 106, 124, 142, 157 and 173.

<sup>67</sup> *Bámaca Velásquez Case*, *supra* note 6, para. 211; and *Paniagua Morales et al. Case*, *supra* note 5, para. 173.

public authorities placed obstacles to steps for disinterment, and there was an official refusal to supply information regarding the whereabouts of the mortal remains of Efraín Bámaca Velásquez, for which reason this Court reached the conclusion that Mrs. Harbury suffered cruel, inhuman, and degrading treatment.<sup>68</sup> All this situation has caused deep anguish as has been corroborated in the expert opinion of expert witness Deutsch and in various testimony;<sup>69</sup>

- b) as regards José León Bámaca Hernández and the sisters, Egidia Gebia and Josefina Bámaca Velásquez, the Court reiterates that it is not necessary to prove non pecuniary damage regarding the parents,<sup>70</sup> and regarding the sisters of the victim it is reasonable to assume that as members of the family they cannot have been indifferent to the loss of their brother.<sup>71</sup> In any case, this Court deems that the affective relationship between Mr. Bámaca Velásquez and his father and sisters has been proven during the procedural stage (*supra* 35). Efraín Bámaca Velásquez entered the URNG, and consequently lost contact with his family nucleus, which at that time included his father and sisters, but this loss of contact resulted, as was proven in the merits<sup>72</sup> from the situation of armed conflict that Guatemala was going through<sup>73</sup> and the army's practice of extracting information from the detainees, and from those participating in any insurgent activity, and to the fear of his next of kin of the sufferings the armed forces might inflict upon them.<sup>74</sup> It is the opinion of this Court that such were the causes of the apparent distance between Efraín Bámaca Velásquez and his next of kin and that it was not due, as the State has argued, to severed family ties. In this case it must be added that given the specific characteristics of Mayan culture, of the Mam ethnic group, the loss of the emotional and economic support of the elder son brought great suffering to the Bámaca Velásquez household. On the other hand, they have suffered the emotional consequences of not having been able to bury the mortal remains of Efraín Bámaca Velásquez; and
- c) as regards Alberta Velásquez (*supra* 36), the sister of Efraín Bámaca Velásquez on his mother's side, the Court reiterates that in the case of siblings, the degree of relationship and affection between them must

<sup>68</sup> *Bámaca Velásquez Case*, *supra* note 6, para. 165.

<sup>69</sup> Among others, the testimony of Mrs. Harbury, of Patricia Davis, of James Harrington, and of Emily Jones, rendered at the Court during the Merits and Reparations stages (*supra* 22).

<sup>70</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 61.a); *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 66; *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 108; *Castillo Páez Case, Reparations*, *supra* note 6, para. 88; *Loayza Tamayo Case, Reparations*, *supra* note 6, para. 142; *Garrido and Baigorria Case, Reparations*, *supra* note 48, para. 62; and *Aloeboetoe et al. Case, Reparations*, *supra* note 40, para. 76.

<sup>71</sup> See *Cantoral Benavides, Reparations*, *supra* note 5, para. 61.d); *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 68; and *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 110.

<sup>72</sup> With the testimony, among others, of Santiago Cabrera López and Otoniel de la Roca Mendoza.

<sup>73</sup> *Bámaca Velásquez Case*, *supra* note 6, para. 121 b).

<sup>74</sup> *Bámaca Velásquez Case*, *supra* note 6, para. 121 f) and g).

be taken into account<sup>75</sup> (*supra* 34), and therefore, given the circumstances of this case, Alberta Velásquez must also be compensated for non pecuniary damages.

66. Taking into account the various aspects of the damages discussed, the estimates of the representatives of the victims and the agreement of the Commission with those estimates, insofar as applicable and in accordance with the specific characteristics of this case, the Court, in equity, sets the value of compensations for non pecuniary damages, to be made in favor of the victims or, when appropriate, to their next of kin (*infra* 67), as listed in the following table:

<b>Reparations for Non Pecuniary Damages</b>	
<b>Victim and next of kin</b>	<b>Amount</b>
Efraín Bámaca Velásquez	US\$100,000.00
Jennifer Harbury	US\$ 80,000.00
José León Bámaca Hernández	US\$ 25,000.00
Egidia Gebia Bámaca Velásquez	US\$ 20,000.00
Josefina Bámaca Velásquez	US\$ 20,000.00
Alberta Velásquez	US\$ 5,000.00
<b>TOTAL</b>	<b>US\$250,000.00</b>

67. As regards compensation for non pecuniary damages to Efraín Bámaca Velásquez, these will be distributed in the same way set forth in paragraph 53.

#### *C) OTHER FORMS OF REPARATION*

68. In this section, the Court will decide on non-monetary measures of compensation for non pecuniary damage.

#### *Arguments of the representatives of the victims*

69. The representatives of the victims stated that the Court should decide that:

- a) the human rights violations committed by State authorities to the detriment of Efraín Bámaca Velásquez did not allow Jennifer Harbury to develop her "life project", making it impossible for her to attain personal, professional, and family goals with him, and this is an element that affects a person in her vital essence, and is therefore autonomous from the moral damages, the pecuniary damages, and the punishment of those responsible, and therefore should be economically determined by the Court, following the criterion of equity; and
- b) compensation for the violation of the right to life of Efraín Bámaca Velásquez, because the latter has an autonomous value that transcends its potential to generate income, and when a person has been deprived of it, it cannot be compensated for by indemnification based on pecuniary or moral damages. This affects the family environment of the victim and transcends a materialistic quantification, for which reason it must be set in equity.

<sup>75</sup> See *Paniagua Morales et al. Case, Reparations, supra* note 5, para. 109.

They also stated that Guatemala must adopt measures of satisfaction to the victims to "guarantee that the violations [they] suffered will not happen again", and they highlighted the following:

- a) the holding of a "true criminal proceeding" to put an end to impunity in this case and clarify the facts that were at its origin, by means of a "serious, expedite, impartial, and effective" investigation, based on what was set forth in the November 25, 2000 judgment of the Court, for it to be possible to try and punish the persons responsible. Specifically, it is necessary to "determine the responsibility of the military commanders who ordered these actions, as well as the place where [the] body of Mr. Bámaca [Velásquez] is located";
- b) handing over the body of Efraín Bámaca Velásquez to his next of kin due to the specific cultural significance as well as the proven close ties, as a means to repair the "obstructive actions" carried out by agents of the State regarding determination of the whereabouts of the victim – what is called a "strategy of the Guatemalan State to ensure impunity"-. Delivery of the body of Efraín Bámaca Velásquez would help his next of kin to overcome the pain they have suffered. Furthermore, they pointed out the right of the victims, especially Jennifer Harbury, to participate in the steps taken in this regard, for which reason they requested that such steps be duly notified and that she be accompanied in them by forensic staff whom she trusts;
- c) vindication of the public image of the next of kin of Mr. Bámaca Velásquez, especially that of Jennifer Harbury, by disseminating a message of relief drafted by her, published in the written press, radio and television, the costs of which are to be covered by the State; and
- d) following the criterion of the Commission (*infra* 70 e) the representatives of the victims requested that the State adopt the legislative and any other measures required to adapt the Guatemalan legal system to human rights norms and humanitarian law.

#### *Arguments of the Commission*

70. In its May 8, 2001 brief, the Commission requested that the Court order the State to carry out the following measures of satisfaction and guarantee of non recidivism:

- a) implementation of the measures required to effectively comply with the obligation to investigate the facts, punish those responsible and make known, publicly, the results of the investigations, so as to put an end to the situation of impunity in connection with this case, which is important both "for the family and for Guatemalan society as a whole";
- b) taking all steps required to recover the mortal remains of Efraín Bámaca Velásquez, as a way to "put an end to an aspect of inhuman treatment and denial of justice experienced by the family" and to deliver them for the victim to be buried in a dignified manner, in the place designated by the next of kin for this purpose, as an essential element for reparation of the damages caused by forced disappearance;

- c) to adopt the measures required to guarantee Jennifer Harbury and the other next of kin of Bámaca Velásquez their right to participate in all legal procedures carried out to locate the mortal remains of the victim and to determine the responsibility for violations committed, through timely and effective notice of such procedures;
- d) to allow Jennifer Harbury to publicly present the facts, as a form of reparation of the detriment caused by the campaign conducted by State authorities against her honor and reputation; in this regard, they requested that three pages be included in the national daily with the highest circulation in Guatemala, and that a video tape be edited on the facts that affected Mrs. Harbury's image;
- e) taking the legislative and any other measures necessary to adapt the Guatemalan legal system to human rights norms and humanitarian law and, specifically, to adapt to those standards the procedures applied by the military forces in connection with treatment of captured combatants, to ensure their right to life, liberty, humane treatment, judicial protection and a fair trial; and
- f) to declare the loss of possibilities of "self-realization" and "life options" of Efraín Bámaca Velásquez, as a consequence of the violations committed against him by State agents, which must be considered by the Court, from "an integral and not only patrimonial perspective", when it sets the amount of compensatory indemnification. The Commission added that there must be a "flexible interpretation of lost earnings, [...] not merely through mechanical application of the growth that would have occurred in the same job, but rather expanding the concept of lost earnings, to refer to what would have been probable in equity". Furthermore, they requested that the age and expectations shared by his spouse be taken into account, for which reason they estimated US\$25,000.00 (twenty-five thousand United States dollars) as a "minimum threshold" to set compensation in equity for detriment to his life plan.

#### *Arguments of the State*

71. Guatemala expressed its commitment to "promote and advance the investigations to clarify the facts analyzed by the Court". The State also pointed out that the signing of the "Agreement for a Firm and Lasting Peace" is an important element for events such as those of the instant case not to occur again, and that the fact that the historical truth-finding committee or Comisión de Esclarecimiento Histórico has taken cognizance of them represents "a principle of reparation by means of which Guatemalan society can know the historical truth". Finally, the State referred to the development of various political actions by the State tending to provide "redress and reparation" to the victims of the various violations that occurred in Guatemala, and among them the State mentioned the draft bill of the Peace Committee or Comisión de Paz y Concordia, the establishment of the National Program to Search for Missing Persons, and the National Program for Exhumations. These are set in the framework of the activities of the Presidential Coordinating Committee for the Policy of the Executive regarding Human Rights. The State recognized, however, that such initiatives do not guarantee that the whereabouts of

the victims of the armed conflict will in fact be established. Nevertheless, the State expressed that it would be convenient for the Court to encourage and request "support from the international community to strengthen [...] such programs".

72. At the public hearing, the State expressed that it is working on five human rights policies, and that within this framework "an investigation will continue" in the instant case.

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### *Considerations of the Court*

73. Pursuant to operative paragraph eight of the November 25, 2000 judgment on the merits, Guatemala must conduct "an investigation to determine the persons responsible for the human rights violations referred to in [that] Judgment, and also to publicly disseminate the results of such investigation and punish those responsible".<sup>76</sup> In this manner, the reparations that must be made by the State necessarily include effectively investigating the facts, punishing all those responsible, and disseminating the results of the investigation.

74. This Court has referred once and again to the right of the relatives of the victims to know what happened<sup>77</sup> and to know which State agents were responsible for the respective facts.<sup>78</sup> "[I]nvestigation of the facts and punishment of those responsible, [...] is an obligation of the State when there has been a human rights violation and this obligation must be fulfilled seriously, and not as a mere formality".<sup>79</sup> Furthermore, this Court has indicated that the State "has the obligation to combat [impunity] through all legal means at its disposal because [it] fosters chronic recidivism of human rights violations and total defenselessness of the victims and their next of kin".<sup>80</sup> A State that does not punish human rights violations would, further, not be complying with its duty to guarantee free and full exercise of the rights of persons under its jurisdiction.<sup>81</sup>

75. This Court also established, in its judgment on the merits, that due to the characteristics of this case, the right to the truth was 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

<sup>76</sup> *Bámaca Velásquez Case*, *supra* note 6, operative paragraph 8.

<sup>77</sup> See *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 100; *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 200; and *Aloeboetoe et al. Case, Reparations*, *supra* note 40, para. 109.

<sup>78</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 69; and *Paniagua Morales et al. Case*, *supra* note 5, para. 200.

<sup>79</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 69; *Cesti Hurtado Case, Reparations*, *supra* note 5, para. 62; *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 100; and *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 200.

<sup>80</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 69; *Cesti Hurtado Case, Reparations*, *supra* note 5, para. 63; *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 100; and *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 201.

<sup>81</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 69; *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 99; *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 199; and *Bámaca Velásquez Case*, *supra* note 6, para. 129.

investigation and prosecution established in Articles 8 and 25 of the Convention.”<sup>82</sup> As this Court has pointed out, only if all circumstances of the violations involved are clarified can it be considered that the State has provided the victim and his next of kin effective remedy and that it has complied with its general obligation to investigate.<sup>83</sup>

76. The right that every person has to the truth has been developed in international human rights law<sup>84</sup> and, as this Court has stated previously, the possibility of the victim’s next of kin knowing what happened to the victim<sup>85</sup> and, if that be the case, the whereabouts of the victim’s mortal remains,<sup>86</sup> is a means of reparation, and therefore an expectation regarding which the State must satisfy the next of kin of the victims and society as a whole.<sup>87</sup>

77. Finally, the State has the obligation, according to the general duty set forth in Article 1(1) of the Convention, to ensure that these grave violations do not occur again. Therefore, the State must take all steps necessary to attain this goal. Preventive measures and those against recidivism begin by revealing and recognizing the atrocities of the past, as was ordered by the Court in its judgment on the merits. Society has the right to know the truth regarding such crimes, so as to be capable of preventing them in the future.

78. Therefore, the Court reiterates that the State has the obligation to investigate the facts that generated the violations of the American Convention in the instant

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<sup>82</sup> *Bámaca Velásquez Case*, *supra* note 6, para. 201.

<sup>83</sup> See *Caballero Delgado and Santana Case*. December 8, 1995 Judgment. C Series No. 22, para. 58.

<sup>84</sup> See, for example, *United Nations Human Rights Committee, Quinteros v. Uruguay, Communication No. 107/1981, decision of 21 July 1983*; United Nations, Human Rights Committee, Subcommittee on Prevention of Discrimination and Protection of Minorities, 49th Session, *Informe final revisado acerca de la cuestión de la impunidad de los autores de violaciones de los derechos humanos (derechos civiles y políticos) preparado por L. Joinet*, UN General Assembly Doc. E/CN.4/Sub.2/1997/20/Rev.1; United Nations, Human Rights Committee, Subcommittee on Prevention of Discrimination and Protection of Minorities, 45<sup>th</sup> Session, *Estudio relativo al derecho de restitución, indemnización y rehabilitación a las víctimas de violaciones flagrantes de los derechos humanos y las libertades fundamentales*, Final report submitted by Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8.

<sup>85</sup> See *Cantoral Benavides Case, Reparations*, *supra* note 5, para. 69; *Villagrán Morales et al. Case, Reparations*, *supra* note 5, para. 100; and *Paniagua Morales et al. Case, Reparations*, *supra* note 5, para. 200.

<sup>86</sup> See *Castillo Páez Case*, November 3, 1997 Judgment. C Series No. 34, para. 90; *Caballero Delgado and Santana Case. Reparations* (Art. 63(1) American Convention on Human Rights). January 29, 1997 Judgment. C Series No. 31, para. 58; and *Neira Alegria et al. Case, Reparations*, *supra* note 38, para. 69.

<sup>87</sup> See *Castillo Páez Case*, *supra* note 6, para. 90. In this regard, see also United Nations, Human Rights Committee, Subcommittee on Prevention of Discrimination and Protection of Minorities, 49th Session, *Informe final revisado acerca de la cuestión de la impunidad de los autores de violaciones de los derechos humanos (derechos civiles y políticos) preparado por L. Joinet*, UN General Assembly Doc. E/CN.4/Sub.2/1997/20/Rev.1; and United Nations, Human Rights Committee, Subcommittee on Prevention of Discrimination and Protection of Minorities, 45th Session, *Estudio relativo al derecho de restitución, indemnización y rehabilitación a las víctimas de violaciones flagrantes de los derechos humanos y las libertades fundamentales*, Final report submitted by Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8.

case, as well as to publicly divulge the results of said investigation, and to punish those responsible.

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79. In the instant case the Court determined the violation of Article 4 of the American Convention, and pointed out that “[...] 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.”<sup>88</sup> Therefore, the State must locate the mortal remains of Efraín Bámaca Velásquez and hand them over to his next of kin, for them to be buried in accordance with their customs and religious beliefs.

80. It is also suitable to highlight that in the “Agreement on the basis for incorporation of the Unidad Revolucionaria Nacional Guatemalteca to legality”, that is part of the body of evidence, the State undertook the commitment, in point 54 of that Agreement, to cooperate “[...] on the issue of the detained and disappeared members of URNG and to contribute all the means, relevant measures, and information leading to the recovery of the remains of members of the URNG”.<sup>89</sup>

81. This Court deems that care for the mortal remains of a person is a form of observance of the right to human dignity. This Court has also pointed out that the mortal remains of a person deserve respectful treatment before that person’s next of kin, due to the significance they have for them.<sup>90</sup> Respect for those remains, observed in all cultures, acquires a very special significance in the Mayan culture, Mam ethnic group, to which Efraín Bámaca Velásquez belonged. The Court has already recognized the importance of taking into account certain aspects of the customs of the indigenous peoples of the Americas for purposes of application of the American Convention on Human Rights (*Mayagna (Sumo) Awas Tingni Case vs. Nicaragua*)<sup>91</sup>. As was reiterated at the public hearing on reparations in the instant case, for the Mayan culture, Mam ethnic group, funeral ceremonies ensure the possibility of the generations of the living, the deceased person, and the deceased ancestors meeting anew. Thus, the cycle between life and death closes with these funeral ceremonies, allowing them to “express their respect for Efraín, have him near and return him or take him

to live with the ancestors”, as well as for the new generations to share and learn about his life, something that is traditional in his indigenous culture.<sup>92</sup>

<sup>88</sup> Bámaca Velásquez Case, supra note 6, para. 133.

<sup>89</sup> *Acuerdo sobre Bases para la Incorporación de Unidad Revolucionaria Nacional Guatemalteca a la Legalidad, Appendix 7, Volume I on Reparations, at the Secretariat of the Inter-American Court, f. 41.*

<sup>90</sup> *Blake Case*. January 24, 1998 Judgment. C Series No. 36, para. 115.

<sup>91</sup> See *Mayagna (Sumo) Awas Tingni Community Case*, supra note 7, para. 149; and *Aloeboetoe et al. Case, Reparations*, supra note 40, para. 62.

<sup>92</sup> In this regard, this Court highlights the constitutional legislation in force in Guatemala:

82. In view of all the above, the Court considers that the State must conduct the exhumations, in the presence of the next of kin, to locate the mortal remains of Efraín Bámaca Velásquez and to hand them over to them. The Court also considers that Guatemala must provide the necessary conditions not only to determine the whereabouts of the victim, but also to take those remains to the place chosen by his next of kin, at no cost to them.

83. Finally, as a measure of satisfaction, the Court considers that the State must implement, if it does not currently exist, a national exhumations program, as the State itself mentioned in its brief with observations on the reparations.

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84. Regarding the request for reparation of the detriment to the reputation and honor of Mrs. Harbury, it is the opinion of the Court that both the judgment on the merits rendered in the instant case, in which it was decided that Guatemala was responsible for the violation of certain human rights, and the instant Judgment, are *per se* adequate reparation in this regard.<sup>93</sup> Nevertheless, the Court deems that the State must carry out a public act of recognition of its responsibility in connection with the facts of this case, and of relief to the victims.<sup>94</sup> The Court also decides that as a means of providing satisfaction, the State must publish in the official gazette, *Diario Oficial*, and in another daily with national circulation, once only, the operative part of the November 25, 2000 judgment on the merits and the chapter pertaining to the proven facts in that judgment.<sup>95</sup>

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85. In accordance with the positions of the Commission and of the representatives of the victims in this regard, the Court deems that Guatemala must adopt the legislative and any other measures required to adapt the Guatemalan legal system to international human rights norms and humanitarian law, and to make them domestically effective, pursuant to Article 2 of the Convention. Specifically, the State must adopt the *national measures to apply international humanitarian law*, as well as those for protection of human rights that ensure the free and full exercise of

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"Article 58.- Cultural identity. The right of individuals and communities to their cultural identity in accordance with their values, their language, and their customs, is recognized.

[...]

Article 66.- Protection of ethnic groups. Guatemala is formed by various ethnic groups, including indigenous groups of Mayan ancestry. The State recognizes, respects, and promotes their life styles, customs, traditions, forms of social organization, the use of indigenous dress by men and women, languages and dialects".

<sup>93</sup> See *Cesti Hurtado Case, Reparations*, *supra* note 5, para. 59; "*The Last Temptation of Christ*" *Case, supra* note 6, para. 99; and *Suárez Rosero Case, Reparations* (Art. 63(1) American Convention on Human Rights). January 20, 1999 Judgment. C Series No. 44, para. 72.

<sup>94</sup> *Cantoral Benavides Case, Reparations, supra* note 5, para. 81.

<sup>95</sup> *Cantoral Benavides Case, Reparations, supra* note 5, para. 79.

the rights to life, to personal liberty, to humane treatment, to judicial protection and to a fair trial, so as to avoid future injurious acts such as those of the instant case.<sup>96</sup>

86. Among the aforementioned measures, the State must comply with Article VIII of the Inter-American Convention on the Forced Disappearance of Persons,<sup>97</sup> according to which: “[t]he States Parties shall ensure that the training of public law-enforcement personnel or officials includes the necessary education on the offense of forced disappearance of persons.”

87. It is also necessary to take into account that in its judgment on the merits this Court declared that “to the detriment of Efraín Bámaca Velásquez, 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.” In the framework of the current reparations stage, the Court deems that, to protect the right to humane treatment under its domestic jurisdiction, the State must fully apply the aforementioned articles of the Inter-American Convention to Prevent and Punish Torture.

## **IX COSTS AND EXPENSES**

### *Arguments of the representatives of the victims*

88. The representatives of the victims requested reimbursement of costs and expenses for the total sum of US\$48,315.00 (forty-eight thousand three hundred and fifteen United States dollars), for expenses incurred by Jennifer Harbury in her search for justice at a national and international level in the instant case. They specifically requested the following amounts: US\$8,500.00 (eight thousand five hundred United States dollars) for professional attorney fees; US\$24,575.00 (twenty-four thousand five hundred and seventy-five United States dollars) as reimbursement for expenses caused by steps taken before the Inter-American Court of Human Rights; US\$15,700.00 (fifteen thousand seven hundred United States dollars) for payment of fees to attorney José Pertierra, for the period between February, 1993 and the year 1997; and US\$8,040.00 (eight thousand and forty United States dollars) for the expenses of CEJIL. However, in their final arguments at the public hearing, the representatives estimated their costs and expenses to be US\$45,054.00.

### *Arguments of the Commission*

89. The Commission endorsed the request made by the representatives of the victims.

### *Arguments of the State*

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<sup>96</sup> See *Paniagua Morales et al. Case*, *supra* note 5, para. 203.

<sup>97</sup> Guatemala has been a State Party to the Inter-American Convention on Forced Disappearance of Persons since July 27, 1999.

90. The State expressed its agreement with the Court setting the amount for costs and expenses, insofar as “those expenses are fully verifiable with legal documents supporting the disbursements made”.

*Considerations of the Court*

91. The Court, pursuant to the provisions of Article 63(1) of the American Convention and its case law,<sup>98</sup> deems it equitable to recognize as costs and expenses US\$18,000.00 (eighteen thousand United States dollars) to Jennifer Harbury and US\$5,000.00 (five thousand United States dollars) to CEJIL.

**X  
METHOD OF COMPLIANCE**

*Arguments of the representatives of the victims*

92. In their May 8, 2001 brief, the representatives of the victims stated that “there must be an effective mechanism to ensure compliance with the judgment on reparations” and to this end they requested that the Court hold a hearing, six months after the rendering of this judgment, for the State to inform the Court regarding compliance with it, especially regarding delivery of the mortal remains of Mr. Bámaca Velásquez to his next of kin. In case this delivery does not occur, if that is due to causes attributable to the State, the representatives would request at the appropriate time that Guatemala have to pay a daily sum until the body is found and delivered to the next of kin. At the public hearing on reparations, the representatives of the victims added that the aforementioned sum would reflect a “monetary translation of the continuing damage caused by anguish and suffering [...] that exists with a forced disappearance”.

93. The representatives of the victims also requested that compensation be paid within six months time, in United States dollars, deposited to “an account previously opened abroad for this purpose”, as well as that it be exempt from any current or future taxes in Guatemala and that, for every day of non-payment, current banking interest be recognized, in accordance with the case law of this Court.

*Arguments of the Commission*

94. The Commission requested that the Court order that:

- a) the State must comply with all measures of reparation within six months of the issuance of the respective judgment, after which time it must report on compliance with it, and the Court could have to hold a public hearing “to consider any matters pertaining to this point that have not been definitively resolved”;

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<sup>98</sup> See *Cantoral Benavides Case, Reparations*, supra note 5, para. 87; *Mayagna (Sumo) Awas Tingni Community Case*, supra note 7, para. 169; *Cesti Hurtado Case, Reparations*, supra note 5, para. 73; *Villagrán Morales et al. Case, Reparations*, supra note 5, para. 109; and *Paniagua Morales et al. Case, Reparations*, supra note 5, para. 217.

- b) payment of compensation be made in United States currency or in an equivalent amount of quetzales, the national currency of Guatemala, but taking into account the need to maintain the purchasing power of the compensation, as a consequence of currency devaluation and depreciation;
- c) compensation be exempt from current or future taxes;
- d) the remains of Efraín Bámaca Velásquez be located and recovered; that the material and intellectual authors of the human rights violations be investigated, tried, and punished; and that the necessary measures be adopted for the next of kin to participate in the judicial procedures pertaining to location and final destination of the remains of Mr. Bámaca Velásquez; and
- e) the Court establish in its judgment that it will maintain its competence regarding this matter until compliance with all reparation measures ordered has been certified.

95. The State did not refer to this aspect in its May 8, 2001 brief.

*Considerations of the Court*

96. To comply with this Judgment, the State must carry out the payment of the compensatory indemnifications, the reimbursement of costs and expenses and adoption of the other measures ordered, within six months time from the date this Judgment is notified, except regarding delivery of the mortal remains of Efraín Bámaca Velásquez, for which the State will have time until December, 2002.

97. Payment of compensation decided in favor of the victims or their next of kin who are of age will be made directly to them. If any are deceased or die, payment will be made to their heirs.

98. Expenses incurred due to steps taken by the next of kin of the victims and their representatives and costs caused by domestic proceedings and in the international proceedings before the inter-American system for the protection of human rights, will be paid to CEJIL and Jennifer Harbury, as previously determined (*supra* 91).

99. If for any reason it were not possible for the beneficiaries of the compensations to receive them within the aforementioned six months time, the State will deposit those amounts to an account or certificate of deposit in their name at a solvent Guatemalan banking institution, in United States dollars or the equivalent amount in Guatemalan currency and under the most favorable financial conditions allowed by banking practice and legislation. If after ten years the compensation has not been claimed, the amount shall return to the State, with the interest accrued.

100. The State can fulfill its obligations by payment in United States dollars or an equivalent amount in Guatemalan currency, using for this calculation the exchange rate between both currencies in the New York, United States of America exchange, the day before the payment.

101. Payments ordered in this Judgment will be exempt from all currently existing taxes and those that may be established in the future.

102. The representatives of the victims requested of the Court that in case the mortal remains of Efraín Bámaca Velásquez are not delivered within the six month term, the State of Guatemala should pay a daily amount until they are effectively delivered to his next of kin (*supra* 92). In this regard, when it evaluates the degree of compliance with these obligations, the Court will adopt the relevant measures at the appropriate time to ensure compliance with this measure.

103. If the State is in arrears, it will pay interest on the amount owed in accordance with the moratory interest rate in Guatemalan banks.

104. Finally, the Court orders that the Guatemalan State publicly make amends to recognize its responsibility in this case and avoid repetition of acts such as those of the instant case.

105. In accordance with this Court's case law, the Court reserves the authority to monitor integral compliance with the instant Judgment. The case will be closed once the State has faithfully complied with the provisions of this Judgment.

## **XI OPERATIVE PARAGRAPHS**

106. Therefore,

### **THE COURT,**

### **DECIDES:**

unanimously,

1. that the State must locate the mortal remains of Efraín Bámaca Velásquez, disinter them in the presence of his widow and next of kin, and deliver them, under the terms set forth in paragraphs 81, 82 and 96 of the instant Judgment.

2. that the State must investigate the facts that generated the violations of the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture in the instant case, identify and punish those responsible, and publicly divulge the results of the respective investigation, under the terms set forth in paragraphs 73 to 78 and 87 of this Judgment.

3. that the State must publish in the Official Gazette and in another daily with national circulation, once only, the chapter pertaining to the proven facts and the operative part of the November 25, 2000 judgment on the merits, and to carry out a public act of recognition of its responsibility in connection with the facts in this case and to make amends to the victims.

4. that the State must adopt the legislative and any other measures required to adapt the Guatemalan legal system to international human rights norms and humanitarian law, and to fully and effectively enforce said norms under domestic jurisdiction, pursuant to Article 2 of the American Convention on Human Rights.

5. that the State must pay, for non-pecuniary damages:
  - a) US\$100,000.00 (one hundred thousand United States dollars) or the equivalent amount in Guatemalan currency, for it to be equally distributed among José León Bámaca Hernández, Egidia Gebia Bámaca Velásquez, Josefina Bámaca Velásquez and Jennifer Harbury, as successors to Efraín Bámaca Velásquez, under the terms set forth in paragraphs 62, 66, 67 and 53 of the instant Judgment.
  - b) to Jennifer Harbury, US\$80,000.00 (eighty thousand United States dollars) or the equivalent amount in Guatemalan currency, under the terms set forth in paragraphs 65.a) and 66 of the instant Judgment.
  - c) to José León Bámaca Hernández, US\$25,000.00 (twenty-five thousand United States dollars) or the equivalent amount in Guatemalan currency, under the terms set forth in paragraphs 65.b) and 66 of the instant Judgment.
  - d) to Egidia Gebia Bámaca Velásquez, US\$20,000.00 (twenty thousand United States dollars) or the equivalent amount in Guatemalan currency, under the terms set forth in paragraphs 65.b) and 66 of the instant Judgment.
  - e) to Josefina Bámaca Velásquez, US\$20,000.00 (twenty thousand United States dollars) or the equivalent amount in Guatemalan currency, under the terms set forth in paragraphs 65.b) and 66 of the instant Judgment.
  - f) to Alberta Velásquez, US\$5,000.00 (five thousand United States dollars) or the equivalent amount in Guatemalan currency, under the terms set forth in paragraphs 65.c) and 66 of the instant Judgment.
6. that the State must pay, for pecuniary damages:
  - a) US\$100,000.00 (one hundred thousand United States dollars) or the equivalent amount in Guatemalan currency, to be equally distributed among José León Bámaca Hernández, Egidia Gebia Bámaca Velásquez, Josefina Bámaca Velásquez and Jennifer Harbury, as successors to Efraín Bámaca Velásquez, under the terms set forth in paragraphs 51, 53 and 55 of the instant Judgment.
  - b) to Jennifer Harbury, US\$125,000.00 (one hundred and twenty-five thousand United States dollars) or the equivalent amount in Guatemalan currency, for her lost earnings of the period from March 12, 1992 to January, 1997, the expenses derived from detriment to her health caused by the facts in this case, and the expenses she incurred seeking to determine the whereabouts of Efraín Bámaca Velásquez, under the terms set forth in paragraphs 54 and 55 of the instant Judgment.
7. that the State must pay, for costs and expenses, US\$23,000.00 (twenty-three thousand United States dollars) or the equivalent amount in Guatemalan currency, to the next of kin and the representatives of the victims, under the terms set forth in paragraph 91 of the instant Judgment.

8. that the State must comply with the measures of reparation ordered in the instant Judgment within six months of the date when notice of this Judgment is served.

9. that payments ordered in the instant Judgment will be exempt from any existing or future taxes.

10. that the Inter-American Court of Human Rights will monitor compliance with this Judgment and will close the instant case once the State has fully applied the provisions set forth in it.

Judges Cañado Trindade and García Ramírez informed the Court of their Opinions, which accompany this Judgment.

Done in the Spanish and English languages, the text in Spanish being authentic, in San José, Costa Rica, on February 22, 2002.

Antônio A. Cañado Trindade  
President

Alirio Abreu-Burrelli

Hernán Salgado-Pesantes

Oliver Jackman

Sergio García-Ramírez

Carlos Vicente de Roux-Rengifo

Manuel E. Ventura-Robles  
Secretary

So ordered,

Antônio A. Cañado Trindade  
President

Manuel E. Ventura-Robles  
Secretary

## SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the present Judgment on reparations which the Inter-American Court of Human Rights has just adopted in the case *Bámaca Velásquez versus Guatemala*, which I consider a new advance in its recent jurisprudential construction. The transcendental questions examined by the Court lead me to some reflections, which I feel obliged to give expression to in this Separate Opinion, as the foundation of my position on the matter. It is significant that the *first* resolutive point of the present Judgment has stressed the determination of the Court to see to it that the respondent State finds the mortal remains of Mr. Efraín Bámaca Velásquez, proceeds to their exhumation in the presence of his widow and relatives, and gives those remains to them. My thoughts concentrate on four specific aspects pertaining to this resolutive point of the Judgment, which I allow myself here to call: a) the time, the living law, and the dead; b) the projection of human suffering in time; c) the passing of time, and the repercussion of the solidarity between the living and the dead in the Law; and d) the precariousness of the human condition and the universal human rights.

### I. The Time, the Living Law, and the Dead.

2. One of the manifestations of the unity of the human kind lies in the links between the living (*titulaires* of the human rights) and the dead (with their spiritual legacy)<sup>1</sup>. Thus, e.g., the respect for the dead is due in the persons of the living. Always cultivated in the most distinct cultures and religions, the respect for the dead is safeguarded in the domain of Law<sup>2</sup>, which, thereby, gives concrete expression to a universal sentiment of the human conscience. In effect, in comparative law it is found that the penal codes of numerous countries tipify and sanction the crimes against the respect for the dead (such as, e.g., the subtraction and the hiding of the mortal remains of a human being). The question marks presence in national as well as international case-law<sup>3</sup>. On its turn, International Humanitarian Law also imposes expressly the respect for the mortal remains of the dead persons, as well as a burial place with dignity for them<sup>4</sup>.

3. Underlying these norms is the constant search - present in all cultures and philosophical traditions of all peoples in all times - for an understanding of death. But despite all the attention dedicated to the theme in the cultures and the modes of expression of the human feelings (such as literature and the arts), curiously all the rich contemporary thinking on the rights inherent to the human being has concentrated almost exclusively in the persons of the living (as *titulaires* of those rights), failing to recollect with sufficient clarity the links between these latter and their dead, even to

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<sup>1</sup>. As I saw it fit to point out in my Separate Opinions in the cases of *Bámaca Velásquez* (Merits, 2000, pars. 14-18) and of the "*Street Children*" (Reparations, 2001, par. 25).

<sup>2</sup>. Already the ancient Roman law, for example, safeguarded penally such respect for the dead.

<sup>3</sup>. Cf., as to this latter, e.g., the Advisory Opinion of the International Court of Justice (of 16.10.1975) on the *Western Sahara*, in: *ICJ Reports* (1975) pp. 68, 36 and 41, pars. 162, 70 and 87.

<sup>4</sup>. Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War, Article 130; Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 34.

determine their legal consequences. This gap ought to be filled, bearing in mind, to start with, that we all live *in time*, and that the legal norms are created, interpreted and applied likewise *in time*.

4. Time keeps on being a great mystery surrounding human existence. Human knowledge of the extreme frontiers of life (birth and death) continues to be limited, and such frontiers have become "more mobile" as a consequence of the cultural changes and the technological development, what attributes an even greater responsibility to the jurists, who ought to be attentive to the ethical codes and to the cultural manifestations in evolution<sup>5</sup>. In thus acting, far from neglecting the universal standards of respect for human rights, they will be contributing to affirm them with even more vigour, discarding the distortions of the so-called cultural "relativism" (cf. *infra*). The very conscience of time is "a very late product of human civilization humana", and when the human being "a pris connaissance du problème du temps, quand il ne s'est plus cantonné dans le cercle étroit de ses désirs et besoins immédiats, mais a commencé à rechercher l'origine des choses, il n'a pu trouver qu'une origine mythique, non historique"<sup>6</sup>.

5. Despite all that has been written on the subject, the very *origin* of the cultures still continues without an answer<sup>7</sup>; and time and space, which they seek to explain, appear ultimately as mental creations<sup>8</sup> of the social conscience, which allow to conceive a unified and coherent cosmos<sup>9</sup>. Of the essence of cultural life are "the perception and the awareness of time", which, in turn, constitute component elements of "the solidarity of human generations which succeeded each other and return, repeating each other as the stations"<sup>10</sup>. Time was even considered - as in

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<sup>5</sup>. S. Rodotà, "Law and Moral Dilemmas Affecting Life and Death - A General Presentation of the Issues", in: *Law and Moral Dilemmas Affecting Life and Death* (Proceedings of the 20th Colloquy on European Law, Glasgow, September 1990), Strasbourg, Council of Europe, 1992, pp. 13-14. - In fact, there is no social *milieu* in which collective representations pertaining to its origin and to its destiny are not found. There is a spiritual legacy which is transmitted, with the passing of time, from generation to generation, conforming a "perfect spiritual continuity between generations". Hence the relevance of the conscience of living *in time*, and of the burial rites; E. Durkheim, *Las Formas Elementales de la Vida Religiosa*, Madrid, Alianza Ed., 1993 (reed.), pp. 393, 419, 436, 443 and 686.

<sup>6</sup>. Ernst Cassirer, *Essai sur l'homme*, Paris, Éd. de Minuit, 1975, p. 243.

<sup>7</sup>. *Ibid.*, p. 47.

<sup>8</sup>. This is what Karl Popper ponders, to whom "space and time do not form part of the empirical, real world, of things and events, but are rather part of our mental constitution, of our apparatus to grasp the world". K. Popper, *En Busca de un Mundo Mejor*, Barcelona, Ed. Paidós, 1996, pp. 171-173.

<sup>9</sup>. A.Y. Gurevitch, "El Tiempo como Problema de Historia Cultural", in *Las Culturas y el Tiempo*, Salamanca/Paris, Ed. Sígueme/UNESCO, 1979, pp. 260-261. In this way, "converted into ruler of time", the human being "is also dominated by it" (*ibid.*, p. 261). The perception of time came to help the human being to overcome "the briefness and the unicity of his life"; with that, and the life in his social environment, the human being thought that he could "deceive death" (*ibid.*, p. 263).

<sup>10</sup>. *Ibid.*, pp. 280 and 264, and cf. p. 272.

the *Confessions* of Saint Augustin - as an essential aspect of the spiritual life of the individuals and groups, as an integral part of the social conscience itself<sup>11</sup>.

6. The *passing* of time brings the living ineluctably closer to their dead, and binds them together, and the preservation of the spiritual legacy of our predecessors constitutes a means whereby they can communicate themselves with the living<sup>12</sup>. In my Separate Opinion in the Judgment as to the merits in the present case *Bámaca Velásquez* (2000), I saw it fit to observe that "even though the juridical subjectivity of an individual ceases with his death (thus no longer being, when having died, a subject of Law or *titulaire* of rights and duties), his mortal remains - containing a corporeal parcel of humanity, - continue to be juridically protected (...). The respect to the mortal remains preserves the memory of the dead as well as the sentiments of the living (in particular his relatives or persons close to him) tied to him by links of affection, - this being the value juridically protected" (par. 12).

7. And, in this line of thinking, I added:

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

8. Some thinkers in the field of Law have had the attention to underline the non-coincidence between the "life" of the rights<sup>13</sup> and that of the human beings, although without taking their analysis to the ultimate consequences of this finding. It is clear that the time of the life of a human being does not necessarily coincide with the time of application (*vigencia*) of the

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<sup>11</sup>. Few persons, like Saint Augustin, felt with such intensity the inscrutable mystery of the time. In the insurmountable pages on the matter, of book XI of his *Confessions* (written between the years 398 to 400), to the question "what is time?", he answered: "if no one asks me, I know it; but if I want to explain it to whoever asks me, then I do not know it" (par. 17). And he added, as to the "three times" (or "three moments in the spirit", namely, "expectation, attention and remembrance" - par. 37): the three times - past, present and future - "are in the mind and I do not see them elsewhere. The present of the past is memory. The present of the present is the vision. The present of the future is the expectation" (par. 26).

<sup>12</sup>. As I saw it fit to point out in my Concurring Opinion in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Provisional Measures, 2000, par. 5), and in my Separate Opinion in the *Bámaca Velásquez* case (Merits, 2000, par. 15). In this last Opinion, I observed *inter alia* that "just as the living experience of a human comunidad develops with the continuous flux of thought and action of the individuals who compose it, there is likewise a spiritual dimension which is transmitted from an individual to another, from a generation to another, which precedes each human being and survives him, *in the time*" (*ibid.*, par. 15).

<sup>13</sup>. The temporal dimension of the formation of Law, as well as of the juridical operations, is evident. Time conditions, in effect, the birth, the exercise, the effectiveness and the extinction of rights. In the same way, the temporal dimension exerts an important role in the very interpretation of the juridical norms (the so-called intertemporal law).

legal norms<sup>14</sup> which seek to protect him; in effect, law seeks to protect the human being for even after his death, e.g., in imposing the respect for his mortal remains<sup>15</sup>. To those who are alive, it is of fundamental importance the intangibility of their own legal personality, as a limit to all the manifestations of arbitrary State - or any other - power. But the thinkers who in the past have sustained, in the domain of Law, the communion between all human beings<sup>16</sup>, have thought only in those who are alive. In my view, this communion extends also to the dead, in relation to those who have survived them.

9. In the present case *Bámaca Velásquez*, the Court has duly taken into account and stressed the importance of the respect for the mortal remains of a person, and the special meaning that this has in particular for the *maya* culture, to which belonged the victim, Mr. Efraín Bámaca Velásquez. In distinct parts of the present Judgment, the Court has taken note that, for those who belong to that culture, the cultural cycle formed by life and death is closed with the burial rites, which provide a "*convivencia*" of the living with the dead and an "encounter" between generations<sup>17</sup>. These "encounters" of the living with their dead have a whole pedagogy, which preserves an "integrated culture", and renders it possible that "values of an ethical and moral kind" be assimilated by the sons and grandsons, who benefit themselves from all the accumulated experience<sup>18</sup>. Thus, one is not only before an encounter of the dead with his own ancestors, but also before the projection of this encounter into the persons of the living, of the new generations<sup>19</sup>.

## II. The Projection of Human Suffering in Time.

10. In the public hearing on reparations, of 28-29 November 2001, before this Court, in the present case *Bámaca Velásquez*, the projection in time of the suffering of the widow of the victim, Mrs. Jennifer Harbury, was pointed out. She herself declared that since what occurred, one decade ago (in 1992), with her husband, until the present, the "very hard reality" of the facts has awoken in her constant "nightmares", has made her hear "cries in the night" (imagining her

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<sup>14</sup>. Already in my Separate Opinion in the *Blake versus Guatemala* case (Judgment as to the merits, of 24.01.1998), I saw it fit to indicate the *décalage* between the chronological time, the biological time (of the life of the human beings), and the time of the juridical solutions: the time in which we live, - I observed, - "besides being an unfathomable mystery which has always accompanied human existence from the beginning until its end, is indifferent to legal solutions devised by the human mind; and the time of human beings, applied to their legal solutions as an element which integrates them, not seldom leads to situations which defy their own legal logic", - as illustrated by the present *Blake* case (paragraph 6).

<sup>15</sup>. Vicente Ráo, *O Direito e a Vida dos Direitos*, 5a. ed., São Paulo, Ed. Rev. dos Tribs., 1999, p. 52.

<sup>16</sup>. Cf., e.g., *ibid.*, pp. 923 and 641.

<sup>17</sup>. Paragraph 81, and cf. par. 21. As pointed out in a declaration by an expert before the Court (taken into account by this latter), the rendering of the mortal remains allows the family to "reintegrate" in a body the spirit, and "to close down the cultural cycle" of life and death; cf. CtIADH, *Transcripciones de la Audiencia Pública...*, *op. cit. infra* n. ( ), pp. 71-72, and cf. p. 64.

<sup>18</sup>. Paragraph 20(c), and cf. par. 21(a).

<sup>19</sup>. CtIADH, *Transcripciones de la Audiencia Pública...*, *op. cit. infra* n. (20), p. 118.

husband "being burned or begging for help"), which have been transformed to her into "a permanent state", which, - she added, - "will go with me into the tomb"<sup>20</sup>. As her husband has remained disappeared for so many years, - she added, - "I have the need to have him in my arms (...) and to lay him into his tomb (...), to leave him in his grave with affection, (...) I need to have him (...) in my arms once more"<sup>21</sup>.

11. In my Separate Opinion in the paradigmatic case of the "*Street Children (Villagrán Morales and Others versus Guatemala, Reparations, 2001)*", I underlined the importance, for an international tribunal of human rights, to bear in mind the intensity of human suffering, and even the impact of this latter into the social *milieu* as a whole, in the following terms:

"(...) Even if those responsible for the established order do not perceive it, the suffering of the excluded ones is ineluctably projected into the whole social *corpus*. (...) Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole. (...) The victims are multiplied in the persons of the surviving close relatives, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others" (párr. 22).

12. Human suffering, moreover, is projected in time, as reckoned by the Court in the present Judgment in the *Bámaca Velásquez* case, to the effects of the reparations, in keepint in mind teh declaration of an expert according to which "the forced disappearance of a person generates a deep psychological impact in their relatives (...). The pain is never lost, and despite the passing of time any minor thing remindful of the disappeared person (...) is sufficient to discharge again absolutely the whole previous suffering" (par. 21). The expert further declared that there are "testimonies of survivors of other situations who after 50 years still remember and still feel pain for what happened, or who still shed tears to think about it"<sup>22</sup>.

13. Human dignity finds expression also in the respect for the mortal remains of those who have already crossed the extreme limit of life. The indifference as to human destiny (and all the symbolism which surrounds this latter) is a way of violating the right to dignity. In this respect, Elie Wiesel, Nobel Peace Prize in 1986, has pointed out with lucidity that "the two great mysteries - birth and death - are what all human beings have in common. Only the path is different. And it is incumbent upon us to humanize it. (...) If there is a word which defines and illustrates the fear of our contemporaries, it is the intolerance which is expressed in humiliation. It continues to threaten all that our civilization has acquired in five thousand years. (...) Every human being has the right to dignity. To violate this right, is to humiliate the human being. (...) One ought to fight indifference. It only helps the persecutor, the opressor, (...) never the victim"<sup>23</sup>.

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<sup>20</sup>. CtIADH, *Transcripción de la Audiencia Pública sobre Reparaciones en el Caso Bámaca Velásquez de 28-29 de Noviembre de 2001*, pp. 19 and 21-22, and cf. p. 113 (internal circulation).

<sup>21</sup>. *Ibid.*, p. 26.

<sup>22</sup>. CtIADH, *Transcripción de la Audiencia Pública...*, *op. cit. supra* n. (19), p. 117.

<sup>23</sup>. E. Wiesel, "Contre l'indifférence", in *Agir pour les droits de l'homme au XXIe. siècle* (ed. F. Mayor), Paris, UNESCO, 1998, pp. 87-90.

14. As already warned, it ought not to pass unnoticed that the *first* resolutive point of the present Judgment determines that the respondent State "must find out the mortal remains of Efraín Bámaca Velásquez, exhume them in the presence of his widow and relatives, as well as to give them to these latter". The Court has attributed due importance to this obligation of the public power, as a measure of reparation, in the circumstances of the concrete case. As it ensues from the present Judgment, the suffering of the dead has an incidence into the very *determination of the reparations*, even though those no longer have legal personality. The surviving relatives are beneficiaries of the reparations also as a result of the sufferings undergone in life for the dead relative. Thus, the projection of human suffering in time is manifested (with repercussions in the domain of Law) in distinct ways: not only in the course of our lives, of the *cammin di nostra vita*, but also in the relations between the living and their dead.

### III. The Passing of Time, and the Repercussion of the Solidarity between the Living and the Dead in the Law.

15. There is a point which deserves to be retaken and considered in greater depth in relation to the present Judgment on reparations which has just been adopted by the Court, namely, that pertaining to the *links of solidarity between the dead and the living*. In fact, the relations between solidarity and the Law have been object of attention from a long time. But the impact of the International Law of Human Rights into the contemporary legal science ought to, in my view, lead us to examine the theme from a wider perspective, in time. By the end of the XIXth century, for example, the study of those relations paved the way to "solidarism", a school of thought which had in Emile Durkheim a precursor and influential theoretician<sup>24</sup>.

16. Years later, in his book *L'État, le Droit objectif et la loi positive* (1901), Léon Duguit retook "solidarism"<sup>25</sup>, as from the warning that human beings can only live in society, the fundamental fact of which is "social solidarity": thus, the damage caused to a person affects the whole social tissue<sup>26</sup>. The human being suffers and dies alone, but the sum of human sufferings is minor when each one lives in relation with the others; the precariousness of the human condition fosters solidarity, which renders suffering less unbearable and unites the members of the

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<sup>24</sup>. Above all in his book *La division du travail social* (1893). But the writings of Durkheim on "social solidarity" are marked by ambiguities and a certain social determinism.

<sup>25</sup>. As from the community of interests and the division of labour in the social *milieu*. To him, the rules of Law are born from the human conscience, attentive to the social and individual ends. The State power is limited by Law. The individual conscience expands to the extent that each one understands solidarity. L. Duguit, *L'État, le Droit objectif et la loi positive*, Paris, A. Fontemoing Éd., 1901, pp. 10-11, 13-15 and 30, and cf. pp. 18, 25 and 81.

<sup>26</sup>. *Ibid.*, p. 24. To L. Duguit, with the development of the conscience, the human being comes to conceive himself as bearer of solidarity, and to understand, on the one hand, that in promoting solidarity one would benefit himself and everyone; and, on the other hand, that in violating a rule of conduct one violates it not only in relation to himself, but also in relation to everyone, and that an attempt against justice is an attempt against oneself and against all. According to him, egoism is nothing but the "imperfect notion of social solidarity", or simply ignorance (*ibid.*, p. 103).

human kind, the whole of humankind<sup>27</sup>. Solidarity is nourished precisely of the wish to diminish human suffering<sup>28</sup>.

17. To the perspicacity of Duguit (who left his mark in legal science), however, an aspect escaped, which I consider of major importance: the temporal dimension. Both Durkheim and Duguit examined "social solidarity" in the relations of human beings, that is, of the living; I think that, if we consider those relations *in time*, they ought to comprise also the dead, with their spiritual legacy, - as the facts of the present *Bámaca Velásquez* case suggest. Solidarity assumes, thus, a wider dimension, beyond the social one: one is before *human* (not only *social*) solidarity, in the links which unite the living to their dead.

18. In effect, in my Separate Opinion in the Judgment as to the merits of this same case *Bámaca Velásquez* (2000), I saw it fit to ponder, precisely in this sense, that

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

In the face of the anguish generated by the death of a beloved person, the burial rites, with the mortal remains, purport to bring a minimum of consolation to the survivors. Hence the importance of the respect for the mortal remains: their hiding deprives the relatives also of the burial ritual, which fulfils the needs of the unconscious itself and nourishes the hope in the prolongation or permanence of being (even though only in the live memory and in the links of affection of the survivors). The hiding and lack of respect for the mortal remains of the beloved person affect, thus, his close relatives in the innermost part of their being.

The spiritual legacy of the dead, in its turn, constitutes, in my understanding, an expression of the solidarity of those who have already died with those who are still alive, in order to help these latter to confront the injustices of this world, and to live with its queries and misteries (such as those of the passing of time and of the destiny of each one). But the expression of solidarity seems to me to operate also in the other, reciprocal, sense, of the living towards their dead, by virtue of the sufferings that these latter had to undergo before their crossing towards eternity" (pars. 19-21).

19. In a Separate Opinion in the case of the *Community Mayagna (Sumo) Awas Tingni versus Nicaragua* (2001), in singling out the attention dedicated by the Inter-American Court to the communal form of property prevailing among the members of that indigenous community in Nicaragua, it was pointed out that such "communal conception, besides the values underlying it, has a cosmovision of its own, and an important intertemporal dimension, in bringing to the fore the bonds of human solidarity that link those who are alive with their dead and with the ones who are still to come"<sup>29</sup>. Despite the fact that the links of solidarity between the living and the dead

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<sup>27</sup>. *Ibid.*, pp. 31 and 40. The different needs of each one are fulfilled within the social environment with solidarity, and the search for a more egalitarian society is fostered by solidarity (*ibid.*, pp. 44-47).

<sup>28</sup>. *Ibid.*, pp. 49-51.

<sup>29</sup>. IACtHR, case of the *Community Mayagna (Sumo) Awas Tingni versus Nicaragua*, Judgment of

have not yet been sufficiently dwelt upon in the domain of Law (*supra*), they have not passed unnoticed in the philosophy<sup>30</sup> and in the sociology of law (cf. *infra*).

20. In effect, in social environments strongly marked by a communitarian outlook there prevails a feeling of harmony between the living and the dead, - as demonstrated in the present case *Bámaca Velásquez*. In fact, at least one trend of the legal doctrine on the matter has envisaged, as passive subject of the right to respect for the dead, the community itself (starting with the relatives) to which the dead belonged. The conscience of time and death, and the anxiety resulting therefrom, are "contained" or circumscribed by the belief in the survival or rebirth. Thus, in the most ancient graveyards that one knows of (the Neanderthalese), the dead were buried in a foetal position, what suggested the belief in rebirth<sup>31</sup>. The funerals are important rites, which form part of the cultural legacy which self-perpetuates in the succession of generations, and contribute to face the reality of death and the anguish provoked by it<sup>32</sup>.

21. The juridical conscience is gradually forming itself and evolving with the succession of generations in search of the realization of the good in face of human suffering. The accumulation in time of the cultural manifestations, the traditions and ideals have conformed the moral patrimony of the peoples, which, on its turn, has repercussion in the evolution of Law. Thus, we who are alive enjoy rights which have been affirmed by past generations, and have the duty to contribute to the evolution of such rights to the benefit of future generations. Intergenerational equity is nourished by the spirit of human solidarity.

22. As it has been very well pointed out, "for after the existence one does not need rights, but one has duties. (...) The just conscience (...) will be understanding and accomplishing a legal relationship throughout time, between those who succeed each other without living together; (...) also in this one has to practice the *neminem laedere* and for that, previously, the *suum cuique tribuere*"<sup>33</sup>. In the present Judgment on reparations, the Court has duly warned that "the care with the mortal remains of a person is a form of observance of the right to human dignity" (par. 81).

#### **IV. The Precariousness of the Human Condition and the Universal Human Rights.**

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31.08.2001, Joint Separate Opinion of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, par. 15.

<sup>30</sup>. As revealed, in the XIXth century, among others, by the writings of Arthur Schopenhauer, as exemplified by his *Meditaciones sobre el Dolor del Mundo, el Suicidio y la Voluntad de Vivir*, Madrid, Tecnos, 1999, p. 88.

<sup>31</sup>. Edgar Morin, *O Paradigma Perdido: A Natureza Humana*, 6th. ed., Sintra/Mem Martins, Publs. Europa-América, 2000, pp. 93 and 135-137.

<sup>32</sup>. *Ibid.*, p. 95, and cf. p. 165. Human knowledge - including the scientific one - has not succeeded to provide an answer to the transcendental problems faced by the human being (such as that of his destiny); it is possible that we still are at the "beginning of knowledge"; *ibid.*, p. 212.

<sup>33</sup>. N. Alcalá-Zamora y Torres, *La Potestad Jurídica sobre el Más Allá de la Vida*, Buenos Aires, Ed. Jur. Europa-América, 1959, pp. 22 and 25-26, and cf. pp. 136, 175 and 185.

23. The facts of the present case, revealing a great cultural density, lead me to a last line of thinking in this Separate Opinion. Beyond the slim formal juridicism, legal norms encompass values (moral, cultural, and others), which the jurist cannot ignore. These values, in turn, reflect the truly universal concern, - present in all cultures, - with the cycle of life and death<sup>34</sup>, a concern which underlies the search for a meaning to human existence. The universal human rights give support to the human beings in face of the vulnerability and precariousness of their condition.

24. The adepts of the so-called "cultural relativism" advance an exclusively "ethnocentric" perspective, which reveals a fragmented and unsustainable vision of the human kind. Contrary to what they allege, the universal human rights are enriched by the multiple cultural experiences, which, on their turn, benefit themselves from their own openness to the universal minimum standards of the treatment of the human being, - just as revealed in the international *contentieux* of the case *Bámaca Velásquez versus Guatemala*, before the Inter-American Court. With that, the universal legitimacy of human rights is reaffirmed, in a world marked by pluralism and the anguish common to all human beings in face of death and the destiny of each one.

25. The present case, in effect, stresses the necessity to consider the human being in relation to the social *milieu* in which he lives<sup>35</sup> (and dies), and his rights in relation to the social milieu in which they are exercised<sup>36</sup>. Furthermore, there are other conclusions of transcendental importance that can be extracted from the case *Bámaca Velásquez*, in the light of the reflections which have here been expressed. In sum, in my view, what we conceive as the *human kind* comprises not only the living beings (*titulaires* of the human rights), but also the dead (with their spiritual legacy). The respect for the dead is in effect due in the persons of the living. Human solidarity has a wider dimension than the purely social solidarity, in so far as it manifests itself also in the links of solidarity between the dead and the living.

26. Human suffering projects itself in time, finding expression also in the domain of Law. In the *cas d'espèce*, the intensity of the human suffering was duly taken into account by the Inter-American Court, both in the determination (in the previous Judgment as to the merits) of the violations of the American Convention (to the detriment of the fatal victim as well as of their relatives who survived them), as well as

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<sup>34</sup>. To the musician Yehudi Menuhin, e.g., one can "feel the revelation of the divinity by means of (...) a recognition of the process which goes from life to death, which passes through an endless succession and continuity of lives and deaths"; Y. Menuhin, "Epílogo", in *La Revolución de la Conciencia - Un Diálogo Multidisciplinario* (eds. E. Laszlo et alii), Barcelona, Ed. Kairós, 2000, pp. 184-185.

<sup>35</sup>. In his monumental *Study of History*, Arnold Toynbee points out that the "intelligible unities" of the historical study are not the States, not even the nations, but rather the social *milieux*. But the "source of action" in these latter, in the vision of Toynbee, lies in the individual, as all evolution emerges from the creative spirit of individuals (or minorities), who first disseminate their discoveries or ideas, and later seek to convert the social environment into the new *modus vivendi* called for by them. Likewise, individuals cannot be themselves without interacting with their fellowmen (A.J. Toynbee, *A Study of History*, Oxford, University Press, 1970 [reprint], pp. 1-11 and 209-240). The great historian, always attentive to the spiritual dimension, - as in his inspired essay *Civilization on Trial (1948)*, - took as "nucleus" for the historical study the human being himself and his values.

<sup>36</sup>. For an assertion of the need to consider the "individual and collective aspects" of human rights, "concurrently and in a balanced" way, cf. U.N., *United Nations Workshop for the Asia-Pacific Region on Human Rights Issues - Report* (Jakarta, January 1993), N.Y., U.N., 1993, p. 1.

in the determination of the forms and extent of the reparations (in the present Judgment in this respect). The passing of time brings ineluctably closer the living to their dead, and awakens human conscience to the links of solidarity which bind them together. The living and the dead are definitively much more closely linked than one can *prima facie* assume, and this reality cannot keep on being ignored by the International Law of Human Rights in evolution. These are, in my view, the main lessons that can be extracted from the present case *Bámaca Velásquez*.

Antônio Augusto Cançado Trindade  
Judge

Manuel E. Ventura-Robles  
Secretary

## CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN THE JUDGMENT ON REPARATIONS IN THE BÁMACA VELÁSQUEZ CASE

### 1. *Restitutio in integrum*

In the section setting forth the legal grounds on which it is based (para. 39), the judgment referred to in this opinion indicates once again that, “whenever possible, the reparation of the harm caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), which consists in re-establishment of the previous situation”.

In this respect, it should be recalled that, for a long time, international jurisprudence and doctrine have understood that *restitutio in integrum* is the perfect form of reparation and that only when this *restitutio* is not viable, should other measures of reparation be ordered. The Inter-American Court has repeatedly followed this course in many decisions. I consider it advisable to abandon references to *restitutio* once and for all; although it may be an ideal target for reparations, it does not correspond to a truly attainable goal. Thus, in my opinion, there is no sense insisting that “the reparation requires full restitution, if possible.”

*Restitutio in integrum* signifies, *strictu sensu* – and this is also its literal meaning – restitution of matters to how they were before the unlawful conduct occurred and the legal rights of certain persons were affected. This is what is said and meant when speaking of “full restitution”, which is not merely simple restitution, which is inevitably partial and relative. Full restitution – which implies full return – is conceptually and materially impossible.

When there is a concern that a crime or an unlawful act will be committed, preventive measures should be taken to avert harm or eliminate danger. However, the crime or unlawful act – whether it is committed or remains at some point of the implementation process – implies an irreversible alteration that no *restitutio* can ignore or suppress. This is clearly seen should a person die, but it also occurs in others circumstances; thus, in the case of deprivation of freedom, this is usually referred to as an eminently reparable measure. In such a case, it is feasible to give the individual back his enjoyment of freedom, but not to return his lost freedom or, in other words, allow him to return to a time before the moment in which the loss occurred. To do this would be much more than legal remedy: it would be a miracle. The same can be said of the deterioration of a person’s health, which can be cured, or of the destruction of an object, which can be substituted.

When all is said and done, *restitutio* only represents a reference point, an ideal target, in both meanings of the word: an idea and an unattainable goal. The intention – or rather, the only possible objective – is not so much to integrally restore the situation that existed before the violation – modified forever in time, space, characteristics, absolute continuity – but to establish a new situation that is as similar as possible to the preceding one. It is to that end that elements of reparation, compensation, satisfaction, retribution, freedom, complement, substitution, etcetera, are factors in the matter. In this way, the victim’s legal rights are regained, at least partially, and he is placed in a very similar position to the one he had before. However, what he has lost is lost forever. The compensation

component of the reparations system is a result of this inevitable difference between what was and what may be.

## **2. Consideration of cultural specificity**

The Judgment on reparations referred to in this opinion takes into account how the fact that the victim and his closest relatives belonged to an indigenous group may influence the Court's decision and determine the grounds on which reparations are ordered, and even their characteristics. In other cases – for example, *Aloeboetoe et al.* and *the Mayagna (Sumo) Awas Tingni Community* – the Court made progress in evaluating the rights linked to this ethnic factor, with its corresponding cultural heritage, from which specific rights or particular forms of rights which are generally observed, derive or could derive.

The evaluation of such rights or the characteristics of the general rights, does not necessarily qualify the concept of human rights, establishing limitations and compartments that weaken individual protection. To the contrary, it judiciously expands the sphere of human rights, recognizes their inherent characteristics – which are above the common, non-derogable, radical traits of humankind – and extracts from all this the legal consequences which help to establish and guarantee the defense of the dignity of the human being, not only in abstract – within the species – but concretely – within a group, an indigenous ethnic group, a family, a people; in brief, it recognizes the individuality of the subject with his wide range of particularities and nuances. Thus, the transfer is made from the generic individual to the specific individual, who incarnates reality. In making this transfer, law is enhanced and rights are perfected.

When referring to the obligation of the State and the right of individuals concerning the discovery, exhumation and delivery of the remains of Efraín Bámaca Velásquez, the judgment has taken into consideration, on the one hand, the right of the next of kin of a person who has died to receive his mortal remains, independently of any ethnic, religious, cultural consideration of a particular case. This is a universal, constant right. On the other hand, this same judgment of the Inter-American Court has considered the specific relevance that receiving, honoring and adequately burying these remains has for the Mayan culture, the Mam group, to which the victim and his next of kin belonged. There is no conflict between these rights, which are concentric circles or manifestations of one and the same legally protected right. This essential relationship between the rights does not lead to one being ignored – that linked to belonging to an indigenous ethnic group – because another is recognized – the universal right to receive the remains of a relative and bury them honorably.

## **3. Reparations to honor**

In my opinion, the decision to publish the chapter on proven facts and the operative paragraphs of the judgment in the official gazette and another newspaper with nationwide circulation is pertinent. The former relates to the formal character of the jurisdictional decision and the latter to the advisability that public opinion should learn about the conclusions and the meaning of the jurisdictional decision in this case, as it did – or could have – of the facts that constituted the violation. Thus, the

range of reparations that the Court can award is broadened, in accordance with the circumstances of each case.

The purpose of publication and compensation is three-fold: a) on the one hand, the moral satisfaction of the victims or their successors, the recovery of honor and reputation that may have been sullied by erroneous or incorrect versions and comments; b) on the other, the establishment and strengthening of a culture of legality in favor, above all, of the coming generations; and c) lastly, serving truth, to the advantage of those who were wronged and of society as a whole. The foregoing is inserted in the broad regime of recognition and protection of rights and in the corresponding preservation of the values of a democratic society. In brief, the reparation of the harm in this case has compensatory and preventive effects; as regards the latter, it considers the need to prevent the repetition of conduct such as that which gave rise to the proceedings before the international instances.

I consider that the Court could have gone further in this aspect of the judgment, in view of the particular conditions of the case and of its protagonists; that is to say, in accordance with the circumstances that reflect the complete panorama of the case and its social and legal consequences. There was public attention – with its different consequence – not only in Guatemala, although this was its natural and principal sphere. It should be recalled that Jennifer Harbury lives and works in the United States of America, of which she is a citizen, and carried out various actions to try and clarify the facts in that country.

If we consider all the circumstances and the purpose of the measure of satisfaction that this type of reparation involves, the judgment should also be published in the place where the person affected by public opinion lives. Indeed, it is a question of the latter finding due social satisfaction precisely in the circles where she usually lives and works. By disseminating certain chapters of the judgment, the intention is not only to inform the public about a relevant event, but also to attract social approval towards those who were involved in it and unjustly suffered the violation of their rights.

#### **4. Calculation of damages and compensation**

I agree with my colleagues that a criterion of fairness should be adopted to define the amounts corresponding to the reparation of the pecuniary and non-pecuniary damage resulting from the human rights violations in this case and I also share the position set out in the judgment concerning the amount established under this heading. In the matter before the Court, there were no elements of evidence that would permit greater precision. In any case, I consider it reasonable that the rule admitted in several of the Court's judgments regarding the future income of the victim, when the latter loses his life, and there is a need to provide certain amounts to his successors, should have been rejected – even when it is only in the case being examined. In this regard, a criterion that I consider inadequate has been used for some time. On several occasions, it has been said that 25 per cent should be deducted from the amount that results from evaluating the subject's income and average life expectancy under normal conditions – issues, which are always debatable – for the victim's personal expenses throughout his future life, and the remaining amount, that is 75 per cent of the total, should be granted to his successors.

Under the existing and generally difficult circumstances of the economy, which influence the Court's deliberations and its adoption of a specific methodology, it would be difficult for an individual to reserve for himself this 25 per cent of his earnings and give the remainder to his next of kin. The low wages received by most individuals, particularly in the social sector to which the victims of human rights violations usually belong in the cases under the jurisdiction of the Inter-American Court, rarely allow a distribution of this nature.

The person on whom the family economy depends is unable to exist on 25 per cent of his income, and the remaining 75 per cent would normally be insufficient to satisfy the family's needs. In brief, the evaluation on these concepts should depend on other more specific and realistic criteria and thus be adequately individualized. Evidently, the difficulties posed by the calculation of these extremes will often determine that the amount is established on the grounds of fairness, as has been done in the judgment to which this opinion refers.

Sergio García-Ramírez  
Judge

Manuel E. Ventura-Robles  
Secretary