

INTERAMERICAN COURT OF HUMAN RIGHTS

BÁMACA VELÁSQUEZ CASE

JUDGMENT OF NOVEMBER 25, 2000

In the *Bámaca Velásquez Case*,

the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), composed of the following judges¹:

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

also present,

Manuel E. Ventura Robles, Secretary and
Renzo Pomí, Deputy Secretary,

Pursuant to articles 29 and 55 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure") delivers the following judgment in the instant case.

1 Judge Oliver Jackman abstained from hearing this case, because he had taken part in several stages of the case while it was being processed before the Inter-American Commission on Human Rights, when he was a member of the Commission.

I INTRODUCTION OF THE CASE

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

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

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

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

II COMPETENCE OF THE COURT

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

III PROCEDURE BEFORE THE COMMISSION

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

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

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

7. On October 4, 1993, the Commission held a public hearing so that Guatemala could present information on the precautionary measures. On

October 15, 1993, the Commission reiterated to Guatemala that it should adopt precautionary measures in favor of the persons named in its communication. On December 15, 1993, the State declared that, in this case, the precautionary measures were "unnecessary and not in order because there were no prisoners of war or clandestine detention centers in Guatemala."

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

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

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

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

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

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

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

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

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

1 That, in the lights of the information and observations that have been presented [...] the State of Guatemala has violated the human rights to life, to humane treatment, to personal liberty, to a fair trial and to judicial protection embodied in Articles 4, 5, 7, 8 and 25 of the American Convention and has failed to comply with the obligation established in Article 1.

In addition, it recommended to Guatemala that

- a. It accept responsibility for the disappearance, torture and extrajudicial execution of Efraín Bámaca Velásquez.
- b. It conduct a prompt, impartial and effective investigation into the facts denounced in order to record in detail, in a duly authenticated, official report, the specific circumstances in which

the crimes against Mr. Bámaca [Velásquez] occurred and the responsibility for the violations committed, so as to inform the wife of Mr. Bámaca [Velásquez], Jennifer Harbury, and the other members of his family about his fate and the whereabouts of his remains.

c. It adopt the necessary measures to submit those responsible for the violations to competent judicial proceedings and punish all those responsible for violating human rights in this case.

d. It adopt the necessary reforms of the training programs and regulations of the Guatemalan armed forces so that they conduct military operations in conformity with the laws and customs applicable to internal armed conflicts.

e. It compensate the violation of the above-mentioned rights, including payment of an adequate compensation to the wife of Mr. Bámaca [Velásquez], Jennifer Harbury, and to the other members of his family.

Lastly, the Commission decided

3. To transmit this report to the Government of Guatemala and grant it a period of 60 days to put its recommendations into effect. The 60-day period shall commence on the date of the transmittal of this report, during which time the Government shall not be authorized to publish it, pursuant to the provisions of Article 50 of the American Convention.

4. To submit this case to the Inter-American Court of Human Rights, pursuant to the provisions of Article 51 of the American Convention, if the Government has not implemented the Commission's recommendations within the period of 60 days following the transmittal of this document.

17. The Commission forwarded this report to the State on April 5, 1996, with the request that, within a period of 60 days, it should provide

information on the measures adopted to resolve the situation denounced. Although it requested this period to be extended, the State did not submit the required information.

IV PROCEDURE BEFORE THE COURT

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

a. Efraín Bámaca Velásquez, known as "Comandante Everardo", formed part of the Revolutionary Organization of the People in Arms (hereinafter "ORPA"), one of the guerrilla groups that made up the URNG; Bámaca Velásquez led this group's Luis Ixmatá Front.

b. Efraín Bámaca Velásquez disappeared on March 12, 1992, after an encounter between the Army and the guerrilla in the village of Montúfar, near Nuevo San Carlos, Retalhuleu, in the western part of Guatemala.

c. Bámaca Velásquez was alive when the Guatemalan armed forces took him prisoner, and "they imprisoned him secretly in several military installations, where they tortured and eventually executed him."

d. Moreover, the State incurred in denial of justice and concealment, "[by failing to] provide any legal protection or compensation for the crimes perpetrated against Efraín Bámaca [Velásquez] and to adequately investigate his disappearance and death, punishing those responsible."

19. The Inter-American Commission appointed Carlos Ayala Corao and Claudio Grossman as its delegates before the Court, David J. Padilla and Denise Gilman as advisors, and José E. Pertierra as assistant. In a

note of April 7, 1997, the Commission also appointed Viviana Krsticevic, Marcela Matamoros and Francisco Cox as assistants (*infra* 42). The last two later resigned as assistants in the case.

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

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

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

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

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

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

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

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

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

Therefore, the Court decided:

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

28. On March 6, 1998, the Commission presented the names of the witnesses and the expert witness who would declare before the Court. Likewise, it requested that "additional evidence be admitted, in accordance with Article 43 of the Rules of Procedure of the Court [because ...], when the application in the present case was filed, [there was] a serious impediment to the presentation of this documentary and testimonial evidence". In this brief, the Commission requested that Ulises Noé Anzueto, Marco A. Carías Monzón, Salvador Rubio, Mario E. Ovando, Sergio V. Orozco Orozco, Edwin M. Lemus Vásquez, Héctor René Pérez, Mary Granfield, Mario Sosa Orellana, Michael Charney, Edmund Mullet and Marilyn McAfee should be eliminated from the list of witnesses; and that, should any of the other witnesses be unable to appear to give their testimony, they should be substituted by others. Furthermore, it requested that Otoniel de la Roca Mendoza, Julio Cintrón Gálvez, Acisclo Valladares, Alberto Gómez, Jesús Efraín Aguirre Loarca (known as Major Aguirre), Gregorio Ávila, José Víctor Cordero Cardona and Ismael Salvatierra Arroyo should be called as new witnesses. It also requested that documentation consisting of two declarations sworn before a Notary on February 22, 1998, by Pedro Tartón Jutzuy and Otoniel de la Roca Mendoza, should be admitted as new evidence.

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

30. On May 15, 1998, the Commission advised that the witness, Otoniel de la Roca Mendoza, was in the United States of America arranging his migratory status, and that "[i]f, for legal reasons, he was unable to travel to San José, Costa Rica, for the public hearing, the Commission

[would], at the appropriate time, request that a delegation of the Court be commissioned to take his declaration in the United States", or that the exhibition of a videotape with his testimony should be authorized.

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

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

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

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

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

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

There appeared before the Court:

For the State of Guatemala:

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

For the Inter-American Commission on Human Rights:

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

Witnesses proposed by the Commission:

Santiago Cabrera López
Jennifer Harbury
Julio Arango Escobar

James Harrington
Francis Farenthall
Fernando Moscoso Moller, and
Patricia Davis.

Expert witness proposed by the Commission:

Helen Mack.

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

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

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

37. The same day, the Commission requested the Court to require the State to present the following witnesses: Acisclo Valladares Molina, Julio

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

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

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

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

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

42. On July 31, 1998, the petitioners sent a power of attorney dated June 22, 1998, in favor of the Center for Justice and International Law

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

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

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

45. On September 30, 1998, the Commission advised that it had notified the summons to the witness, Otoniel de la Roca Mendoza; however, it had not been able to summon Urizar García as it had been unable to

find him and, consequently, it reiterated the need to listen to his testimony on videotape. Moreover, it emphasized that the State should have summoned the witnesses who were State officials and "who did not appear in [the] public hearing [in June] and who [...] have had five months to consider and evaluate the public evidence of the other witnesses, most of which had been published in the press, before giving their own evidence."

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

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

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

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

There appeared before them:

For the State of Guatemala:

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

For the Inter-American Commission on Human Rights:

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

Witness proposed by the Commission:

Otoniel de la Roca Mendoza.

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

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

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

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

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

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

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

There appeared before the Court:

For the State of Guatemala:

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

For the Inter-American Commission on Human Rights:

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

Witnesses proposed by the Commission:

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

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

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

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

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

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

58. With regard to the last point, on December 10, 1998, the President informed the Commission that, during the public hearing, it had been explained that "any evidence ha[d] to be submitted through the appropriate channels; and, the documents offered had not been delivered to the Secretariat of the Court on that occasion". Moreover, the Commission

was informed that, before any document sent by the State was included, it would be forwarded to the Commission so that it could make the pertinent observations. On January 12, 1999, the Commission reiterated the objection set out in its brief of December 4 with regard to the presentation of new evidence, based on the provisions of Article 43 of the Rules of Procedure, and stated that some of the documents presented were certifications made by one of the witnesses, who had not appeared at the public hearings to which he had been summoned

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

60. On March 24, 1999, the Commission requested the admission as supervening evidence of the final report of the Commission for the Historical Clarification of the human rights violations and violent acts that have caused suffering to the Guatemalan People (hereinafter "the Commission for Historical Clarification"), entitled "Guatemala, Memory of Silence" and presented a copy of illustrative case No. 81 in this report.

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

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

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

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

V

URGENT AND PROVISIONAL MEASURES

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

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

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

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

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

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

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

VI DOMESTIC PROCEEDINGS

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

72. On March 13, 1992, a corpse was removed from near the Ixcucua River and an autopsy was performed. The same day, in the presence of the Magistrate of Retalhuleu and of Captain Sosa Orellana, the body was "transferred to the morgue of the general cemetery of the city of Retalhu-

leu". The Magistrate of Retalhuleu opened file No. 395-92 and examined the body that had been found. The description detailed features similar to those of Bámaca Velásquez. However, the autopsy that had been performed provided details of the dead man that did not coincide with either the physical characteristics of Efraín Bámaca Velásquez or with the cause of his death².

73. Through investigations conducted in 1992, Ramiro de León Carpio, at that time Ombudsman, discovered that the remains of Bámaca Velásquez might be buried in an XX grave in Retalhuleu. On May 20, 1992, the Second Criminal Trial Judge of Retalhuleu ordered the exhumation of the said body. However, the procedure was cancelled owing to the intervention of the Attorney General, Acisclo Valladares Molina, who arrived at the site accompanied by about 20 members of the armed forces and questioned the legality of the exhumation³.

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

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

74. On April 24, 1992, the URNG sent a note to the Ombudsman, informing him that the member of the guerrilla who had been killed in combat and buried in the Retalhuleu cemetery was not Efraín Bámaca Velásquez. In this note, it assured that Bámaca Velásquez had been captured alive, detained clandestinely and tortured to obtain information. On May 11, 1992, the Ombudsman replied to the URNG, providing a detailed description of the body that had been buried in Retalhuleu, which coincided with the characteristics of Bámaca Velásquez⁴.

75. Based on the statements of the witness, Santiago Cabrera López, the Guatemalan Human Rights Commission and Jennifer Harbury filed a petition for habeas corpus in favor of Bámaca Velásquez against the President of the Republic, in his capacity as Commander in Chief of the Army, and the Minister of National Defense, on February 22, 1993. On the following February 25 and 26, in file No. 14/93, the Supreme Court of Justice declared that this was without merit because the victim had not been found, and "immediately order[ed] the appropriate investigation, and that all relevant information should be officially forwarded to a competent court". On March 11, 1993, the President of the Supreme Court of Justice indicated that "current mechanisms for *habeas corpus* procedures are inadequate for conducting an effective investigation under petitions for *habeas corpus*", and suggested that there was a need "to undertake a thorough reform of justice in Guatemala."⁵

76. On August 17, 1993, the Second Criminal Trial Court Judge of Retalhuleu again ordered an exhumation to be held to determine whether

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

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

the body removed from the banks of the Ixcucua River on March 13, 1992, (*infra* 86 and 93.C.b) was that of Bámaca Velásquez. The corpse exhumed on August 17, 1993, coincided with the description in the report of the autopsy performed in March 1992, but not with the physical characteristics of Bámaca Velásquez⁶.

77. Based on a complaint by Jennifer Harbury, the Office of the Ombudsman opened file GUA 12-93/DI in January 1994; and in this it placed her testimony together with that of Santiago Cabrera López and Jaime Adalberto Agustín Recinos, the last two on videotape⁷.

78. On June 1, 1994, the Attorney General filed a petition for *habeas corpus* in favor of Efraín Bámaca Velásquez against the President of the Republic, the Minister of the Interior, the Minister of Defense, the Director General of the National Police Force and Guatemalan police and military authorities⁸. On September 1, 1994, the Supreme Court of Justice declared the petition for *habeas corpus* without merit (*infra* 80) because, on the one hand, the Ministry of Defense, the Directorate of the National Police Force and the Directorate of the Treasury Police advised that "they had not received any judicial order for the detention of [Efraín Bámaca

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

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

8 Cf. Decision of September 1, 1994, of the Supreme Court of Justice, in file No. 82/94, Annex 25; complaint presented before the Public Ministry on October 21, 1994, by the Attorney General, Acisclo Valladares Molina, Annex 27; and Human Rights Watch/Americas, *Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez*, March 1995, Annex 51.

Velásquez]" and, on the other, visits to public prisons, military posts and substations of the National Police Force had yielded negative results⁹.

79. On October 27, 1994, as a result of Jennifer Harbury's hunger strike (*infra* 93.C.b), the President of the Republic announced that a new investigation would be conducted to discover the whereabouts of Bámaca Velásquez and appointed the Permanent Representative of Guatemala to the Organization of American States (hereinafter "OAS") to head a special committee that would be in charge of this .

80. On October 31, 1994, the Attorney General submitted a complaint before the Prosecutor General and the Public Ministry to initiate a criminal action on the disappearance of Bámaca Velásquez. On the same day, the Prosecutor General filed a petition for *habeas corpus* in the name of Efraín Bámaca Velásquez and 38 other persons who had allegedly been detained clandestinely. On November 2 that year, the Supreme Court of Justice appointed the Second Judge of the Criminal, Narco-activity and Crimes against the Environment Trial Court of Coatepeque, Quetzaltenango, to head the corresponding investigation. In the context of this investigation, Harbury testified before the said court the following day¹¹.

9 Cf. Decision of September 1, 1994 of the Supreme Court of Justice in file No. 82/94, Annex 25; complaint submitted to the Public Ministry by the Attorney General, Acisclo Valladares Molina, on October 21, 1994, Annex 27; Human Rights Watch/Americas, *Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez*, March 1995, Annex 51; and testimony of Acisclo Valladares Molina, given to the Court on November 22, 1998.

10 Cf. Human Rights Watch/Americas, *Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez*, March 1995, Annex 51; and letter of March 13, 1995, from the Government to the Inter-American Commission.

11 Cf. Complaint submitted to the Public Ministry by the Attorney General, Acisclo Valladares Molina, on October 21, 1994, Annex 27; decision of the Supreme Court of Justice of Guatemala of November 2, 1994, Annex 28; statement by Jennifer Harbury, submitted to the Inter-American Commission on December 20, 1995, Annex 46; official record of the interview with Jennifer Harbury of November 3, 1994, in the Public Ministry, Annex 47; questions for the interview with the Attorney General, Acisclo Valladares Molina, October 31,

The same day, the prosecutor informed Jennifer Harbury that the following day, a body that it was believed, corresponded to Bámaca Velásquez would be exhumed. On November 4, 1994, the exhumation was postponed until the following November 10. That day, two young men who had died from shots in the head were exhumed; they did not correspond to the remains of Bámaca Velásquez¹².

81. Since the petition for *habeas corpus* presented by the Attorney General had been declared without merit on June 1, 1994 (*supra* 78), on October 30, 1994, the said Attorney General requested the Supreme Court of Justice to order a special pre-trial investigation procedure - a procedure introduced with the reform of the Criminal Procedural Code. On November 8, 1994, the Supreme Court of Justice ordered the Ombudsman to open the special pre-trial investigation procedure in order to establish the whereabouts of Efraín Bámaca Velásquez¹³. On December 2, 5, 6 and 7, 1994, in the course of procedure No. I-94, the members of the armed forces who were allegedly connected to the death Bámaca Velásquez were questioned, and they declared that they knew nothing

1994, Annex 48; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Acisclo Valladares, given to the Court on November 22, 1998; and letter of March 13, 1995, from the Government to the Inter-American Commission.

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

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

about the facts¹⁴. In his report of December 9, 1994, the Ombudsman established that, except for one or two who were on duty at Santa Ana Berlín, most of the members of the armed forces who had been questioned were serving in Military Zone No. 18 in San Marcos at the time of the facts, that none of them knew Efraín Bámaca Velásquez, and that none of them took part in an armed encounter on the day of the facts. According to this report, during the investigation, inspections, random visits and inquiries were carried out "without prior warning, simultaneously and unexpectedly" in military and police centers. However, the whereabouts of Bámaca Velásquez could not be established, nor was it possible "to determine whether he is alive or dead at this time,"¹⁵. On March 16, 1995, when the procedure had been completed, the Supreme Court of Justice forwarded the case file to the Office of the Prosecutor General so that "it could continue with the investigations."¹⁶

82. On November 29, 1994, the Attorney General commenced an action for jactitation against Jennifer Harbury. Under this procedure, the latter was given 15 days to make the corresponding complaint or, to the contrary, cease to hold the armed forces responsible for a determined conduct. On December 2, 1994, the Court prohibited Jennifer Harbury from leaving Guatemala for the duration of the proceeding; this prohibition was lifted 10 days later¹⁷. On January 26, 1995, the Sixth Civil Trial

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

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

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

17 *Cf.* Human Rights Watch/Americas, *Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez*, March 1995, Annex 51; testimony of Jennifer Har-

Court declared itself incompetent in the action for jactitation, because this legal figure only applies to cases of disputes relating to property¹⁸.

83. On March 29, 1995, the President of the Republic, Ramiro de León Carpio, declared that, when he assumed the Presidency, Bámaca Velásquez was already dead and that he was not illegally imprisoned or detained¹⁹.

84. On March 23, 1995, the Office of the Prosecutor General incorporated various statements made during proceeding No. I-94 (*supra* 81), under proceeding No. 2566-94, which was being processed before the First Criminal, Narco-Activity and Crimes against the Environment Trial Court of Guatemala. On March 28, 1995, this Court declared itself incompetent because the proceeding related to crimes or common misdemeanors committed by members of the armed forces, and forwarded the file to the Retalhuleu Military Trial Court²⁰.

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

bury, given to the Court on June 16, 1998; testimony of Acisclo Valladares, given to the Court on November 22, 1998; and letter of the Government to the Inter-American Commission of March 13, 1995.

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

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

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

crimes against the obligations of humanity, abuse of authority and abuse against individuals", to the detriment of Bámaca Velásquez, had not been proved²¹. The representative of the Public Ministry filed a complaint appeal against the Retalhuleu Military Trial Court. On July 17, 1995, the Eleventh Chamber of the Appeals Court of Retalhuleu convened in Court Martial, declared that the Military Trial Court Judge "had committed a substantial error, violating essential formalities of the proceeding", invalidated the statements of Julio Roberto Alpírez, Julio Alberto Soto Bilbao and Ulises Noé Anzueto Girón, and annulled the notifications of the decisions pronounced in the proceeding²². On November 22, 1995, the same Eleventh Chamber of the Appeals Court of Retalhuleu convened in Court Martial revoked the decision of the Retalhuleu Military Trial Court because "the necessary juridical presumptions that would justify the dismissal that was granted d[id] not exist, and also the examination of the crimes under investigation [...] had not been concluded"; it therefore returned the case file to the said Court²³.

86. In June that year, the Retalhuleu Military Trial Court, contradicting the statements made by the forensic experts, and presuming that the corpse found on the banks of the Ixcucua River corresponded to Bámaca Velásquez, ordered the latter's death to be officially recorded in the Registry Office of the Municipality of Nuevo San Carlos, Retalhuleu²⁴.

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

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

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

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

87. On December 5, 1995, the Military Trial Court declared that the case was without merit and decreed the corresponding *simple liberty* of the members of the armed forces under investigation, based on the same arguments that had been established previously (*supra* 86) and adding that the death of Bámaca Velásquez had been recorded in the Registry Office²⁵.

88. On May 7, 1995, Julio Arango Escobar was appointed special prosecutor in the Bámaca Velásquez Case. At that time, a stay of proceedings had been pronounced for the members of the armed forces who were allegedly involved. The special prosecutor appealed the stay of proceedings before the Retalhuleu Appeals Chamber and was able to have it annulled. Furthermore, he tried to have Jennifer Harbury included as private prosecutor in the proceeding, but was unsuccessful²⁶. In June 1995, the United States Government provided Arango Escobar with information indicating that the remains of Bámaca Velásquez were buried in the military detachment of Las Cabañas, in the village of La Montañita, Municipality of Tecún Umán, Department of San Marcos. Based on this information, the special prosecutor took the necessary steps to conduct an exhumation²⁷. At the beginning of June 1995, the Second Judge of the Criminal, Narco-activity and Crimes against the Environment Trial Court of Coatepeque, Quetzaltenango, authorized the exhumation in Las Cabañas²⁸. On June 13, 1995, on being informed of the measure that was planned, the Commander in charge of the Las Cabañas military detachment declared that his superiors had not give him permission to

25 Cf. Decisions of the Military Trial Court of Retalhuleu of December 5, 1995, Annex 56.

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

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

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

authorize it²⁹. The following day, the legal representative of the Ministry of Defense stated that some of the legal requirements for conducting the exhumation procedure had not been fulfilled and also, that the Bámaca Velásquez Case had to be transferred to the jurisdiction of the Commission for Historical Clarification, in accordance with declarations of the President of the Republic³⁰. On June 19, 1995, as a result of the appeal filed by Colonel Julio Roberto Alpírez, the Second Criminal, Narco-Activity and Crimes against the Environment Trial Court of Coatepeque, Quetzaltenango, suspended the exhumation that was going to be conducted in Las Cabañas until the appeals court had made a decision³¹.

89. Between May and August 1995, Arango Escobar received pressure and threats and attempts were made on his life because he was acting as special prosecutor in the Bámaca Velásquez Case. In particular, he was followed, fired at in his workplace and received telephone threats. On August 2, 1995, Arango Escobar resigned from the position of special prosecutor in the case³².

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

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

31 Cf. Decision of June 19, 1995, of the Second Criminal, Narco-Activity and Crimes against the Environment Trial Court, Annex 37; newspaper article, "Frustrado nuevo intento para exhumar cadáver de Bámaca Velásquez", Prensa Libre, July 7, 1995, Annex 41; and testimony of Julio Arango Escobar, given to the Court on June 17, 1998.

32 Cf. Newspaper article, "El fiscal Arango Escobar se retira del caso Bámaca Velásquez", Prensa Libre, June 27, 1995, Annex 31; Report of the Ombudsman of June 27, 1995, Annex 32; bulletin of the Guatemalan Human Rights Commis-

90. In February 1998, the new special prosecutor for the case, Shilvia Anabella Jerez Romero, requested that an exhumation procedure be conducted in the Las Cabañas military detachment. However, this procedure was not carried out³³.

VII EVIDENCE

A) DOCUMENTARY EVIDENCE

91. The Commission presented documentation on:

- a) the practice of the detention and use of former guerrillas by the Guatemalan Army³⁴;

sion of June 24, 1995, Annex 33; newspaper article, "*Arango se excusa de seguir caso Bámaca Velásquez*", El Gráfico, August 2, 1995, Annex 34; testimony of Julio Arango Escobar, given to the Court on June 17, 1998; and Report of the Commission for Historical Clarification, Tome VII.

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

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

b) the detention, torture and extrajudicial disappearance of Bámaca Velásquez³⁵;

Commission for Historical Clarification, Tome VII; and letter of the U.S. Senator, Robert Torricelli, of June 17, 1998.

35 *Cf.* Testimonies of Santiago Cabrera López given to Inter-American Commission on Human Rights and to the Office of the Guatemalan Prosecutor General, Annexes 1, 2 and 3; Watson, F. Alexander, "U.S. Policy Toward Guatemala: The Cases of Michael Devine and Efraín Bámaca". Statement before the Senate Select Committee on Intelligence Washington, D.C., April 5, 1995. Published in U.S. State Department Dispatch. Vol. 6, No. 6, April 17, 1995, Annex 8; testimony of Nery Ángel Urizar García, given to the Inter-American Commission on Human Rights on September 8, 1995, and recorded on videotape, Annex 9; testimony of Nery Ángel Urizar García, given to the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; supplementary statement by Nery Ángel Urizar García given to the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 24, 1995, Annex 12; transcript of the State Department daily information meeting, by Christine Shelly, Federal News Service, of November 14, 1994, Annex 13; cable of the U.S. Central Intelligence Agency (hereinafter "CIA") to the U.S. State Department of March 18, 1992, Annex 14; report of the U.S. Department of Defense, November 1994, Annex 15; Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; letter from Representative Robert Torricelli to President William Clinton, of March 22, 1995, Annex 17; CIA report of January 25, 1995, Annex 18; United States intelligence information of January 1995 presented in response to a request under the U.S. Freedom of Information Act, Annex 35; letter of May 23, 1995 from Anne W. Patterson, Deputy Under-Secretary of the U.S. State Department to Jennifer Harbury, Annex 38; report on the press conference of Ramiro de León Carpio of March 29, 1995, Annex 42; document of the U.S. Department of Defense, July 1995, Annex 44; CIA report of March 7, 1995, Comments of the Guatemalan Ministry of Defense, Annex 50; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; statement sworn before a Notary with the testimony of Pedro Tartón Jutzuy "Arnulfo", of February 23, 1998; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo", of February 24, 1998; testimony of Otoniel de la Roca Mendoza to the Inter-American Commission on Human Rights on February 23, 1998, recorded on videotape; Report of the Commission for Historical Clarification, Tome VII; REMHI Report Tome II; letter from the U.S. Senator, Robert Torricelli, of June 17, 1998; and letter of May 11, 1992, from Ramiro de León Carpio, Ombudsman, to Francisco Villagrán Muñoz.

- c) the autopsy and the exhumations conducted in the Bámaca Velásquez Case in Guatemala³⁶;
- d) the petitions for *habeas corpus* filed in favor of Bámaca Velásquez³⁷;

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

37 Cf. Decisions of February 25 and 26, 1993 of the Supreme Court of Justice in file No. 14/93, Annex 23; letter of March 11, 1993, from Juan José Rodil Peralta, President of the Supreme Court of Justice, to the members of the Board

e) the other judicial proceedings conducted to determine the whereabouts of Bámaca Velásquez, and also those responsible for the facts³⁸;

f) the marriage of Efraín Bámaca Velásquez and Jennifer Harbury, the proceedings to obtain its recognition and the process of jactitation³⁹;

of the Guatemalan Human Rights Commission Annex 24; and decision of September 1, 1994, of the Supreme Court of Justice in file No. 82/94, Annex 25.

38 Cf. Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; Decision of August 11, 1993, of the Second Trial Court of Retalhuleu, Annex 21; decision of February 28, 1995 of the Second Trial Court of Retalhuleu, Annex 22; complaint presented before the Public Ministry on October 21, 1994, by the Attorney General, Acisclo Valladares Molina, Annex 27; decision of the Supreme Court of Justice of Guatemala of November 2, 1994, Annex 28; decision of the Public Ministry of March 23, 1995, Annex 29; decision of the Criminal, Narco-activity and Crimes against the Environment Trial Court of Guatemala of March 28, 1995, Annex 30; U.S. intelligence information of January 1995, presented in response to a request under the U.S. Freedom of Information Act, Annex 35; Newspaper article, "*Abogado de Harbury se reunió ayer con diplomáticos and testigo en la OEA*", Prensa Libre, October 4, 1994, Annex 45; statement by Jennifer Harbury to the Inter-American Commission, on December 20, 1995, Annex 46; questions for Jennifer Harbury in the interview with the Attorney General, Acisclo Valladares Molina, October 31, 1994, Annex 48; decisions of April 6 and 10, 1995, of the Military Trial Court of Retalhuleu, Annex 52; decision of April 5, 1995, of the Military Trial Court of Retalhuleu, Annex 53; decision of July 17, 1995, of the Eleventh Chamber of the Appeals Court of Retalhuleu, convened in Court Martial, Annex 54; decisions of November 22, 1995, of the Eleventh Chamber of the Appeals Court of Retalhuleu, convened in Court Martial, Annex 55; and decisions of the Military Trial Court of Retalhuleu of December 5, 1995, Annex 56.

39 Cf. Declaration and record of marriage in Travis County, Texas, United States of America, on June 22, 1993, Annex 19; judgment of May 23, 1996, of the Second Trial Court of San Marcos, issued as an amparo tribunal, Annex 20; decision of August 11, 1993, of the Second Trial Court of Retalhuleu, Annex 21; decision of February 28, 1995, of the Second Trial Court of Retalhuleu, Annex 22; record of the interview with Jennifer Harbury of November 3, 1994, in the Public Ministry, Annex 47; CIA report of March 7, 1995, comments of the Guatemalan Ministry of Defense, Annex 50; and Human Rights Watch/Americ-

- g) the steps taken by Jennifer Harbury to determine the whereabouts of Bámaca Velásquez⁴⁰;
- h) the representation⁴¹ of Jennifer Harbury and the next of kin of Bámaca Velásquez in the proceeding before the inter-American system;
- i) the declarations on compensation made by Jennifer Harbury⁴²; and

as, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51.

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

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

42 Cf. Statement sworn before a Notary with by Jennifer Harbury on December 23, 1997; newspaper article, "*Caso Bámaca Velásquez: Declaran más militares*", November 24, 1998, Última Hora newspaper; newspaper article, "*Hoy declaró otro militar en caso Efraín Bámaca Velásquez*" (no source); newspaper article, "*Harbury pide US \$25 millones por el caso Bámaca Velásquez*", June 5, 1998, Última Hora newspaper; and document about the visit of April 25, 1999.

j) the alleged attacks and threats against various persons connected with the Bámaca Velásquez Case⁴³.

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92. The State presented documents on:

- a) the death of Bámaca Velásquez⁴⁴;
- b) the activities of the Quetzal Task Force in the southwestern region of Guatemala at the beginning of 1992⁴⁵;
- c) the presence, in 1992, of the Army officer, Luis Alberto Gómez Guillermo, in a commando course in Colombia⁴⁶ and

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

44 Cf. Death certificate of Efraín Bámaca Velásquez.

45 Cf. Photocopy of official letter No. 229/G-3-92 of July 13, 1992, with fragmentary Order No. 008/G-3-92 attached; two photocopies of telegrams dated July 21 and 27, 1992; photocopy of official letter No. 245/G-3-92; and photocopy of telegram of August 7, 1992.

46 Cf. Certificate of successful completion of a commando course, issued by the Army of the Republic of Colombia on November 24, 1992; certificate of successful completion of a commando course, issued by the School of Arms and Services, Colombia, on November 24, 1992; two photocopies of official passport No. 32205, registration No. 0547; photocopy of official passport 23918, registration No. 3219; and photocopy of official passport 1326315, registration No. 21251.

the Army officer, Jesús Efraín Aguirre Loarca, in the United States⁴⁷;

d) Nery Ángel Urízar García and his criminal record⁴⁸; and

e) Otoniel de la Roca Mendoza and his criminal record⁴⁹.

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

B) EXPERT EVIDENCE

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

In Guatemala, justice is "slow, inefficient, it is corrupt, fearful" and partial, particularly when those with any political power are prosecuted. In

47 Cf. Medical certificate of October 28, 1998; letter signed by Patricia Chalupsky, of June 4, 1992; letter signed by Dr. Gary M. Gartsman of June 8, 1992; medical records of Jesús Aguirre of March 18, 1992; and physical examination of Jesús Aguirre of March 18, 1992.

48 Cf. Affidavit of May 24, 1995, related to the deposition of Cleonice Dique Carnicelli, the widow of Thomae; affidavit of May 26, 1995, related to the deposition of Walter Aroldo Barrios Reyes; affidavit of May 30, 1995, related to the deposition of Julian Socop Cuyuch; affidavit of May 30, 1995, related to the deposition of Edgar René Muñoz Cifuentes; affidavit of May 30, 1995, related to the deposition of Francisco Ortíz Sánchez; affidavit of May 30, 1995, related to the deposition of María Macaria Cotón; affidavit of May 30, 1995, related to the deposition of Belfina Judith Fajardo; and copy of the expansion of the statement of April 15, 1996, by Anastasia López Calvo before the district prosecutor, Shilvia Anabella Jerez de Herrera.

49 Cf. Certificate of criminal record of Otoniel de la Roca Mendoza of November 20, 1998; and certificate of military enrolment of Otoniel de la Roca Mendoza of November 16, 1998.

particular, as a result of the internal conflict that Guatemala has experienced over the last three decades, the judicial system underwent a profound crisis, especially from 1992 to 1996, particularly with regard to human rights, and this resulted in a weak Judiciary, which allowed the Executive Branch to commit abuses.

As a result of corruption and the fear of those who apply justice to "act against Army officers who still have considerable political power", 99.9% of cases of human rights violations go unpunished. Impunity also exists because many of the violations entail the surrender of information that is classified as a State secret by the Ministry of Defense although, according to the Criminal Procedural Code, it is the judge who should make this classification; because the evidence is adulterated or disappears, and due to abuse in filing appeals within the judicial proceedings.

"Military intelligence" has used slander as a strategy to obstruct the exercise of justice, by diminishing the credibility of the victims of human rights violations and intimidating those in charge of the criminal prosecution. The most recent example was the crime of Monsignor Gerardi, which she interprets as a clear message that "any [...] person is vulnerable when conducting a lawsuit in the area of human rights". For example, in the instant case, an effort was made to discredit Jennifer Harbury by not recognizing her marriage to Bámaca Velásquez. Moreover, depending on the case, the Guatemalan press does not publish information on judicial proceedings, because the journalists may expose themselves to threats.

In Guatemala, the remedy of *habeas corpus* exists to guarantee the liberty and physical safety of an individual; however, in cases of human rights violations, "it is rarely successful" and often depends on the pressure that the plaintiff is able to apply.

There is a special pre-trial investigation procedure, which is applied when the remedy of *habeas corpus* has been exhausted; this consists of the Supreme Court of Justice designating the Ombudsman or some human rights organization or person to conduct the investigation. However, this procedure "has not had positive results", as it is very bureaucratic.

In Guatemala, there was a practice of forced disappearances that generally culminated in the death of those who disappeared, to give the impression that there were no political prisoners.

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

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

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

Those who present complaints or appear as witnesses in cases that involve State agents do not receive the necessary protection. Moreover,

human rights activists have been seen as people who were "linked to the guerrilla movement" and "protectors of criminals" and have been harassed.

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C) TESTIMONIAL EVIDENCE

a. Testimony of Santiago Cabrera López, former URNG combatant

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

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

He met Jennifer Harbury in 1990 in the guerrilla camp.

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

He was captured by seven or eight "military intelligence" agents from the Department of San Marcos, and "[t]hey ordered him to stop, when he was carrying a quintal of rice and they beat [him] severely". Anastasia López Calvo, known as "Karina", was captured with him and they were both taken in a pick-up truck to the military detachment of Santo Domingo, Municipality of San Pablo, Department of San Marcos.

When they reached the detachment, they were taken to a room, where his "hands were tied to the wall above him and one of the men who captured

[him] began to beat [him] with a large brick". When they had finished torturing him, they asked for information on his camp and the combatants. He was able to identify two of the Army officers who tortured him.

Subsequently, they were transferred to the military detachment of the community of El Porvenir, Municipality of San Pablo, Department of San Marcos. There, they were put in another room where they were interrogated and received death threats. During the night, they were taken to a basement in the detachment, where they were kept for two days, after which the interrogation continued.

Approximately 10 days later, he was transferred to Military Zone No. 18 in San Marcos, where the torture and interrogation continued. Here, he could see how the Army captured and killed civilians. They obliged those they detained to memorize texts so that they could appear in public and declare that they had given themselves up to the Army voluntarily, in order to conceal the military practice of using former guerrillas to obtain information that was relevant for "military intelligence", by torturing them.

He was kept in shackles for about six months; during this time the Army took him out dressed in uniform like a soldier to carry out tasks such as "identifying combatants [...] or those who sympathized with the guerrilla". After six months, the treatment he received changed and his restrictions at the base were reduced. During all the time that he was detained he was never taken before a judge or an authority with any formal charge against him.

In February 1992, he was obliged to take part in a unit known as the Quetzal Task Force which was initially set up at the military bases of San Juan de Loarca in the Municipality of Tumbador, San Marcos, and then transferred to Santa Ana Berlín, in Coatepeque, Quetzaltenango; its aim was "to make an end to all the guerrilla forces". The commander of this task force was Ismael Segura Abularach, and Colonel Julio Roberto Alpírez also took part in it. There he met other guerrilla combatants who had been captured, among them, one known as Bayardo (Otoniel de la Roca Mendoza).

On March 12, 1992, the third battalion of Military Zone No. 18 in San Marcos captured Bámaca Velásquez, in Montrúfar in the Municipality of Nuevo San Carlos, Retalhuleu. He was able to see him in an office of the detachment in Santa Ana Berlín de Coatepeque, where he was kept tied up. "Captain Laco", Major Mario Ernesto Sosa Orellana and "Captain Soto" were with him. The latter tried to obtain all possible information about the guerrilla from Bámaca Velásquez. The day following the capture of Bámaca Velásquez, the witness was sent to talk to him to tell him to collaborate, or otherwise he would be tortured. On that occasion, he spoke to Bámaca Velásquez alone, and the latter asked the witness, if he was able to escape, to say that he [Bámaca Velásquez] had been captured alive and was in Santa Ana Berlín.

He saw Bámaca Velásquez on many occasions during the approximately one month that his detention in Santa Ana Berlín lasted. In June 1992, he heard Major Mario Sosa Orellana say that "Comandante Everardo had escaped from the capital, but that [...] he had once again been captured and shot because he had tried to escape". However, in July, he saw Bámaca Velásquez in Military Zone No. 18 once again, together with Colonel Julio Roberto Alpírez and Major Sosa Orellana, who told the other detainees that "they could not communicate with him". He helped to collect some medical equipment that was for Bámaca Velásquez and kept guard on the room where he was kept. Colonel Alpírez told him off for being in that place. On another occasion, he saw Bámaca Velásquez "lying half-naked on a bed, with his eyes bandaged and an arm and leg bandaged" and with his face swollen. Beside him was what appeared to be an oxygen cylinder.

On about July 22, 1992, he saw Bámaca Velásquez for the last time in Military Zone No. 18 in San Marcos. On that occasion, the Army was preparing a military operation in the "El Porvenir" detachment; to this end, they recorded a guerrilla radio communication and sent it to him so that he could give it to Bámaca Velásquez for the latter to disclose what the guerrilla were saying in the communication. Later, he heard from Anastasia López Calvo that, during July, Bámaca Velásquez was at the Quetzaltenango military base No. 1715 and that his treatment had been different there, because "they made him do the cleaning where he was and he was not tied up during the day."

After having been detained for one year and ten months, and having obtained the confidence of the members of the armed forces sufficiently, the witness used a license to leave with Simcón Cum Chutá and Martín Pérez Cabrera to spend Christmas with his family, and took advantage of this opportunity to escape.

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

She began to learn about the human rights violations suffered by the Guatemalan peasants at the beginning of the 1980s, while working as a lawyer near the border between Mexico and Texas. As a result of the massacres that were occurring, she decided to visit Guatemala to try to help more directly. There, she began to work with victims of torture and people who were trying to leave the country, among them, people involved with the guerrilla groups. For safety reasons, she returned to her home in Texas in 1986, and decided to write a book on the situation in Guatemala. To this end, she visited secret URNG clinics, where those who had been injured were treated and gathered testimonies for her book. She sympathized with the URNG, but she did not become a guerrilla.

In order to conduct the interviews for her book, she spent 30 days with the Luis Ixmatá Front, which was led by Efraín Bámaca Velásquez, known as Comandante Everardo, where she also met Santiago Cabrera López. The former protected her there and arranged the interviews. When she left, they wrote to each other and, starting in 1991, they began a close relationship while peace talks regarding the indigenous people were being held in Mexico City. Afterwards, they both went to Texas, where they were legally united "by a type of marriage that is very similar to a common law marriage". Bámaca Velásquez subsequently returned to Guatemala.

In mid-March 1992, she went to Mexico D.F., where she met with members of ORPA, who told her that Bámaca Velásquez had disappeared after an armed encounter near Nuevo San Carlos. The day after the events, the Guatemalan press had informed that the Army had found a corpse dressed in an olive green uniform there.

According to the information she was given, following his capture, Bámaca Velásquez was initially detained at the Santa Ana Berlín detachment, then transferred to Guatemala City and then to Quetzaltenango and, finally, in July 1992, he was in San Marcos. According to information from the US State Department, Bámaca Velásquez was still alive in May 1993, together with 350 other prisoners.

She spoke by telephone with Ramiro de León Carpio, then Guatemalan Ombudsman, who later informed her in a letter that a corpse had been found on March 13, 1992, which was subsequently buried in Retalhuleu as XX; according to the letter, the description of the corpse coincided with that of Bámaca Velásquez. However, in view of the lack of information received from the G-2, they doubted that Bámaca Velásquez had died. Therefore, de León Carpio officially requested that the body buried in Retalhuleu should be exhumed.

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

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

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

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

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

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

In August 1993, the exhumation in Retalhuleu was finally carried out in the presence of Patricia Davis, the judge, the administrator of the cemetery, "people from the Health Department", an official from the Office

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

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

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

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

She feared for her husband's life owing to the signature of the Peace Agreements, because she considered that the armed forces would not need any further information from him. She went to the offices of the Organization of American States (OAS) and then to the United Nations, but the Army maintained "a position of international defiance". In these

circumstances, during the first week of October 1994, she began another hunger strike in front of the National Palace, which lasted 32 days; she was ready to continue this until she died and, as a consequence, her heart and kidneys were damaged and she had problems with her sight.

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

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

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

She started a third hunger strike on March 12, 1995, which lasted 12 days, until a United States senator, Robert Torricelli, told her that her husband had been executed on the orders of Colonel Julio Roberto Alpírez, after having been held prisoner by the Army. She later obtained a copy of the State Department and CIA files containing information that Bámaca

Velásquez (Comandante Everardo) had been captured and "was clandestinely detained" and being tortured by members of the G-2, in order to "maximize his intelligence value". She obtained documents indicating that Julio Alberto Soto Bilbao, Mario Ernesto Sosa Orellana and Julio Roberto Alpírez were those responsible for the abuses. She also acquired a statement by Acisclo Valladares, which established that Bámaca Velásquez had given false information to the Army, which had led it into an ambush, and that was why he had been executed.

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

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

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

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

Owing to the steps taken by the US senator, Robert Torricelli, Julio Arango was appointed special prosecutor for the case. Among the

actions that the latter took was an interview with Santiago Cabrera López, and also with a member of the G-2, Nery Ángel Urizar García, who stated that the Retalhuleu corpse was that of Cristóbal Che Pérez, a young soldier who was killed to simulate that he was Bámaca Velásquez. A proceedings was also initiated under the military justice system against several of the members of the armed forces mentioned by Cabrera, including Colonel Alpírez.

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

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

That night they returned to the hotel and heard that the President of Guatemalan himself had ordered the exhumation to proceed. The following day, they tried to obtain an authorization from the Magistrate of Tecún Umán, but he "had gone into hiding", for fear of collaborating with the procedure, so that his assistant had to intervene.

On the same occasion, the prosecutor, Ramsés Cuestas, told them that they only had permission to excavate for one day when, according to their calculations, they needed a month to measure and prepare the site. Finally, it was impossible to conduct the exhumation requested, because the life of the prosecutor Arango was in danger, and he resigned from his position in September 1995.

Subsequently, she again tried to have an exhumation conducted in Las Cabañas, this time with the new prosecutor, Shilvia Jerez, but, once again, this was not possible. The new prosecutor was assassinated in May 1998.

The authorities stated that they would "continue to obstruct any exhumation procedure in Las Cabañas [...] until they receive[d] an amnesty through the peace talks."

While seeking justice in Guatemala, the witness and her supporters were threatened and attacked, and there was also a campaign to slander them. Among the groups that supported her and were threatened, were the Mutual Support Group and the Inter-American Commission on Human Rights. A bomb exploded in the building of the Polytechnic School, during her first hunger strike. A US Government agency told her that there were "clear messages [coming from the] network of contacts in Guatemala, which [affirmed that they had] heard [...] senior members of the armed forces planning [...] to pay someone" to assassinate her. In January, a bomb exploded in the car of her lawyer, José E. Pertierra, in Washington D.C. The witness, Otoniel de la Roca, was also harassed and threatened.

She had debts of US\$35,000.00 as a result of continuing with the case, but she had never thought of filing a civil suit for damages, because she was seeking justice and for the remains of Efraín Bámaca Velásquez to be returned to her. Should she receive compensation as a result of the proceeding before the Inter-American Court, she would like all of it to be given to the next of kin of Bámaca Velásquez.

There was "a total obstruction" of the investigation of this case in Guatemala and no one has been found responsible. The criminal action that is being processed in Retalhuleu is still open.

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

On May 7, 1995, he was appointed special prosecutor for the investigation of the Bámaca Velásquez Case. When the investigation started, the

files were in the Office of the Military Judge of the Department of Retalhuleu and, under the military system of justice, a final stay of proceedings had been pronounced in favor of 12 members of the armed forces. He appealed this before the Retalhuleu Appeals Chamber and had it declared unfounded, so that the case was reactivated. Despite this, none of the officers were convicted.

A proceeding was underway in the Retalhuleu departmental court, to discover the whereabouts of Bámaca Velásquez, which was "more or less filed". One of the steps he took was to try and have Jennifer Harbury included as an accuser in the proceeding, because the Public Ministry "had requested her separation, as she was a foreigner"; however, the tribunals rejected his petition.

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

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

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

He obtained a document from the US State Department, which said that the body of Bámaca Velásquez was buried in the Las Cabañas detach-

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

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

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

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

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

The Guatemalan judicial system is totally ineffective and it is not possible "to have access to a simple and effective recourse, with full guarantees of due process, in the case of the forced disappearance of Efraín Bámaca

[Velásquez]". In Guatemala, no guerrilla has been submitted to justice and condemned for his terrorist activity; in other words, there are no political prisoners in the country.

He was concerned that he had given testimony before the Court, because "one cannot tell what may happen [in Guatemala]."

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

He traveled to Guatemala in order to accompany Jennifer Harbury to an exhumation procedure in Retalhuleu, on May 20, 1992. The purpose of this procedure was to verify whether the body buried in that place was really that of Efraín Bámaca Velásquez.

On arriving in Guatemala City, those who accompanied Harbury met with the Ombudsman, who appointed a coroner and a photographer to accompany them during the procedure. Many security measures surrounded the meeting and the Ombudsman was very nervous.

In the cemetery on May 20, 1992, were the judge who was going to direct the exhumation, a representative of the church, Francis Farenthall, Jennifer Harbury and himself.

When the excavation was commencing, a caravan of approximately 8 to 12 military vehicles arrived at the cemetery. About 20 armed soldiers surrounded the site that was being excavated and one of them told the judge that he must halt the exhumation. Despite this, the judge and the coroner did not cede and the judge gave the order to continue the procedure, indicating "that he had the authority and that the procedure would continue."

The excavation continued and they were able to find the plastic bag with the body. Just as they were extracting the bag, the Attorney General, Acisclo Valladares, arrived in a helicopter, accompanied by a photographer and one or two soldiers, shouting that the exhumation should be halted. Owing to this order, there was a heated discussion between the judge and the Attorney General.

Among the reasons that the Attorney General mentioned for canceling the exhumation were that: there was no one who could identify the body; in order to conduct the procedure, a member of the family should be present; it could not be conducted in the presence of foreigners; and someone from the guerrilla should be present. The Attorney General treated the judge very badly, to the point where the latter decided to obey him. The Attorney General said that the procedure would be conducted at a later date.

It would not have been possible to carry out this procedure, even if all the conditions mentioned by the Attorney General had been fulfilled, because it was cancelled for "political reasons."

When the procedure was cancelled, those present were filmed and photographed and their names were listed. On his return to the town, the forensic photographer, who was an official of the Office of the Ombudsman, informed his chief of what had occurred.

When they returned to the capital, two of those who accompanied Jennifer Harbury went to the airport and Harbury and one other person received protection from the Office of the Ombudsman.

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

In May 1992, Jennifer Harbury asked her to attend the exhumation of a body in the Retalhuleu cemetery, in Guatemala. During the trip to Guatemala, Harbury told her that the body sought was that of her husband.

Prior to the exhumation procedure, they held a meeting with Ramiro de León Carpio, Guatemalan Ombudsman. There was a certain unexpected tension during the meeting, demonstrated by the fact that the meeting was not held in his office, but in a public building in Guatemala City, and that special security measures were taken, such as keeping the doors locked.

Subsequently, the same night, she, Jennifer Harbury and James Harrington again met with de León Carpio and, on that occasion, the latter gave

them details of the trip to Retalhuleu and informed them that a forensic expert, representing the Office of the Ombudsman, and a photographer would accompany them during the procedure.

On reaching the cemetery, they found a few people there, including the excavators and a person who had joined them when they arrived at the town. When they began the excavation, the atmosphere was peaceful; however, subsequently, a significant number of policemen or soldiers arrived and a large group of photographers who accompanied the authorities began to take photographs of the scene and those present; she considered that this was a form of intimidation.

Despite the military presence, the excavation continued and they managed to find a bag containing a body. At that moment they heard noises and the Guatemalan Attorney General appeared, shouting that they must halt the excavation. The Attorney General appeared to be angry and his attitude was inflexible.

The exhumation did not continue and a heated discussion started, which increased the tension, and, above all, caused her to fear for the safety of Jennifer Harbury.

When they left the cemetery, they went to an office in a nearby town, and the judge or the forensic expert who accompanied them asked them not to move from there, because it was a place where they would be protected.

Later, they returned to Guatemala City and Harbury called someone in Mexico City, and this person told them that they should not leave the hotel and that they should leave the country as soon as possible

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

He has carried out historical and forensic anthropological investigations at the request of the Guatemalan authorities since 1992, and has worked internationally with such organizations as the United Nations in Bosnia

and Herzegovina and with the Commission for Historical Clarification of the Republic of Haiti. His expertise is the analysis of bones from the human skeleton, in other words, when there is no longer any soft tissue.

A forensic anthropological investigation has three basic aims: to identify a person by his osseous remains, in particular to determine sex, height, age, diseases and dental characteristics; to establish the cause of death and, lastly, to establish how this happened.

As a member of the Guatemalan Forensic Anthropology Team, he had conducted an exhumation in Retalhuleu, in August 1993, in order "to establish whether the person buried as XX on March 13, 1992, and who had died the day before, supposedly in an armed encounter, was Efraín Bámaca [Velásquez]."

As more than a year had elapsed between the time that Bámaca Velásquez allegedly died and the moment when the exhumation in Retalhuleu was conducted, it was not possible to perform an autopsy on the corpse, but rather an anthropological study, with the characteristics described above.

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

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

On examining the skeleton that was recovered, it was found that, among other elements, it did not have prognathism, or separation of the upper

and lower median incisors. To the contrary, it had "some metallic crowns" on both upper median incisors. Moreover, on analyzing the characteristics of the skeleton, using the Todd method, it was determined that it corresponded to an individual of between 18 and 22 years of age, and not 34 as Bámaca Velásquez had been.

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

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

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

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

He was present at another exhumation carried out in Coatepeque, on November 10, 1994, in order to establish whether the corpse in a grave

was that of Bámaca Velásquez. On that occasion, Dr. William Hagland, from the US organization, Physicians for Human Rights, the Coatepeque coroner, local authorities of the National Police Force, members of the Guatemalan Forensic Anthropology Team, some journalists and observers, and Jennifer Harbury, who was "in the middle of a hunger strike", were present.

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

As a member of the Guatemalan Forensic Anthropology Team, he took part in another exhumation attempt related to the Bámaca Velásquez Case, in a military detachment known as La Montañita or Las Cabañas. There had been an attempt to conduct this procedure in 1995, at the request of the Office of the Prosecutor of the Public Ministry, but "it could not be carried out", because lawyers, representing the Guatemalan Army arrived, and they considered that the requirements for this procedure had not been fulfilled.

They tried to conduct the procedure a second time, in the presence of the special prosecutor, Julio Arango, and after one day's work, the Army's lawyers once again suspended it, because they considered that the necessary requirements had not been fulfilled. In a preliminary study, the Guatemalan Forensic Anthropology Team established that approximately four weeks would be required to carry out the archaeological phase of the study.

They made another exhumation attempt in Las Cabañas with "the new prosecutor" who had been assigned to the case, but when the order was given to initiate the excavations, they were prevented from continuing by the appearance of an Army officer who ordered the procedure to be halted, "because something [...] in the documents was considered not in order". The following day, the prosecutor obtained other documents from the judge and, once again, the Army's lawyers found that the requirements had not been fulfilled, so that they could not continue. The prosecutor who accompanied them was Shilvia Jerez, who died, riddled with bullets, in 1998.

Two members of his organization, Andrés Kauffman and Federico Reyes López, were threatened and this was denounced before the corresponding authorities at the appropriate time. Subsequently, these threats caused the Inter-American Commission to grant him precautionary measures.

He is not a URNG sympathizer.

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

She accompanied Jennifer Harbury to an exhumation in Retalhuleu on August 17, 1993, as an international human rights observer and witness. She arrived in Guatemala on July 24 that year in order to help Harbury with the various procedures and, at the same time, seek support for the principle that war prisoners should receive humane treatment and be kept in places to which the public has access.

At that time, Harbury told her that she feared that the publicity surrounding the search for her husband and the preparations for the exhumation could result in the death of Bámaca Velásquez, should he still be detained. Even so, she still hoped to see him again alive.

During the week preceding the exhumation, she accompanied Harbury to the Magistrate in order to organize the procedure. She also had the opportunity to review the case file about the finding of a body in the Ixcucua River, which corresponded to the description of the body that Ramiro de León Carpio gave in a letter he sent to the URNG, except for the fact that the body did not have any scars. She also examined the report of the original autopsy performed 24 hours after the facts and confirmed that the report had information that did not correspond to the description in the previous document.

She was surprised to find these reports because, as Harbury had told her, when the URNG requested documentation about the body, it was told that there was none. The report contained information on the fingerprints and the conclusion that death had been due to strangling.

The environment was tense during the exhumation in Retalhuleu on August 17, 1993. The day before the procedure, she noted that they were being followed and that the forensic team was questioned by five policemen when it was outside the Second Criminal Trial Court of Retalhuleu. The day of the exhumation, when they were in the cemetery, a helicopter flew over the site every ten minutes exactly. Also, there were at least two people among the photographers who were asked to leave, because they were not carrying appropriate credentials. Furthermore, there were a great many people around who they could not identify, and this made them fearful. On different occasions, Jennifer Harbury was pushed towards the grave and had to struggle to return to the place where she had been. There was constant pressure during the procedure.

It was not possible to identify the body of Bámaca Velásquez, and this did not surprise Jennifer Harbury, owing to the information that she had seen in the autopsy report.

Harbury began a hunger strike in the Central Park of Guatemala City, in order to save the life of Bámaca Velásquez; she was ready to die during the hunger strike. This lasted for approximately 33 days, after which Jennifer Harbury suffered various physical problems, which almost caused her to fall into a coma.

This whole process caused pain and anxiety to Harbury and knowing what had happened to Bámaca Velásquez would have helped alleviate her suffering.

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

At the beginning of 1980, he joined the Rebel Armed Forces (FAR) of the Santos Salazar Front, a group that was part of the URNG, owing to the repression that the Government had unleashed against the people of Guatemala.

He was a member of that organization until September 10, 1988, the date of which he was captured by four members of the Army, who tied him

up and beat him. Then they took him in a pick-up truck to Military Zone No. 1316 in Retalhuleu, where he was kept naked in a one meter-square room until he was interrogated one hour later.

The interrogation was carried out by members of the Army's "intelligence" service, among them, Nery Ángel Urizar García and Captain Guzmán, who asked him about the structure of the URNG and the location of the Santos Salazar Front; he answered that he knew nothing. Consequently, they hung him from the roof with his hands tied and began to beat him with a baseball bat. Then, they placed him face downwards and put a hood with herbicide on him. Subsequently, they submerged him in a tank of water, and then laid him out on the floor and stood on him. Captain Guzmán ordered him to answer the questions, threatening him with death. They also used wires, which they connected to an electric socket and began to place the uncovered ends on different part of his wet, naked body, which made him faint, because he was so weak.

The following day, he woke up very ill and in the afternoon they sat him in a chair and told him "today, you are going to talk, because today you are going to die" and, faced with his refusal to give them any answers, they again hit him with a baseball bat.

The following day more people came to the room where he was and one of them said "yes, this is Bayardo". Later, the same man came up to him, identified him by his name and by his guerrilla alias and asked him to identify members of the Front in some photographs. Subsequently, he discovered that this person was known by the alias Jorge and that he was a member of the Army who had infiltrated a rebel organization.

The members of the Army asked him about his family and, when they did not obtain an answer about where they were, they brought in one of his brother-in-laws, who was also detained, and beat him to obtain the information; but, finally, it was the witness himself who told them where they were. A month later, his two children of 3 and 5 years of age and his mother-in-law, with six children, were captured in Retalhuleu and sent to Military Zone No. 1316, where they were kept in the infirmary for nearly two months.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He left the Army in August 1996, after contacting Jennifer Harbury. When he was in the airport leaving Guatemala, he was told that there was an order of *ne exeat* against him. Moreover, he was detained because he was carrying a gun. He was freed after payment of a financial surety. Then he went to Mexico, where he remained from August 1996 until October 1997.

He fears for his safety and that of his family, because he has given testimony before the Court, and because a few days after his arrival in Washington D. C., in November 1997, he heard that people were driving round his family's house in Guatemala. He did not request protection from the law as he considered that "in Guatemala, the laws are controlled by the Army."

He was granted political asylum in the United States.

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

He began his service with the Army on June 30, 1977. In 1992, he held the rank of Major and he was posted to Military Zone No. 1316 at Mazatenango. Subsequently, between March and December that year, he transferred to the Santa Ana Berlín military base while the Quetzal Task Force was active, and when this closed down he was posted to Military Zone No. 18, in the Department of San Marcos, where he worked as an Intelligence Officer.

Regarding the structure of the military in Zone No. 18, he stated that it was a military command, led by three commanders with the rank of colonel, who were well-informed about military operations; the second commander was responsible for the Staff and the third commander, was the inspector. The battalion commanders were under the orders of the second commander and then the Staff officers, including the officer in charge of personnel, intelligence, operations, logistics and civilian matters, and the companies of soldiers. As an intelligence officer, he was under the authority of the second commander of the military zone. With regard to the line of authority among the Staff officers there was a situation of "rank to rank"; in other words, they all had the same employment, but the years spent in the Army were respected.

He knew Julio Alberto Soto Bilbao, who was an Army Major and Operations and Training Officer, and whose function was to plan counterinsurgency operations. He got to know Simeón Cum Chutá in San Marcos, in 1992. There, the latter worked under him as Specialist or office worker, doing typing work; intelligence analysis was carried out by the officer, in this case the witness. He knew Julio Roberto Alpírez, Army Colonel, who was the third commander in Military Zone No. 18, in 1992. Alpírez's functions were to supervise the operation of the detachment and cleaning activities. In July 1992, he was mobilized with a small group of the Staff of Military Zone No. 18 to the "El Porvenir" property, located in San Marcos, responsible for a Task Force formed to confront the rebels in the Zone. He got to know Raúl Rodríguez Garrido in Military Zone No. 1316 in Mazatenango. The latter was a Specialist to whom he gave orders on a daily basis.

Although he, personally, had not taken part in the capture of guerrillas during an armed encounter, should this situation arise, the Army proceeded to call the nearest authorities in order to hand them over and then "they claimed an amnesty."

During his time in Military Zone No. 18 in San Marcos, he got to know some "former rebels", including Anastasia López Calvo and Santiago Cabrera López, who [...] were part of us, as they had given themselves up to the Army and carried out cleaning functions and ran errands in the

detachment. Cabrera López was not at the Santa Ana Berlín military base.

He was not afraid that these people in the military bases would take information to the guerrilla groups to which they had belonged and, also, he had never heard that any former combatant had been captured and then tortured to obtain information and, subsequently, maintained in military installations for "military intelligence" purposes. The Army considered that the former guerrillas who were working for them were a very imprecise source of information.

In March 1992, a Task Force called Quetzal was formed; it was led by the then Colonel Ismael Segura Abularach. The purpose was to locate ORPA militants who were in the region. Members of the battalions from San Marcos and Military Zone No. 1715 of Quetzaltenango participated in this military undertaking. He took part in this mission in March that year because Colonel Aguirre Loarca was injured in the shoulder during an encounter with the guerrilla and the witness was called to relieve him. Colonel Conde Uriales was the Second Commander; he was an intelligence officer; Major Soto Bilbao was the logistics officer; Captain Aragón Cifuentes was the civilian affairs officer and there was also a personnel officer.

As an intelligence officer he heard that there had been an encounter between the Quetzal Task Force and the Luis Ixmatá Front in March 1992. He received a radio communication that "a terrorist criminal [...] had been killed in combat" near a river in Nuevo San Carlos. When the situation had calmed down, following orders, he went in one of the three Army helicopters at Retalhuleu to inform the authorities that there had been an armed encounter and that a guerrilla had died, and he helped the Magistrate get to the place in question. He was able to see the corpse, near the Ixcucua River, and they removed it by helicopter as part of the judicial procedure.

He was at the Santa Ana Berlín detachment after the encounter of March 12, 1992, and did not know whether Efraín Bámaca Velásquez had been captured at that time, nor did he know that members of ORPA had made declarations confirming this.

He denied having been with Nery Ángel Urizar at the Santa Ana Berlín base or having taken him to identify Bámaca Velásquez. He did not see Bámaca Velásquez either detained or tortured, or any other person with his physical characteristics at the Santa Ana Berlín base or at San Marcos and only knew of his existence because of all the information that appeared in the newspapers.

He denied having taken the decision to exploit the capture of Bámaca Velásquez for "military intelligence purposes", by pretending that he was killed in combat and keeping him detained.

He met Nery Ángel Urizar, Specialist from Military Zone No. 1316 in 1991. The same year, he met Cristóbal Che Pérez, former combatant of ORPA's Javier Tambriz Front, who gave himself up directly to the witness. In the case of those mentioned, later "the whole procedure [of presenting them to the competent authorities] was carried out". Finally, Che Pérez decided to remain at the military installations and he was even given a position as a soldier. He denied having ordered his death and then handing him over to the Magistrate as the corpse found in the Ixcucua River. He warned that the testimony of Urizar García could not be trusted, because he is a "criminal" and there are even orders of arrest against him.

As a result of the disappearance of Bámaca Velásquez he made statements before the Public Ministry, in a court and at the Office of the Ombudsman. He was investigated and then the case against him was dismissed in a criminal proceeding arising from the Bámaca Velásquez Case, in about 1994. He also made a statement in the special pre-trial investigation procedure that tried to find the whereabouts of Bámaca Velásquez. During the period when the investigations were being carried out he was not separated from his functions in the Army.

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

He carried out functions in the judicature, he was Head of the Public Ministry and Attorney General. He occupied the latter post for the peri-

od 1991-1993 and during the constitutional period from 1994-1998. During the first period, the Guatemalan Constitution attributed two principal functions to the post: to be the legal representative of the State and "to ensure strict compliance with the laws and to criminally prosecute crimes". Furthermore, in Guatemala there existed the figure of public prosecution whereby any person could "prosecute any kind of crime, with the exception of private or semi-public crimes", and the Public Ministry was "simply an auxiliary of the tribunals of justice", while it was the judges who really headed investigations.

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

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

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

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

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

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

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

In 1992, as a result of the proceeding that was underway against him, he requested the Congress of the Republic that to permit an "*antejuicio*" (pre-trial), a procedure aimed at suspending a Government official from his functions until his legal situation is clarified, so that he may defend himself "without any kind of privilege". In consequence, he was effectively suspended as Attorney General from September 1992 to September 1993.

In September 1993, having resolved his situation before the tribunals, he returned to his functions "and immediately present[ed] [his] resignation", in order to allow the new President of the Republic, Ramiro de León Car-

pio, to select another person to occupy the position. He was again appointed Attorney General for the period 1994-1998, but by that time the functions of Attorney General and Head of the Public Ministry had been separated.

In 1994, he proposed a series of recourses to determine the whereabouts of Bámaca Velásquez. In October that year, considering that Bámaca Velásquez might possibly be detained, he began a special pre-trial investigation procedure before the Supreme Court of Justice, a procedure that had been introduced during the reform of the Criminal Procedural Code. He also filed a criminal complaint, in order to determine the whereabouts of Bámaca Velásquez. The then Ombudsman, Jorge Mario García Laguardia, was appointed executor in the first proceeding, and statements were received from the father of Bámaca Velásquez, José León Bámaca Hernández, and his sister, Egidia Gebia Bámaca Velásquez, in order to try and gather further information.

He did not remember that, during the judicial proceedings that had been instituted, and during Jennifer Harbury's hunger strike, the US Government had confirmed that the Army had captured Bámaca Velásquez alive and had addressed a formal diplomatic note to the Guatemalan Government on this subject. He knew that Harbury had made statements that criminal proceedings would be instituted against the military officers involved in the death of Bámaca Velásquez.

As Attorney General, he opposed the registration of Jennifer Harbury's marriage to Bámaca Velásquez, because "it [did] not comply with Guatemalan legal requirements". In November 1994, he filed a civil suit for jactitation against Harbury, strictly with regard to the economic aspects of her pretensions, and not in relation to the case of human rights violations, due to the possibility of financial fraud, of trying to make money at the cost of the Guatemalan State. He recognized that Jennifer Harbury "had always declared that she did not want any money and that she was not seeking money". The Sixth Judge of the Civil Trial Court rejected the action for jactitation, because he considered that Harbury was referring to filing criminal suits and not civil suits. Owing to the action for jactitation, Jennifer Harbury was obliged to remain in

Guatemala under *ne exeat*, which could have been avoided, since "the proceeding for a [civil] *ne exeat* to be lifted takes less than 24 hours."

The various investigations that he instituted did not permit the facts related to the disappearance of Bámaca Velásquez to be clarified, and no military officer was convicted in relation to the instant case.

He denied having received information from Colonel Julio Roberto Alpírez indicating that the Army had kept Bámaca Velásquez detained secretly in order to obtain "intelligence information", and that it had then decided to execute him.

Owing to the prolonged internal conflict that Guatemala experienced, "it was not always easy [...] to obtain precise information about many things that were happening, so as to be able to clearly establish what had occurred in each case". Because of his position, he knew about acts of State authorities that involved tortures and extrajudicial executions.

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

He worked with the armed forces from November 1979 to September 1997, as First Class Sergeant in the Defense Staff's transport team. The National Palace team of drivers comprised 12 persons, divided into two groups and he served Luis Alberto Gómez Guillermo directly and drove him from his house to the National Palace. He did not meet José Víctor Cordero Cardona, known as "La Yegua" (pilot of an Army helicopter), there.

He denied knowing about the Army practice of presenting all the guerrillas, both those captured in combat and those who gave themselves up voluntarily, to the corresponding civil authorities where they could claim amnesty. And, during his 17 years and 10 months of service, he had not heard of any former guerrilla who worked for the Army.

He did not know whether the Army had organized a special force in March 1992 to operate in San Marcos, or whether someone was captured

as a result of an encounter in which this special force took part. Lastly, he denied knowing anything about the detention, torture and transfer to different military detachments of Bámaca Velásquez.

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

He has been an Army officer and formed part of the intelligence unit called G-2. He later stated that he had not worked as an intelligence officer.

He did not know that the Army captured or arrested members of the guerrilla, or that there were clandestine detention centers for those who had been captured. When such persons gave themselves up they were not mistreated. The sources of information available to "military intelligence" to find out about guerrilla activities, in the context of the "armed conflict", were the local population or information provided by guerrillas who had given themselves up voluntarily.

The Army did not conduct interrogations, but rather "interviews" of the former guerrillas who gave themselves up voluntarily and claimed amnesty, such as the former guerrillas, de la Roca and Boitsiu. In these circumstances, the procedure followed was to immediately inform the superior officers and "then, bring the press so that, both their families and the rebels would know [...] that this man was now '*adaptado a la vida política*' (re-adapted to society)". The "interview" was carried out by the competent judge, in the presence of representatives of the Public Ministry and lawyers, so that it could then be "used for or against in a formal proceeding."

He was acquainted with Otoniel de la Roca, and knew that he was a former member of the guerrilla, and did not work in the Army. He had spoken to him and to Luis Boitsiu, in 1991, regarding the existence of "schisms" in the guerrilla. He did not know that Otoniel de la Roca had been captured by the Army, tortured and used to "obtain intelligence" about the guerrilla.

Later he heard that Otoniel de la Roca Mendoza had been detained by the National Police Force because he was carrying a gun and uttering

threats. He heard that de la Roca had made declarations to the press, but not that he had said that "something would happen to him or his family" if he did not make such declarations.

He was not acquainted with either Santiago Cabrera López or Anastasia López Calvo, or a member of the armed forces named José Víctor Cordero Cardona.

In June 1992, he abandoned the country to take a military course. In 1992, he was a member of the National Defense Staff, and was specifically appointed as an official member of the Support Committee for the Government Peace Commission, which met in the National Palace, as of January 1991. His function was to gather information on entities of a political nature, "to see how the peace process was regarded."

This Peace Commission was "a Government body, specifically set up to conduct the peace process". From January to June 1992, this Commission declared itself in permanent session due to internal problems among the guerrilla that might affect the peace process.

He did not take part in the military operation called the Quetzal Task Force, from January 6 to June 15, 1992, because "[his] competence was of a political nature, and not in military operations", nor was he at the Santa Ana Berlín military detachment in March 1992, nor in Military Zone No. 18 of San Marcos in July 1992. He learned of the capture and torture of Bámaca Velásquez through the media.

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

The Guatemalan Army did not capture guerrilla fighters or keep them detained; rather, to the contrary, when they deserted, the general policy was, first, to try and establish their true identity; then, they presented themselves before the tribunals of justice in order to claim "some kind of amnesty" and, subsequently, "they were incorporated into the work [...of] the military command where they had given themselves up", because they feared that they would "be executed by the guerrilla groups."

The guerrillas who gave themselves up were used by "Army intelligence" as a source of information on the military structure in which they had taken part and, principally, "to be able to determine the areas where [... there were] minefields" and, thus, alert the patrols to where they could pass. No pressure was exerted to ensure that former guerrillas told the truth. From what he knew of a case in the 1980s, those injured in combat were provided with the necessary medical support.

During his years in the Army, he knew some people who had given themselves up, specifically Santiago Cabrera López and others with the aliases "Karina", "Augusto" and "Pepe."

In 1992, he was a major in the Infantry and worked in the area of intelligence for the Quetzal Task Force, at the Santa Ana Berlín military detachment. Santiago Cabrera "performed duties in the [Intelligence] Office in which [the witness] worked."

On February 28, 1992, he was injured in combat by a group from the Luis Ixmatá guerrilla front that operated in the area of San Marcos. After being injured, he was evacuated from the Zone and spent approximately 15 days recovering in the Military Medical Center in Guatemala City, which he could not leave; subsequently, he was transferred to the United States to continue his treatment for four months.

He returned to Guatemala at the beginning of June 1992 and as he was not totally recovered, "[he] was assigned to an Operations unit with the National Defense Staff in the capital", so that he did not return to the Zone of Santa Ana Berlín until the end of June 1992.

He knew who Efraín Bámaca Velásquez was and that "he was doing political work in the area of [...] San Marcos", and that he was a Commander.

Through the press, he learned about the armed encounter between the Luis Ixmatá Front and the Guatemalan Army in March 1992, and also about the capture of an important guerrilla leader.

He was not prosecuted nor did he declare before any tribunal in Guatemala with regard to the Bámaca Velásquez Case.

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

He was in the Guatemalan Army from 1985 to 1997, working as a Specialist in the intelligence unit in Military Zone No. 18 in the Department of San Marcos.

He knew Santiago Cabrera López, former URNG combatant, who, in 1991, presented himself voluntarily to Military Zone No. 18 in San Marcos, with another guerrilla called Karina. He was not aware of the procedure followed when Cabrera López arrived at the Military Zone, because that corresponded to the officer in charge of the intelligence section, Colonel Pérez Solares. He was unaware whether these persons had been taken before a judge.

His superior officers were "Lieutenant Colonel Pérez Solares, then Major Aguirre [and] then [officer] Sosa Orellana."

He was aware that, in March 1992, the Army organized the Quetzal Task Force, with the aim of fighting the guerrilla in San Marcos. This Task Force operated from the Military Zone No. 18 and Santa Ana Berlín bases. He never took part in it in any way. Major Aguirre did participate in it, as an intelligence officer.

He accompanied Santiago Cabrera to request his identity documents in March 1992, because, in his opinion, a person without personal identification could be prosecuted for this in Guatemala.

He knew nothing about an encounter between the Quetzal Task Force and the ORPA Luis Ixmatá Front in March 1992, because he was in San Marcos at that time. He did not know who Bámaca Velásquez was through his work, or whether he was captured as a result of the encounter of March 1992. Nor did he know about possible tortures inflicted on Bámaca Velásquez.

In March 1992, Raúl Sandoval, Santiago Cabrera López and a woman known as Karina, all former members of the guerrilla, formed part of the personnel of the intelligence office. Santiago Cabrera was always posted at the San Marcos base.

He was investigated in a criminal proceeding under the ordinary jurisdiction of Retalhuleu in relation to the disappearance of Bámaca Velásquez, in which he was exonerated.

The testimony of Cabrera López was not true.

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

From January 1 to September 31, 1992, he was on active service in Military Zone No. 18, carrying out duties as operations and training officer for this military Zone, which was under the command of Colonel Harry Ponce Ramírez.

He did not remember capturing any combatant, but rather having dealt with guerrillas injured in combat. The Guatemalan Army's policy during the conflict was "to give first aid to the [injured] person, transfer him to the command post [and] evaluate his health"; after this, they decided if he should be hospitalized. Then, they proposed to the guerrilla that he should voluntarily claim amnesty, which was processed in the magistrate's courts "and often in the presence of the press". He did not know whether the Army kept former guerrillas as informers or "the procedure followed to obtain information from former guerrillas."

He did not remember any other former guerrilla who might have been working in Military Zone No. 18. However, he was aware of "various former guerrillas who had presented themselves voluntarily to different military commands, claimed amnesty and, for their own personal safety, remained working with the institution". He did not work with any of them, because they worked with "military intelligence."

He received intelligence information from the intelligence officer on how and where guerrilla detachments were located.

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

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

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

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

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

He was not criminally prosecuted for the Bámaca Velásquez case; however, he appeared voluntarily before a criminal investigation instituted by the Public Ministry and was left "at liberty due to lack of merit". At the beginning of the proceeding, military courts were involved, but "subse-

quently, they were closed [...] and the whole process was transferred to the Retalhuleu Criminal Trial Court."

VIII EVALUATION OF THE EVIDENCE

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

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

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

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

the procedural system is a means of attaining justice and [...] cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved⁵⁰.

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

97. In an international tribunal such as the Court, whose aim is the protection of human rights, the proceeding has its own characteristics that differentiate it from the domestic process. The former is less formal and more flexible than the latter, which does not imply that it fails to ensure legal certainty and procedural balance to the parties⁵¹. This grants the Court a greater latitude to use logic and experience in evaluating the evidence rendered to it on the pertinent facts⁵².

98. It must also be remembered that the international protection of human rights should not be confused with criminal justice. When States appear before the Court, they do so not as defendants in a criminal proceeding, since the Court does not impose punishment on those responsible for violating human rights. Its function is to protect the victims and to determine the reparation of the damages caused by the States responsible for such actions⁵³. To this end

[t]he sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention. Moreover, the State's international responsibility is also at issue when it does not take the necessary steps under its domestic law⁵⁴.

51 *Ibid.*

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

53 *Cf. Castillo Petruzzi et al. Case, supra* note 50, para. 90; *Paniagua Morales et al. Case, supra* note 50, para. 71; *Suárez Rosero Case*. Judgment of November 12, 1997. Series C No. 35, para. 37; *Fairén Garbí and Solís Corrales Case*. Judgment of March 15, 1989. Series C No. 6, para. 136; *Godínez Cruz Case*. Judgment of January 20, 1989. Series C No. 5, para. 140; and *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 134.

54 *Cf. Villagrán Morales et al. Case (the "Street Children" Case), supra* note 52, para. 75; and *Paniagua Morales et al. Case, supra* note 50, para. 91.

99. It is worth emphasizing that, in this case, the State did not present any type of evidence for the defense during the procedural opportunities indicated in Article 43 of the Rules of Procedure and, to the contrary, partially recognized its international responsibility. Both in the reply to the application and in its final arguments, the State concentrated its defense on the argument that, at the time of the facts, Guatemala was experiencing an internal conflict, and accepted its international responsibility with regard to the rights and guarantees established in Articles 8, 25 and 1(1) of the American Convention.

100. In this respect, the Court considers, as it has in other cases, that when the State does not provide a specific reply to the application, it is presumed that the facts about which it remains silent are true, provided that consistent conclusions about them can be inferred from the evidence presented⁵⁵. However, the Court will proceed to examine and evaluate all the elements that comprise the evidence in this case, applying the rule of "sound criticism" that enables judges to arrive at a decision as to the truth of the alleged facts⁵⁶.

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

55 Cf. *Villagrán Morales et al. Case (the "Street Children" Case)*, *supra* note 52, para. 68; *Godínez Cruz Case*, *supra* note 53, para. 144; and *Velásquez Rodríguez Case*, *supra* note 53, para. 138.

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

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

103. In this respect, the Court considers that the videotape with the testimony of Nery Ángel Urizar García, contributed by the Commission as documentary evidence, lacks autonomous value, and the testimony that it contains cannot be admitted as it has not complied with the requirements for validity, such as the appearance of the witness before Court, his identification, swearing in, monitoring by the State and the possibility of questioning by the judge⁵⁷.

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

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

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

obtained. Those circumstances prevent these documents from being granted value as evidence.

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

107. As for the newspaper cuttings contributed by the Commission, this Court has considered that, although they are not real documentary evidence, they could be taken into consideration when they cover public or well-known facts, or declarations of State officials or when they corroborate what has been established in other documents or testimonies received during the proceeding⁵⁸. Consequently, the Court adds them to the probative evidence as an appropriate way of verifying the truth of the facts of the case, in conjunction with all the other evidence presented.

108. The statements made before a Notary and presented by the Commission should be admitted. On the one hand, because they constitute evidence produced by the Commission in March 1998, subsequent to the submission of the application (August 1996) and, on the other, because this Court has discretionary powers to evaluate statements or declarations that are presented to it, either orally or by any other means. However, the Court observes that, since the requirements established in Articles 43 and ff. of the Rules of Procedure were not fulfilled, this Court cannot admit them as testimonial evidence and decides to incorporate them to the probative evidence in this case as documentary evidence⁵⁹.

109. With regard to the reports of the Inter-Diocesan Recovery of the Historical Memory Project and the Commission for Historical Clarification, they were offered as supervening evidence by the Commission, in

58 Cf. *Paniagua Morales et al. Case*, *supra* note 50, para. 75; *I'airén Garbí and Solís Corrales Case*, *supra* note 53, para. 145; *Godínez Cruz Case*, *supra* note 53, para. 152 and *Velásquez Rodríguez Case*, *supra* note 53, para. 146.

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

accordance with Article 43 of the Rules of Procedure, and the State expressly accepted their incorporation into the probative evidence, so the Court incorporates them as documentary evidence.

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

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

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

who made statements in the case; one was about the death of Bámaca Velásquez and 10 about the specific situation of two Army officers during 1992. Although the State did not make any statement about the reasons for the time-barred presentation of these elements of evidence and, therefore, did not explain the exceptional circumstances that would justify their admission by the Court, the latter considers that they constitute useful evidence inasmuch as they contain information about the facts examined, and accordingly incorporates them into the probative evidence based on Article 44(1) of the Rules of Procedure and deems them to be circumstantial evidence within the probative evidence, in accordance with the principle of "sound criticism."⁶⁰

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

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

- a) regarding the testimony of Santiago Cabrera López, it indicated that there are irregularities with regard to his position and functions in the Guatemalan Army, since they vary from what was stated by the witnesses who declared on November 22 and 23, 1998; it therefore requests that this testimony should be rejected;

60 Cf. *Cantoral Benavides Case*, *supra* note 56, para. 52; *Durand and Ugarte Case*, *supra* note 56, paras. 52-56; *Villagrán Morales et al. Case (the "Street Children" Case)*, *supra* note 52, para. 71; *Castillo Pérez Case. Reparations*, *supra* note 56, para. 40; *Loayza Tamayo Case. Reparations*, *supra* note 56, para. 57; and *Paniagua Morales et al. Case*, *supra* note 50, para. 76.

- b) as for the testimony of Otoniel de la Roca Mendoza, it stated that he is "a fugitive from Guatemalan justice, that his testimony was given in order to obtain political asylum", and that it contradicts that of Cabrera López;
- c) in relation to the two witnesses mentioned above, it said that the inaccuracy of their testimonies is proved by the testimonies of Salvatierra Arroyo, Simeón Cum Churá and Soto Bilbao; and
- d) with regard to the testimony of Jennifer Harbury, it stated that, on the one hand, she had a financial interest in the case and, on the other, the "Guatemalan legal system does not permit the execution of decisions or judgments pronounced abroad", so that it was not possible to register her marriage in the national registries.

115. Thus, the State merely made general observations on the alleged lack of competence or impartiality of the testimonies, basing itself on statements of agents or former agents of the State, who have been mentioned as possibly being responsible for the facts of the case. The Court believes that the statements of such witnesses, who have a direct interest in the case, are not sufficient to invalidate testimonies that coincide fundamentally with other types of evidence that have not been objected to, and therefore the Court is unable to reject them.

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

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

this alone [is not] sufficient to deny the competence of witnesses to attest before the Court [because it would be] contradictory,

under the American Convention on Human Rights, to deny *a priori* a witness the possibility of testifying about material facts of a case submitted to the Court, because he was being prosecuted or had even been convicted in a domestic proceeding, even if the said case referred to matters that affect it⁶¹.

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

119. In accordance with these criteria, the Court attributes probative value to the declarations of the witnesses Harbury, Cabrera López and de la Roca Mendoza that were objected by the State. It is important to emphasize that, unlike other cases of forced disappearance in which the available evidence is limited to hearsay and circumstantial evidence⁶², in this case, the Court has the direct testimonies of Santiago Cabrera López and Otoniel de la Roca Mendoza, to form an opinion.

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

IX PROVEN FACTS

121. The Court now proceeds to consider the relevant facts that it finds have been proved, which it will present chronologically. They result from the examination of the documents provided by the State and the Inter-

61 Cf. *Godínez Cruz Case*, *supra* note 53, para. 51.

62 Cf. *Blake Case*, *supra* note 52, para. 51 and, similarly, *Castillo Páez Case*, *supra* note 52, paras. 50-53.

American Commission, and also the documentary, testimonial and expert evidence submitted in the instant case.

a) Efraín Bámaca Velásquez was born on June 18, 1957, on the El Tablero property, El Tumbador, San Marcos⁶³.

b) At the time when the facts relating to this case took place, Guatemala was convulsed by an internal conflict⁶⁴.

c) Jennifer Harbury and Efraín Bámaca Velásquez met in 1990 and were married in the State of Texas, United States, on September 25, 1991⁶⁵.

d) In 1992, there was a guerrilla group called the Organization of the People in Arms (ORPA) in Guatemala, which operated on four fronts, one of which was the Luis Ixmatá Front, commanded by Efraín Bámaca Velásquez, known as Everardo⁶⁶.

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

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

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

66 Cf. Testimonies of Santiago Cabrera López before the Office of the Guatemalan Prosecutor General and before the Inter-American Commission, Annexes 2 and 3; final oral argument of the State during the public hearing held

e) On February 15, 1992, the Quetzal Task Force, established by the Army to combat the guerrilla in the southwestern zone of the country, began its activities. Its command post was initially at the Santa Ana Berlín military detachment, in Coatepeque, Quetzaltenango. Other military zones, such as Military Zone No. 18 in San Marcos also collaborated with it⁶⁷.

f) It was the Army's practice to capture guerrillas and keep them in clandestine confinement in order to obtain information that was useful for the Army, through physical and mental torture. These guerrillas were frequently transferred from one military detachment to another and, following several months of this situation, were used as guides to determine where the guerrilla were active and to identify individuals who were fight-

at the seat of the Court on June 16, 17 and 18, 1998; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Efraín Aguirre Loarca, given to the Court on November 23, 1998; testimony of Julio Alberto Soto Bilbao, given to the Court on November 23, 1998; Report of the Commission for Historical Clarification, Tome II; and REMHI Report, Tome III.

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

ing with the guerrilla. Many of those detained were then executed, which completed the figure of forced disappearance⁶⁸.

g) At the time of the facts of this case, various former guerrillas were collaborating with the Army, and providing it with useful information⁶⁹. They included Cristóbal Che Pérez, known as Valentín, Santiago Cabrera López, known as Carlos, Otoniel de la Roca Mendoza, known as Bayardo, and Pedro Tartón Jutzuy, known as Arnulfo⁷⁰.

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

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

70 Cf. Testimony of Santiago Cabrera López before the Inter-American Commission, Annex 3; testimony of Nery Ángel Urizar García before the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; supplementary statement by Nery Ángel Urizar García before the special prosecutor, Julio Eduardo Arango Escobar, Public Ministry, May 24,

h) On March 12, 1992, there was an armed encounter between guerrilla combatants belonging to the Luis Ixmatá Front and members of the Army on the banks of the Ixcucua River, in the municipality of Nuevo San Carlos, Department of Retalhuleu⁷¹. Efraín Bámaca Velásquez was captured alive during this encounter.⁷²

1995, Annex 12; statement sworn before a Notary with the testimony of Pedro Tartón Jutzuy "Arnulfo" of February 23, 1998; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo" of February 24, 1998; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Luis Alberto Gómez Guillermo, given to the Court on November 23, 1998; and testimony of Jesús Efraín Aguirre Loarca of November 23, 1998.

71 Cf. Testimony of Nery Ángel Urizar García before the special prosecutor, Julio Eduardo Arango Escobar, in the Public Ministry on May 20, 1995, Annex 10; Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; Human Rights Watch/Americas, *Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez*, March 1995, Annex 51; statement sworn before a Notary with the testimony of Otoniel de la Roca Mendoza "Bayardo" of February 24, 1998; testimony of Santiago Cabrera López, given to the Court on June 16, 1998; testimony of Otoniel de la Roca Mendoza, given to the Court on October 15, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Julio Alberto Soto Bilbao, given to the Court on November 23, 1998; photocopy of official letter No. 229/G-3-92 of 13 July, 1992, attaching Fragmentary Order No. 008/G-3-92; two photocopies of telegrams of July 21 and 27, 1992; photocopy of official letter No. 245/G-3-92; photocopy of telegram of August 7, 1992; and Report of the Commission for Historical Clarification, Tome VII.

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

i) Efraín Bámaca Velásquez, who was wounded, was taken by his captors to the Santa Ana Berlín military detachment, Military Zone No. 1715, located in Coatepeque, Quetzaltenango. During his confinement at this detachment, Bámaca Velásquez remained tied up, with his eyes covered, and was submitted to unlawful coercion and threats while he was being interrogated⁷³.

j) Efraín Bámaca Velásquez remained at the Santa Ana Berlín military detachment from March 12, 1992, until April 15 or 20 that year. Subsequently, he was transferred to the detention center known as *La Isla* (the Island), in Guatemala City⁷⁴.

k) After his stay in Guatemala City, Efraín Bámaca Velásquez was transferred to the military bases of Quetzaltenango, San Marcos and Las Cabañas⁷⁵.

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

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

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

l) On about July 18, 1992, Efraín Bámaca Velásquez was in Military Zone No. 18 in San Marcos. Here he was interrogated and tortured. The last time that he was seen, he was in the infirmary of that military base, tied to a metal bed⁷⁶.

m) As a result of the facts of this case, several judicial proceedings were initiated in Guatemala, including: petitions for *habeas corpus*⁷⁷, a special pre-trial investigation procedure and various criminal lawsuits⁷⁸,

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

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

78 Cf. Final report of the Ombudsman on the special pre-trial investigation procedure, December 9, 1994, Annex 16; Decision of the Public Ministry of March 23, 1995, Annex 29; decision of the First Criminal, Narco-activity and Crimes against the Environment Trial Court of Guatemala on March 28, 1995, Annex 30; statement by Jennifer Harbury presented to the Inter-American Commission on December 20, 1995, Annex 46; Human Rights Watch/Americas, Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez, March 1995, Annex 51; Decision of the Military Trial Court of Retalhuleu of April 10, 1995, Annex 52; Decision of the Military Trial Court of Retalhuleu of April 5, 1995, Annex 53; Decision of July 17, 1995, of the Eleventh Chamber of the Retalhuleu Appeals Court, convened in Court Martial, Annex 54; decisions of November 22, 1995, of the Eleventh Chamber of the Appeals Court of Retalhuleu, convened in Court Martial, Annex 55; decisions of the Military Trial Court of Retalhuleu of December 5, 1995, Annex 56; testimony of Jennifer Harbury, given to the Court on June 16, 1998; testimony of Fernando Moscoso Moller, given to

none of which was effective, and the whereabouts of Efraín Bámaca Velásquez are still unknown. As a result of those proceedings, on various occasions, exhumation procedures were ordered in order to find his corpse. These procedures did not have positive results as they were obstructed by State agents⁷⁹.

the Court on June 17, 1998; testimony of Acisclo Valladares Molina, given to the Court on November 22, 1998; testimony of Mario Ernesto Sosa Orellana, given to the Court on November 22, 1998; testimony of Simeón Cum Chutá, given to the Court on November 23, 1998; testimony of Julio Alberto Soto Bilbao, given to the Court on November 23, 1998; Report of the Commission for Historical Clarification, Tome VII; and letter of March 13, 1995, from the Government to the Inter-American Commission.

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