

Bámaca Velásquez v. Guatemala: An Expansion of the Inter-American System's Jurisprudence on Reparations

by Megan Hagler and Francisco Rivera*

On November 28 and 29, 2001, the Inter-American Court of Human Rights (Court) held hearings for the reparations phase of *Bámaca Velásquez v. Guatemala*, a landmark case that expanded the scope of reparations for cases of forced disappearance in the inter-American system. At the reparations hearing, the Inter-American Commission on Human Rights (Commission) requested that the Court order the exhumation and return of the disappeared body as a specific remedy. In its judgment on reparations, released on February 22, 2002, the Court granted the Commission's request and ordered the Guatemalan government to exhume the body and return it to the victim's family. Because the Court has never before ordered the exhumation of a body in a case of forced disappearance, the Court's ruling on reparations in the *Bámaca* case is a significant development in forced disappearance jurisprudence in the inter-American system.

History of the Case

On March 12, 1992, the Guatemalan army captured Efraín Bámaca Velásquez, a Mayan *comandante* of the Guatemalan National Revolutionary Unity (URNG), during Guatemala's civil war. The army secretly detained and tortured Bámaca for over a year before killing him in September 1993. According to an eyewitness, Bámaca was last seen "lying half-naked on a bed, with his eyes bandaged and an arm and leg bandaged" and with his face swollen. His body has never been found. For the last ten years, Jennifer Harbury, Bámaca's wife, has been searching for truth, justice, and her husband's body.

Hoping to find her husband alive, Harbury filed petitions for habeas corpus, pursued several criminal lawsuits, and carried out a series of hunger strikes in front of Guatemalan military headquarters and in front of the United States White House. At that time Harbury did not know that Bámaca was already dead. In 1995, three years after Bámaca's disappearance, U.S. Senator Robert Torricelli disclosed that Bámaca was assassinated in 1993 upon orders of Guatemalan Colonel Julio Roberto Alpiroz, a former paid CIA informant and a graduate of the School of Americas, a U.S. Army training center based in Fort Benning, Georgia.

Since 1995, Harbury has focused her efforts on obtaining her husband's remains. To this end, Harbury participated in various exhumations in attempting to identify her husband's remains. These exhumations were unsuccessful due to a number of obstructions by Guatemalan agents. Although it was fully aware that the bodies exhumed belonged to people other than Bámaca, the government of Guatemala carried out the exhumations under the pretext that the exhumed bodies at least matched Bámaca's characteristics. None of the bodies exhumed so far resembles the physical characteristics of Bámaca or appears to have died of the same causes.

In 1995, CIA documents provided information indicating that Bámaca's remains were buried in a Guatemalan mil-

itary base called Las Cabañas. To this day, no exhumation has been conducted at Las Cabañas base, and Guatemalan authorities have stated that they would "continue to obstruct any exhumation procedure in Las Cabañas until they receive[d] an amnesty."

Despite official stonewalling, Harbury has continued with her quest for justice simultaneously on three fronts. First, the Guatemalan government has denied Harbury justice despite her continuous demands for a full investigation and the return of her husband's body. Second, in the United States, Harbury filed a Freedom of Information Act suit against the CIA, which is allegedly withholding vital information regarding her husband's case. Harbury also filed a *Bivens* action, a case for damages against a federal agent who violates the U.S. Constitution while acting under color of law. In this case, which Harbury argued before the U.S. Supreme Court, she claimed that CIA officials participated in torturing and murdering her husband, and that while he was being tortured, and for more than a year and a half after his death, U.S. State Department and National Security Council officials systematically concealed information from her and misled her about her husband's fate. Finally, Harbury has sought justice through the inter-American human rights system.

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The Case on the Merits before the Inter-American Court of Human Rights

After exhausting domestic remedies in Guatemala, and with no success toward recovery of Bámaca's remains, Harbury filed a complaint with the Commission. In 1996, after a hearing on the case, the Commission recommended in its annual report that Guatemala accept responsibility for the disappearance, torture, and extrajudicial execution of Bámaca; investigate the matter fully; bring to justice those responsible; adopt reforms to bring their military programs into conformity with international humanitarian law norms; and provide reparations to Harbury and the other members of Bámaca's family.

When Guatemala failed to comply with these recommendations, the Commission brought the case before the Inter-American Court of Human Rights. On November 25, 2000 the Court reached a decision on the merits of the case, holding unanimously that Guatemala should repair the damages it caused to Bámaca, Harbury, and Bámaca's relatives. The Court determined that Guatemala violated the following articles of the American Convention on Human Rights (American Convention): Article 1(1) (Obligation to Respect Rights); Article 4 (Right to Life); Articles 5(1) and 5(2) (Right to Humane Treatment); Article 7 (Right to Personal Liberty); Article 8 (Right to a Fair Trial); and Article 25 (Right to Judicial Protection). The Court considered that Guatemala violated Articles 1, 4, 5, 7, 8, and 25 with respect to Bámaca, and Articles 1, 5, 8, and 25 with respect to Harbury and Bámaca's family. In the same manner, the Court declared unanimously that the Guatemalan State did not violate Article 3 of the Convention (Right to Juridical Personality). Further, the Court failed to find a violation of Article 13 of the Convention (Freedom of Thought and Expression), reasoning that Bámaca's and his family's right to the truth was subsumed by the right to a fair trial and judicial protection.

Additionally, the Court declared that Guatemala failed to comply with its obligation to prevent Bámaca's torture and sanction those involved as required under the following articles of the Inter-American Convention to Prevent and Punish Torture: Article 1 (duty to abide by this Convention); Article 2 (duty not to commit torture); Article 6 (duty to take effective measures to prevent and punish torture); and Article 8 (duty to make impartial judicial examinations of torture claims). Finally, the Court ordered an investigation to determine which persons were responsible for the human rights violations mentioned in the ruling, impose sanctions, and publicly announce the results of this investigation.



Panel of judges at the reparations hearing before the Inter-American Court of Human Rights.

Credit: Francisco Rivera

The Reparations Hearing before the Inter-American Court

The Court held a separate hearing in November 2001 to determine appropriate reparations for the violations found in the merits decision of November 2000. The Commission petitioned the Court for several forms of reparation pursuant to Article 63(1) of the American Convention. According to Article 63(1), the Court must rule that a state remedy the breach of its obligation to respect victims' human rights, and that the state compensate the injured party in cases in which the Court determines the state has violated human rights. In the *Bámaca* case, the Commission petitioned the Court primarily for compensation, as well as satisfaction and guarantees of non-repetition.

Compensation

Although the damage in human rights cases is often irreparable, international and national courts have required states to compensate victims with money to acknowledge the violation and to sanction the state. The Court has required states to pay victims damages to compensate them for both material and moral damages.

Material Damages

In the *Bámaca* case, the Commission asked the Court to order the Guatemalan government to compensate the family for *lucro cesante*, or wages that Bámaca would have earned during the rest of his life had he survived. The Court has awarded victims and their families damages according to this theory to attempt to place the victim or the victim's family where they would have been had the violation not occurred. Even though Bámaca was not earning a salary as a guerrilla leader, the Commission argued he would have earned a salary if he had the chance to continue working as a leader in Guatemalan civil society after the end of the civil war. In devising a formula to present to the Court, the Commission requested that the Court average the salaries earned by three other guerrilla leaders and one Mayan community leader in their positions since the end of the Guatemalan civil war. Based on the Commission's arguments, the Court awarded damages to the Bámaca family pursuant to the *lucro cesante* theory.

Additionally, the Commission requested that Guatemala compensate Harbury for *daño emergente*, or her economic loss. This request included compensation for the income Harbury forfeited while she interrupted her career to search for her husband, payment for the damage to her physical health as a result of the hunger strikes, and compensation for the expenses she incurred while searching for her husband. The Court granted the Commission's request and awarded damages to compensate for Harbury's *daño emergente*.

Moral Damages

The Commission requested that the Court order

Guatemala to pay the family for suffering inflicted on Bámaca while the government illegally detained and tortured him. The Commission sought compensation for the loss to Harbury and the immediate family, as well as for their own suffering as victims of violations of the rights to humane treatment, a fair trial, and judicial protection. The Commission also demanded that the Court require the Guatemalan government to pay moral damages to acknowledge Harbury's emotional anguish resulting from the government's lies, its bad faith efforts to comply with the petitions for habeas corpus that required Harbury to participate in the exhumations of three bodies, and the government's ongoing campaign to ruin Harbury's reputation. The Court also ordered that Guatemala pay damages for the moral suffering of Bámaca's family and Harbury.

Proyecto de Vida

In addition to seeking material and moral damages, the Commission requested that the Court award compensation based on Bámaca's loss of his *proyecto de vida*, or life plan. The *proyecto de vida* concept serves to award victims for lost opportunities and the lost enjoyment of achieving goals, taking into consideration the vocation, potential, circumstances, and skills of the individual victim. Unlike the concept of *lucro cesante*, the *proyecto de vida* is designed to compensate the victim for the personal fulfillment and liberty interest in planning his or her life.

The Commission argued that compensatory awards based on moral damages and the *lucro cesante* and *daño emergente* theories were not enough in the Bámaca case. The Commission reasoned that when the government killed Bámaca, it did much more than violate his physical and psychological integrity and take away his capacity to earn money. The Commission therefore sought compensation for the government's denial of Bámaca's right to live his life as he planned it. While he was a guerrilla, Bámaca learned to read and write, developed leadership skills, and became a high-ranking *comandante* in the URNG. Bámaca planned to continue working as a leader after the signing of the Guatemalan Peace Accords, reintegrating himself into civil society. Requiring compensation on this basis would require the Guatemalan government to acknowledge that it denied him the possibility to continue working to effect social change in Guatemala and destroyed his future with his wife.

The Center for Justice and International Law (CEJIL), the victims' representative, also asked the Court to award

proyecto de vida damages. CEJIL, however, requested *proyecto de vida* damages for Harbury rather than for Bámaca. CEJIL's theory was that Harbury's loss was not limited to moral damage or *daño emergente*. CEJIL urged the Court to require the Guatemalan government to compensate Harbury for interfering with her plans to raise a family and spend the rest of her life with her husband.

The Court first considered the idea of *proyecto de vida* in its recent decision *Loayza Tamayo v. Peru*. The *Loayza Tamayo* case involved the illegal detention and torture of a surviving victim. The Commission argued for monetary compensation due to the severe psychological and physical effects of the violations, which prevented the victim from resuming her studies and developing her professional and personal goals.

Although the Court ruled in the *Loayza Tamayo* case that the *proyecto de vida* concept is valid, the Court did not compensate the victim on this basis, asserting that it is impossible to put a monetary value on a victim's *proyecto de vida*.

To the contrary, in *Cantoral Benavides v. Peru*, pursuant to the *proyecto de vida* theory, the Court required the Peruvian government to provide a scholarship for a university student who was illegally detained and tortured.

The Court reasoned that the Peruvian government should be required to pay for the victim's tuition when the victim is ready to return to his studies in order to allow the victim to continue to develop his *proyecto de vida*.

The Commission's request for awards on this basis in the Bámaca case is significant because the Commission attempted to persuade the Court to order states to pay damages according to a model that more accurately reflects the scope of the violations. Despite the Commission's efforts, the Court did not award damages to compensate for the destruction of Bámaca's *proyecto de vida* or the alteration of Harbury's *proyecto de vida*. To this date, in cases of forced disappearance, the Court has not ordered compensation for the destruction of the disappeared's *proyecto de vida*, or the effect of the disappearance on the *proyectos de vida* of family members.

Satisfaction and Guarantees of Non-Repetition

In seeking to redress non-pecuniary wrongs, the Commission requests satisfaction and guarantees of non-repetition. Such measures may be appropriate for requiring an acknowledgement of wrongdoing, the prosecution and punishment of perpetrators, the state's promise to take measures to prevent the recurrence, or symbolic acts of reparation.



Jennifer Harbury during her 32-day hunger strike in Guatemala City in 1994.

Credit: Guatemala Human Rights Commission

The Commission requested that Guatemala adopt the measures necessary to recover Bámaca's body and allow the family to access legal procedures making it possible to locate and rebury his body. The Commission demanded that the government locate the body and acknowledge that the nature of the continuing violation perpetuates emotional suffering of the family members while the fate of their loved one remains uncertain. In making its request, the Commission also sought to allow the family to provide Bámaca with a proper burial in accordance with the traditions of the Mam ethnicity of the Mayan culture, thereby requiring the government to acknowledge the anguish they caused the family by disposing of Bámaca's body after they tortured and killed him. Finally, the Commission urged that the Court order the return of the body as a remedy in order to require the government to reveal evidence of the crime and thus end the impunity of the perpetrators.

In previous cases of forced disappearance, and in the merits phase of the *Bámaca* case, the Court recognized that the disappearance of an individual is a continuing violation. Accordingly, the Court required that a state cease its violation by investigating circumstances surrounding a disappearance. Because Guatemala did not comply with the Court's orders to investigate the matters fully, the Commission argued that the government must exhume the body to end its impunity and allow the family to bury the body in accordance with their



Credit: Guatemala Human Rights Commission

Visitors demonstrating support for Jennifer Harbury during her 32-day hunger strike.

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Further, at the request of the Commission, the Court demanded that Guatemala prosecute and punish the per-

petrators of the violations against Bámaca, Harbury, and the family. The Commission also urged the Court to require the Guatemalan government to publish Harbury's account of the case through the national media, in efforts to restore partially Bámaca's, Harbury's and the family's dignity. The Court ordered the Guatemalan government to publish the facts of the *Bámaca* case in two national newspapers. Finally, as requested by the Commission, the Court ordered the Guatemalan government to adopt the necessary measures to adapt its internal system to conform with its obligation to respect the right to life under the Convention.

Conclusion

Bámaca Velásquez v. Guatemala is a landmark case not only because the Commission sought to expand the system's jurisprudence on reparations, but also because the case advanced the struggle for justice in Guatemala. Victims had the opportunity to denounce Guatemala's human rights violations publicly before the international community and demand that the Guatemalan government take specific measures to end the cycle of impunity. The Court's judgment is particularly important because after Harbury's ten-year search for the truth, the *Bámaca* case

has resulted in the only binding court order requiring the investigation, prosecution, and punishment of the perpetrators who violated Bámaca's right to life. 🌍

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