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# A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence

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# A COMPARATIVE APPROACH TO ENFORCED DISAPPEARANCES IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE

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## *Introduction*

*The phenomenon of enforced disappearances is a particularly heinous human rights violation.*

Manfred Nowak [1]

For decades the practice of enforced disappearances has been the trademark of repressive and dictatorial regimes. The practice emerged in the early 1970's in various Latin American military dictatorships, but it is not confined to the Americas. The Organization of American States has been a pioneer in addressing the issue of enforced disappearances. Correlatively, the first cases brought forth upon the Inter-American Court of Human Rights (Inter-American Court) concerned enforced disappearances in Honduras.[2]

It took the international community almost forty years[3] to

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[1] Manfred Nowak, *Monitoring Disappearances – The difficult path from clarifying past cases to effectively preventing future ones*, 4 EUR. HUM. RTS. L. REV. 348 (1996).

[2] *See, e.g.*, Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 4 ¶¶ 2, 4 (July 29, 1988); Godínez & Cruz Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5 ¶¶ 1, 3, 4 (Jan. 20, 1989); Fairén Garbi and Solís Corrales Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 6. ¶¶ 2, 4 (Mar. 15, 1989).

[3] J. Daniel Livermore & B.G. Ramcharan, *"Enforced or Involuntary Disappearances": An Evaluation of a Decade of the United Nations Action*, CAN. HUM.

adopt the International Convention for the Protection of All Persons from Enforced Disappearances.[4] The issue of enforced disappearances was first referred to by the General Assembly of the United Nations in 1978 in Resolution 33/173.[5] In 1979, the Commission on Human Rights mandated the Subcommission on Prevention of Discrimination and Protection of Minorities to make recommendations concerning the issue. Then, the Subcommission proposed the creation of a Working Group on Enforced and Involuntary Disappearances (UNWEIG), which was established in February 1980. It was not until 1998 that the UNWEIG adopted the "Draft International Convention for the Protection of All Persons from Enforced Disappearances," and until 2006 that the text was finally adopted by the General Assembly. Since the International Convention opened for signatures on February 2007, it has not yet entered into force.[6] This International Convention was long awaited by the families who have endured the distress of the uncertainty over the fate of their relatives.[7] But, more significantly is the recognition of the phenomenon of enforced disappearance as one of the most grievous violations of human rights deserving its own international convention.

Yet, the practice has not come to an end. Instead, the focus is now shifting to Europe where the number of disappearance cases submitted to the European Court of Human Rights (European Court) has become overwhelming. The root of the prominence of disappearances in the European Court stems from the situation in Turkey and more recently from the conflict in Chechnya.[8]

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RTS. Y.B. 217, 218 (1989-1990).

[4] International Convention for the Protection of All Persons from Enforced Disappearances, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006) [hereinafter International Convention].

[5] G.A. Res. 33/173, U.N. Doc. A/RES/33/173 (Dec. 20, 1978).

[6] International Convention, *supra* note 4, art. 39 (stating that the International Convention "shall enter into force on the thirtieth day after the date of deposit of the Secretary-General of the United Nations of the twentieth instrument of ratification or accession."). To this day, only thirteen countries have ratified the Convention.

[7] Susan McCrory, *The International Convention for the Protection of All Persons from Enforced Disappearance*, 7 HUM. RTS. L. REV. 545 (2007).

[8] *See generally* HUMAN RIGHTS WATCH, 13(1)THE "DIRTY WAR" IN CHECHNYA: FORCED DISAPPEARANCES, TORTURE, AND SUMMARY EXECUTION,

Taking into account the current tremendous caseload before the European Court related to enforced disappearances, this article seeks to make a comparative analysis between the Inter-American Court and the European Court jurisprudence.

Part I addresses the various difficulties concerning evidence in disappearance cases. It examines the criteria set up by both courts in terms of admission of evidence and burden of proof, as well as the requisite standard of proof in order to accommodate the difficulties arising in disappearance cases. It underscores the Inter-American Court's willingness to render the standard of evidence more flexible in response to the conundrum faced in disappearance cases while the European Court struggles with former rigid standards that ultimately trigger innovative interpretations of rights.

Part II explores the notion of enforced disappearances as defined by the Inter-American Court and ignored by the European Court. It reveals the different methods undertaken by both courts when dealing with disappearance cases and the courts' related effectiveness.

Part III enumerates and analyzes the rights violated in disappearance cases in the Inter-American and European systems. It underscores the fundamental differences between the two systems with respect to their normative content and application to the phenomenon of enforced disappearances.

Finally, this article proposes to highlight the advantages and shortcomings of both systems and to suggest where a work of comparison of their perspective should be useful in order to identify which one is the most adequate to enhance the full enforcement of human rights in cases of enforced disappearances.

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(2001), *available at* http://www.hrw.org/reports/2001/chechnya/RSCH0301.PDF.

## *I. Evidence in Disappearance Cases*

### *A. Admission of Evidence*

The submission of evidence may be a daunting task when dealing with cases of disappearances. The very nature of making someone disappear implies that meticulous steps are undertaken by the government to erase any evidence of the disappearance.[9] Indeed, in most instances, disappearance cases are characterized by a total uncertainty as to the whereabouts of the body of the victim.[10] The issue arising before human rights courts is to determine – in light of this "uncertainty" – the degree of flexibility that should be allowed when admitting evidence. Both the Inter-American Court and the European Court have proved to be flexible and, therefore, accept a wide range of evidence.

#### *1. The Rules of Admission of Evidence in the Inter-American Court*

As pointed out by Jo Pasqualucci, the rules of evidence in the Inter-American court system are based on general principles of evidence from both civil and common-law traditions.[11] However, the Inter-American Court stressed that the rules are "less formal and more flexible"[12] and that it is not bound by the same formalities that bind domestic courts.[13] In sum, the court made it plain that it enjoyed

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[9] Thomas Buergenthal, *Judicial Fact-Finding: Inter-American Human Rights Court, in* FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS 269, 270 (Richard B. Lillich ed., 1991).

[10] *See, e.g.,* Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000). The *Bámaca* case was of one of the many examples of situations where the corpse of the victim was not identified. As a result, the court ordered as a compensatory measure that the State should take all the necessary measures to investigate where the corpse was buried. This entails exhumations. However, to date, the State has not yet complied with this obligation and Bámaca's relatives still ignore the truth.

[11] JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 189 (2003).

[12] Cantoral-Benavides v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 45 (Aug. 18, 2000).

[13] Loayza-Tamayo v. Perú, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 38 (Sept. 17, 1997).

greater latitude in the admission of evidence.[14]

Chapter IV of the Rules of Procedure of the Inter-American Court governs the rules of admission of evidence.[15] The Court uses the wide discretion granted by Article 45 of the Rules of Procedure that allows the Court "to obtain, on its own motion, any evidence it considers helpful" to assume a fact-finding function.[16] Consequently, in addition to admitting a wide range of evidence, the Court exercises fact finding functions by hearing "witness[es], expert witness[es], or in any other capacity, any person whose evidence, statement or opinion it deems relevant."[17]

With respect to the type of evidence admitted, the Inter-American Court held that "circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to [a] conclusion consistent with the facts."[18] The admission of circumstantial or presumptive evidence has been particularly crucial in cases of disappearances because as the Court underlined, "this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim."[19] Thus, in *Blake,* the Court found it "possible for the disappearance of a specific individual to be demonstrated by means of indirect and circumstan-

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[14] Loayza-Tamayo, 1997 Inter-Am. Ct. H.R., (ser. C) No. 33, ¶ 42.

[15] Rules of Procedure of the Inter-American Ct. of Hum. Rts., OEA/ser. L./V./III.25, doc. 7, reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/ser. L./V./ I.4 rev. 9 (2003) [hereinafter Rules of the Court].

[16] *See* Buergenthal, *supra* note 9, at 264 (arguing that this fact-finding function adopted by the Court should evolve on the ground that the Inter-American Convention and the Court's Statute indicate that those who drafted the Convention assumed that, in principle, fact-finding would be done at the Commission level, leaving the Court to review only disputed issues of fact and law. Buergenthal also noted that the Commission repeatedly asked the Court to accept its findings at least presumptively).

[17] Rules of the Court, *supra* note 15, art. 45(1).

[18] *See, e.g.,* Godínez-Cruz Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5 ¶ 136 (Jan. 20, 1989); Blake Case, 1998 Inter-Am. Ct. H. R. (ser. C) No. 36, ¶ 47 (Jan. 24, 1998)(stating the Court "used both circumstantial evidence and indication or presumption on which to base its pronouncement" in the Gangaram Panday Case, 1994 Inter-Am. Ct. H.R. (ser.C) No. 16, ¶ 49 (Jan. 21, 1994)).

[19] Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) ¶ 131.

tial testimonial evidence, when taken together with their logical inferences, and in the context of the widespread practice of disappearances."[20] For instance, although press reports are not admitted as documentary evidence, the Court admitted them for the purpose of corroborating testimony about the conditions or attitudes prevailing in a country at the given time, which may be relevant in determining the practice of disappearances.[21] In a similar vein, the Court held in November 2008, in the disappearance case of *Tiu Tojin v. Guatemala,*[22] that Internet links to Non-Governmental Organizations' (NGOs) and International Organizations' documents were admissible insofar as the link may be directly accessed by the Court or the other parties.[23] In sum, although it reserves to itself the right to weigh the probative character of the evidence admitted, the Court has been extremely liberal in admitting almost all the evidence that was proffered in various cases.[24]

*2. The Rules of Admission of Evidence in the European Court*

The rules of admission of evidence[25] under the European Court system are similar to those in the Inter-American Court system in the sense that they also reflect the concept of "free evaluation of evidence."[26] In other words, there are no strict rules as to what evidence may be put before the Court.[27]

Prior to Protocol 11, which amended the European Convention for the Protection of Human Rights and Fundamental Freedoms

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[20] Blake Case, 1998 Inter-Am. Ct. H. R. (ser. C) No. 36, ¶ 49 (Jan. 24, 1998).

[21] Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) ¶ 146.

[22] Tiu Tojín v. Guatemala, 2008 Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 38 (Nov. 26, 2008).

[23] Such approach gives great latitude to the Court to take into account reports that may help to elaborate the existence of a pattern of disappearances.

[24] Buergenthal, *supra* note 9, at 270.

[25] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 28, Sept. 3, 1953, 213 U.N.T.S. 222; Rules of the European Court of Human Rights, Rules 40-52, July 1, 2009 [hereinafter European Convention].

[26] Ugur Erdal, *Burden and Standard of Proof in Proceedings under the European Convention,* 26 EUR. L. REV. (HUM. RTS. SURV.) HR/68, HR/73 (2001).

[27] PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 64 (John Wadham ed., Oxford University Press 2005).

to abolish the European Commission of Human Rights, the function of establishing and verifying the facts was vested in the European Commission.[28] The new single court, thus, had to readjust its working methods in order to assume the fact-finding function of the European Commission. The Annex to the Rules of the Court (Rules A1 to A8) regulates the practice and procedure relevant to establishing the facts. The Court may adopt "any investigative measure," including requesting documentary evidence and hearing any person as a witness or expert (or in any other capacity).[29] The Court has used the ability to hold fact-finding missions frequently in Turkish disappearance cases.[30] On the other hand, there has been no fact-finding investigation held by the Court in Chechen disappearance cases.[31]

In terms of the type of evidence admitted, the European Court has held that it "is entitled to rely on evidence of every kind, including, insofar as it deems them relevant, documents or statements emanating from governments, be they respondent or applicant, or from their institutions or officials."[32] The Court also frequently relies on reports produced by inter-governmental institutions and human rights NGOs.[33] In a similar vein, the Court does not take a restrictive view about the submission of new evidence.[34] Nonetheless, it must be noted that unlike the Inter-American Court, the European Court has been less inclined to rely on indirect evidence with respect to certain rights. For instance, the European Court systematically rejects the allegation of torture or ill-treatment absent direct evidence.[35]

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[28] Andrew Drzemczewski, *Fact-finding as Part of Effective Implementation: the Strasbourg Experience*, *in* THE UN HUMAN RIGHTS SYSTEM IN THE 21ST CENTURY 121 (Anne F. Bayefsky ed., 2000).

[29] Rules of the Court, *supra* note 15, at Rule A1 (1) Annex to the Rules.

[30] Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, 13 EUR. HUM. RTS. L. REV. 732, 748 (2008).

[31] *Id.*

[32] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 209 (1978).

[33] LEACH, *supra* note 27, at 64.

[34] K.A. v. Finland, App. No. 22751/95, Eur. Ct. H.R., ¶ 89 (Jan. 14, 2003) (holding "the Court is in principle not prevented from taking into account any additional information and fresh arguments in determining the merits of a complaint, if it considers them relevant.").

[35] *See* discussion regarding the right to humane treatment in Part III. B. of this article.

In other words, the phenomenon of enforced disappearances has acted as a great impulse for both Courts to test the limits of their so-called flexible rules of admission of evidence.[36] The Inter-American Court set the pace for progress while the European Court's improvements are still limited. The very nature of the crime of enforced disappearances calls for a need to use indirect evidence that the European Court still neglects. It is to be hoped that the European Court will come to terms with the necessity to include indirect evidence and presumptions as types of evidence relevant to prove torture.

### *B. Burden of Proof*

#### *1. The Inter-American Court's Approach*

In principle, both under domestic law[37] and international law,[38] factual allegations relied upon by a party to a dispute must be proved by that party.[39] Domestic law[40] and international law[41] do not preclude that the burden may shift back and forth.[42]

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[36] Erdal, *supra* note 26, at HR/72.

[37] *See, e.g.,* Dominique Mougenot, *La prevue en Droit Belge, in* JOSE MANUEL LEBRE DE FREITAS, THE LAW OF EVIDENCE IN THE EUROPEAN UNION 73 (2004); Sakari Laukkanen, *The Law of Evidence in the Finnish Judicial System, in* JOSE MANUEL LEBRE DE FREITAS, THE LAW OF EVIDENCE IN THE EUROPEAN UNION 118 (2004).

[38] *See* CHITTHARANJAN F. AMERASINGHE, EVIDENCE IN INTERNATIONAL LITIGATION 62 (2005) (citing the "Queen case," Brazil v. Sweden/Norway (1872), de La Pradelle-Politis, 2 RAI at 708, "One must follow, as a general rule of solutions, the principle of jurisprudence, accepted by the law of all countries, that it is for the claimant to make the proof of his claim.").

[39] Buergenthal, *supra* note 9, at 267.

[40] *See, e.g.*, Régine Genin-Meric, *Droit de la Preuve: L'Exemple Francais in* THE LAW OF EVIDENCE IN THE EUROPEAN UNION 147 (José Manuel Lebre de Freitas ed., 2004); Declan McGrath, *Irish Report on Evidence in* THE LAW OF EVIDENCE IN THE EUROPEAN UNION 247 (José Manuel Lebre de Freitas ed., 2004).

[41] *See, e.g.*, Rights of Nationals of the United States in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, at 200 (Aug. 27); Legal Status of Eastern Greenland, 1933 P.I.C.J. (ser. A/B) No. 53, at 49 (Apr. 5); Mavrommatis Jerusalem Concessions, 1925 P.I.C.J. (ser. A) No. 5, at 29 (Mar. 26).

[42] Buergenthal, *supra* note 9, at 267.

However, as rightly noted by Buergenthal, in disappearances cases the most difficult problem concerns the allocation of the burden of proof.[43] This difficulty stems from the fact that the policy of disappearances practiced by a government involves measures that are carefully designed to erase whatever traces of evidence that remain.[44] In other words, "[t]he absence of direct evidence [therefore,] neither proves nor disproves the existence of the practice."[45] The Inter-American Court resolved this burden of proof dilemma in its first case, *Velásquez-Rodríguez*.

a. The Approach Adopted in *Velásquez-Rodríguez*

In *Velásquez-Rodríguez*, the Inter-American Court adopted a two-step approach for resolving the burden of proof issue. Thus, in order to prove that someone disappeared, the claimant must show: 1) there is a governmental practice of disappearances (pattern of disappearances), and 2) the disappearances of the specific individual were linked to that practice (link with the pattern).[46] It is important to note that, according to the Court, it is not necessary that the government conducted the practice of disappearance, but sufficient that the government at least tolerated the practice.[47] Therefore, under the *Velásquez-Rodríguez* jurisprudence, once these two requirements are proven, the person is presumed disappeared and the burden shifts to the State to prove otherwise. The Court's line of reasoning was confirmed by subsequent decisions such as *Godínez Cruz*, *Caballero-Delgado*, and *Santana*.[48] Conversely, the facts of isolated forced

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[43] *Id.* at 268.

[44] *Id.*

[45] *Id.*

[46] Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) ¶ 126. (holding "if it can be shown that there was an official practice of disappearances in Honduras, carried out by the government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required.").

[47] *Id.* ¶ 126.

[48] *See, e.g.*, Godínez & Cruz Case, 1989 Inter-Am. Ct. H.R. (ser. C) ¶ 76; Caballero-Delgado & Santana Case, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22. ¶ 72(5) (Dec. 8, 1995).

disappearances must be proven on their own, thus, making it more difficult for the applicant. However, this is not the only time the burden of proof may shift from the applicant to the State.

b. State Control of Evidence and Burden of Proof

The Inter-American Court seems increasingly inclined to take into account the State's failure to cooperate when it controls the evidence. The question is whether the Court takes it into account to the extent that it shifts the burden of proof onto the State. Provided disappearance cases are characterized by the fact that the State holds all the evidence or has destroyed them, the Court made it plain in *Velásquez Rodriguez* that States cannot rely on the defense that the complainant has failed to present evidence when such evidence cannot be obtained without the State's cooperation.[49] The Court took a step further in *Godinez Cruz* and found that when a government "controls the means to verify acts occurring on its territory" and fails to assist the fact-finding process, it is proper for the Court to take this consideration into account in weighing the evidence before the Court, and in determining which of the parties has met its burden of proof.[50] The decision, therefore, suggested that the State's lack of cooperation might have an effect on the burden of proof. However, the Court remained evasive and unclear as to the type of effect. In *Bámaca,* the Court indicated that when the State controls "the means to clarify the facts that have occurred in its jurisdiction," therefore, "in practice it is necessary to rely on the cooperation of the State itself in order to obtain the required evidence."[51] In Jo Pasqualucci's opinion, such wording is tantamount to recognizing that when the State is in control of the evidence, it then bears on the burden of proof.[52] However, the wording of the Court is unclear as it is not explicitly referring to a shift of the burden of proof. Nevertheless, the decision's following paragraph seems to provide clarification and states that "in the same way" the United Nations Human Rights

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[49] Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) ¶ 135.

[50] Godínez & Cruz, 1989 Inter-Am. Ct. H.R. (ser. C) ¶¶ 142-43.

[51] Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 152 (Nov. 25, 2000).

[52] PASQUALUCCI, *supra* note 11, at 210.

Committee has indicated that when "subsequent clarification of the case depends on information that is exclusively in the hands of the State Party, the Committee may consider that those charges are justified unless the State party presents satisfactory evidence and explanation to the contrary."[53] As a result, it is possible that the Court recognized – albeit timidly – that a State's control of evidence may shift the burden of proof in *Bámaca*. This conclusion appears to be supported by the Court's decision rendered in 2005 in *Gómez- Palomino* in which it explicitly provided that the burden of the duty to provide the Court evidentiary elements rests upon the States, "as the State must provide the Tribunal with the evidence that can only be obtained with their cooperation."[54] Therefore, it is not bold to submit that the Court has recognized a shift of burden of proof when the State retains evidentiary information. Conversely, it is relevant to note that when observing its recent jurisprudence on disappearances, the Court is not leaning towards a confirmation of this holding.[55]

*2. The European Court's Approach*

Traditionally, the European Court refused to rely on the concept that the burden of proof is borne by one of the two parties concerned.[56] Instead, it examined "all the material before it, whether originating from the Commission, the Parties or other sources."[57] The Court's first departure from this stance was the case *Tomasi v. France* where it held that when someone previously in good health is injured in custody, it is incumbent on the State to provide an explanation.[58] In recent years, the Court appeared inclined to extend this reasoning in cases of disappearances.

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[53] *Bámaca,* 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 153 (citing the U.N. Human Rights Committee Communication Hiber Conteris v. Uruguay No. 139/1983 ¶ 182-186 [17th to 32nd sessions (October 1982 to April 1988)]).

[54] Gómez-Palomino v. Peru, 2005 Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 52 (Nov. 22, 2005).

[55] *See, e.g.*, Tiu Tojín v. Guatemala, 2008 Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 30 (Nov. 26, 2008).

[56] Ireland v. United Kingdom 25 Eur. Ct. H.R. (ser. A) ¶ 209 (1978).

[57] *Id.* ¶ 160.

[58] Tomasi v. France, 241 Eur. Ct. H.R. (ser. A) ¶¶ 114-115 (1992).

a. Presumption of Death and Shift of Burden of Proof

The European Court is now of the opinion that when a person is taken into custody before he disappeared, and the State provides no reasonable explanation for his disappearance, he must be presumed dead. This principle was first established in *Akkum v. Turkey*, in which the Court stated as follows:

> The Court considers legitimate to draw a parallel between the situation of detainees for whose well-being the state in responsible, and the situation of persons found injured or dead in an area within the exclusive control of the authorities of the State . . . It is appropriate, where it is the non disclosure by the government of crucial documents in their exclusive possession which is preventing the court from establishing the facts, it is for the government either to argue conclusively why the document in question cannot serve to corroborate the allegations made by the applicants, or to provide satisfactory explanation of how events in question occurred.[59]

The above-mentioned reasoning was confirmed in *Togcu v. Turkey*, in which the Court indicated that "to shift the burden of proof onto the government in such circumstances requires, by implication that the applicant has already made out a *prima facie* case."[60] Although these two decisions made it clear that in certain instances the burden of proof may be shifted, the details of these circumstances remained unclear until *Bazorkina v. Russia.*[61] The Court indeed set out a number of guiding principles relating to the circumstances under which an applicant will make a *prima facie* case in *Bazorkina v. Russia:* first, the government must not deny that the allegedly disappeared person was detained; second, witnesses must confirm that he was detained in circumstances that could reasonably be considered as life threatening; third, there must be no news from him since, and;

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[59] Akkum v. Turkey, App. No. 21894/93, Eur. Ct. H.R. ¶ 211 (2005).

[60] Togcu v. Turkey, App. No. 27601/95, Eur. Ct. H.R., ¶ 95 (2005) (emphasis added).

[61] Bazorkina v. Russia, App. No. 69481/01, Eur. Ct. H.R. ¶ 110 (2006).

fourth, the government must not submit any plausible explanation as to what happened.[62] In other words, once these requirements are fulfilled, a person will be presumed dead and the burden of proof will shift to the State. The Court upheld this line of reasoning in subsequent cases and applied such reasoning consistently.[63]

Two remarks must be made with respect to the *Bazorkina* decision. First, it is very important to bear in mind that this jurisprudence only applies to the establishment of the presumption of death of the victim.[64] In other words, it is only relevant with regard to the recognition of the right to life. Second, the first two criteria set out in *Bazorkina* are *a priori* difficult to meet. Indeed, it entails that the government recognizes that the victim was detained and that there exists a witness of the detention that may testify that such detention was life threatening. In sum, these criteria make it very easy for the government to impair the shift of the burden of proof. In reality, the Court's attitude toward these criteria is less stringent than it may appear. Indeed, in its most recent decisions, the Court relied on mere witness testimonies that could only certify that State service men were patrolling during curfew hours to make a *prima facie* case.[65]

b. State Lack of Cooperation and Adverse Inferences

In dealing with enforced disappearances cases, the Court has demonstrated a growing willingness to use inferences. Such attitude was adopted in the cases involving Chechnya in which Russia refused to disclose documents and relied on its Penal Code Article 161, which sets forth that information from the investigation files may only be disclosed with the permission of the prosecutor or investigator.[66] The Court rejected the State's reliance on Article 161 and con-

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[62] *Bazorkina*, App. No. 69481/01, Eur. Ct. H.R. ¶110.

[63] *See, e.g.*, Betayev and Betayeva v. Russia, App. No. 37315/03, Eur. Ct. H.R. ¶ 69 (2008); Osmanoğlu v. Turkey, App. No. 48804/99, Eur. Ct. H.R. ¶ 54 (2008); Sangariyeva and Others v. Russia, App. No. 1839/04, Eur. Ct. H.R. ¶ 63 (2008).

[64] *Bazorkina*, App. No. 69481/01, Eur. Ct. H.R. ¶131.

[65] *See, e.g., Betayev and Betayeva*, App. No. 37315/03, Eur. Ct. H.R. at ¶ 6; Ibragimov and Others v. Russia, App. No. 34561/03, Eur. Ct. H.R. ¶ 80 (2008).

[66] Leach, *supra* note 30, at 745.

sidered it could draw inferences from the failure of disclosure.[67] Albeit used quite frequently, it was difficult to discern from the judgments exactly how inferences were drawn.[68] The Court's decision in *Musayeva* nonetheless indicated that non-disclosure of information might lead to a shift of burden of proof. Indeed the Court considers that when a *prima facie* case has been made and that Court is prevented from reaching a conclusion because of the absence of the documents requested, the burden of proof shifts to the State "to argue conclusively why the documents in questions cannot serve to corroborate the allegations made by the applicant, or to provide a satisfactory and convincing explanation of how events in question occurred."[69]

However, recent decisions seem to suggest that the State's lack of cooperation and failure to disclose constitutes, in itself, a failure to discharge the burden of proof.[70] In that sense, it appears that the Court has finally decided how and when to use inferences from a State's lack of cooperation, namely, after the applicant made a *prima facie* case resulting in the shift of the burden of proof to the State.

c. The Importance of the "Phenomenon of Disappearances"

It may be deduced from the Court's decisions that "[p]atterns of related events are clearly important."[71] For instance, the Court reiterates on a constant basis that it "notes with great concern that a number of cases have come before it, which suggest that the phenomenon of 'disappearances' is well-known in the Chechen Republic."[72] However, the implications of such statements in the Court's

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[67] *See, e.g.,* Khashiyev and Akayeva, App. Nos. 57942/00 & 57945/00, Eur. Ct. H.R.¶128, 139 (2005).

[68] Leach, *supra* note 30, at 746.

[69] Musayeva and Others v. Russia, App. No. 12703/02, Eur. Ct. H. R. ¶ 100 (2007).

[70] *See, e.g.,* Utsayeva and Others v. Russia, App. No. 29133/03, Eur. Ct. H.R. ¶ 160 (2008); *Sangariyeva and Others*, App. No. 1839, Eur. Ct. H.R. at ¶ 64, *Betayev and Betayeva*, App. No. 37315/03, Eur. Ct. H.R. at ¶¶ 69, 70.

[71] Leach, *supra* note 30, at 749.

[72] *See, e.g.*, *Sangariyeva*, App. No. 1839/04, Eur. Ct. H.R. ¶ 66; *Utsayeva*, App. No. 29133/03, Eur. Ct. H.R. ¶ 162.

holding are still unclear. In the recent decision *Baysayeva v. Russia,* the Court agreed with the applicant stating that "in the context of the conflict in Chechnya, when a person is detained by unidentified servicemen without any subsequent acknowledgement of detention, this can be regarded as life-threatening."[73] Similar statements were made in subsequent decisions[74] and may suggest that a "pattern" of disappearances may be relevant when making a *prima facie* case. It is interesting to analyze to what extent such reference to "patterns of disappearances" may be inspired by the Inter-American Court's jurisprudence.

Unfortunately, the European Court seems to undertake a different approach. A careful reading of the jurisprudence suggests that litigators have put forward the argument that there was a phenomenon of disappearances and that it should be taken into account. Nevertheless, the Court only "notes" the existence of such phenomenon.[75] On the other hand, it "agrees" that "in the context of the conflict in Chechnya the disappearance of a person may be life threatening."[76] In other words, the determining factor stems from the term "conflict in Chechnya" rather than solely "pattern of disappearances." The distinction made by the Court is not innocent. In reality, the term "conflict in Chechnya" is used by the Court to refer to a wider problem than simply enforced disappearances, it points to a situation analogous to an armed conflict.[77] For instance, in *Isayeva*

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[73] Baysayeva v. Russia, App. No. 74237/01, Eur. Ct. H.R. ¶ 119 (2007).

[74] *Sangariyeva*, App. No. 1839/04, Eur. Ct. H.R. ¶ 66; *Utsayeva*, App. No. 29133/03, Eur. Ct. H.R. ¶ 162.

[75] *See, e.g.,* Imakayeva v. Russia, App. No.7615/02, Eur. Ct. H.R. ¶ 141 (2006) ("The Court also notes the applicant's reference to the available information about the phenomenon of 'disappearances' in Chechnya."); Alikhadzhiyeva v. Russia, App. No. 68007/01, Eur. Ct. H.R. ¶ 61 (2007).

[76] *See, e.g., Imakayeva*, App. No.7615/02, Eur. Ct. H.R., ¶141 (the Court "agrees that, in the context of the conflict in Chechnya, when a person is detained by unidentified servicemen without any subsequent acknowledgement of detention, this can be regarded as life-threatening.").

[77] *See, e.g.*, Isayera, Yusupora and Bazayera v. Russia, App. Nos. 57947/00, 57948/00, 57949/00, Eur. Ct. H.R. ¶ 181. See *generally* William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights Chechnya*, (Center for Hum. Rts. & Global Just., Working Paper No. 4, 2005) (describing the armed conflict in Chechnya).

*v. Russia*, the Court accepted that there existed a situation that "called for exceptional measures by the State in order to regain control over the Republic and to suppress the armed insurgency."[78] Such a situation was referred to as a "context of conflict in Chechnya."[79] Therefore the Court's careful choice of wording suggests that the sole existence of a pattern of disappearances would not be sufficient to make a *prima facie* case. Furthermore, the fact that the Court mentions the phenomenon of disappearances after it concludes that a *prima facie* case had been made, corroborates that it is not intended to be taken into account in the reasoning.[80] In other words, the European Court does not wish to endorse the Inter-American Court's approach of shifting the burden of proof when there is a demonstrated pattern of enforced disappearances. It does suggest nevertheless that an internal armed conflict may trigger such shift.

### *C. Standard of Proof*

#### *1. The Flexible Standard of Proof Adopted by the Inter-American Court*

Since its early jurisprudence, the Inter-American Court underscored that "the standards of proof are less formal in an international proceeding than a domestic one."[81] In the Honduras cases, the Court emphasized that it had to take into account "the special seriousness of a finding that a State party had carried out or has tolerated a practice of disappearances in its country."[82] Ultimately, the Inter-American Court adopted a "standard of proof which considers the seriousness of the charge and which is capable of establishing the truth of the allegations in a convincing manner."[83] This standard is weaker than the standard of "beyond reasonable doubt" adopted by

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[78] Isayeva v. Russia, App. No. 57950/00, Eur. Ct. H.R., ¶ 180 (2005).

[79] *Id.*

[80] *Sangariyeva*, App. No. 1839/04, Eur. Ct. H.R. ¶ 66; *Utsayeva*, App. No. 29133/03, Eur. Ct. H.R. ¶ 162.

[81] *See, e.g.*, Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 128 (July 29, 1988).

[82] *Id.* ¶ 129.

[83] Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R ¶ 129.

the European Court. The Inter-American Court explained why it refused to endorse such a strict standard in *Velásquez-Rodriguez*.[84] Here, the Court underscored the intrinsic differences between the international protection of human rights and criminal justice; namely that States are not to be considered as defendants in criminal actions and that the purpose of human rights law is not to punish individuals, but to protect the victims and provide reparations because of violations of the State's responsibility.[85]

Instead, the Inter-American Court adopted a standard based on the "*sana crítica*," which is "reasoned judgment."[86] As explained by Héctor Fix-Zamudio, the "*sana crítica*" is based on the logic of experience whereby the judge bases his or her judgment on the intimate conviction derived from a logical analysis of the elements presented.[87] The corollary to this flexible standard was the recognition by the Court of its power to weigh the evidence freely.[88]

This standard also allows the Inter-American Court to make presumptions.[89] The Court presumes facts, unless contested by the government, provided that the evidence presented is consistent with those facts.[90] Similarly, if the state fails to present evidence to refute the applicant's claim, the Court may presume that facts not disclosed are true, provided that a conclusion consistent with such facts may be

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[84] *Id.*

[85] *Id.* ¶ 134.

[86] Cantoral-Benavides v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 52 (Aug. 18, 2000).

[87] Héctor Fix-Zamudio, *Orden y valoración de las pruebas en la función contenciosa de la Corte Interamericana de Derechos Humanos*, 197 MEMORIA DEL SEMINARIO, EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI, TOMO I 212 (2003) (Costa Rica).

[88] Castillo-Páez v. Perú, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 38 (Nov. 27, 1998).

[89] *See* PASQUALUCCI, *supra* note 11, at 209 (citing Black's Law Dictionary: a presumption is a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.").

[90] "Street Children" (Villagrán-Morales et al.) v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 68 (Nov. 19, 1999) (applied the presumption of ECHR that a State is responsible of the ill treatment of a person in custody of a State agent unless the authorities can demonstrate that the agent did not engage in such behavior).

inferred.[91]

*2. The European Court's "Beyond Reasonable Doubt" Standard*

The standard of proof of "beyond reasonable doubt," adopted by the European Court, was first developed by the European Commission in the *Greek* case.[92] It was subsequently endorsed by the Court in *Ireland v. UK*, which added that "such proof may follow from the coexistence of sufficiently strong, clear and concordant influences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account."[93] In reality, there is very little indication as to the definition for this standard of proof and what it may entail.[94] The only explanation that may be found is from the Commission, which stated that "beyond reasonable doubt" is "not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented."[95] Apart from this, Ugur Erdal notes that neither the Reports of the Commission nor the judgments of the Courts provide guidance as to the nature of the "reasonable doubt" which prevented these bodies from being convinced.[96] Kazazi contended that this lack of clarity was due to the influence of the civil law system on international law and also the flexibility of international tribunals in matters related to the evaluation of evidence.[97] Others argue that the formula of "beyond reasonable doubt" may

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[91] Constitutional Court v. Perú, 2001 Inter-Am. Ct. H.R. (ser. C) No. 71, ¶ 48 (Jan. 31, 2001).

[92] UGUR ERDAL & HASAN BAKIRCI, ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, A PRACTITIONER'S HANDBOOK 256 (Boris Wijkstrom ed., OMCT 2006); *See* YEARBOOK OF THE EUROPEAN CONVENTION, THE GREEK CASE 196 (Martinus Nijhoff, 1969).

[93] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 209, 161 (1978).

[94] Erdal, *supra* note 26, at HR/74.

[95] Jochen A. Frowein, *Fact-finding by the European Commission of Human Rights, in* FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: ELEVENTH SOKOL COLLOQUIUM 246 (Richard B. Lillich ed., 1991) (citing to 1969 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n of H.R.) 196).

[96] Erdal, *supra* note 26, at HR/74.

[97] MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES, A STUDY ON EVIDENCE BEFORE THE INTERNATIONAL TRIBUNALS 325 (1996).

lead to a misunderstanding since although it may appear to be influenced by the Anglo-Saxon standard for criminal cases, the practice of the Commission and the European Court cannot be assimilated with the Anglo-Saxon standard.[98] Judges in the European Court are nonetheless increasingly cognizant of the rigidity of the standard and are questioning it. For instance, in *Labita*, eight of the seventeen judges agreed on the following dissenting opinion:

> We are of the view that the standard used for assessing the evidence in this case is inadequate, possibly illogical and even unworkable . . . It should be borne in mind that the standard of proof beyond reasonable doubt is, in certain legal systems, used in criminal cases. However, this Court is not called upon to judge an individual's guilt or innocence or to punish those responsible for a violation, its task is to protect victims and provide redress for damage caused by the acts of the State responsible.[99]

It is not amiss to point out the similarity of the argument put forward by the dissenting judges with the reasoning of the Inter-American Court in *Velásquez-Rodríguez*. It seems that judges are more and more inclined to move toward a standard similar to the one adopted by the Inter-American Court in cases of disappearances.

Conversely, in order to compensate for the rigidity of the standard, the European Court found violations of procedural rights.[100] In other words, since the standard "beyond reasonable doubt" disallowed the Court to find a violation of the substantive right such as the right to life, the Court decided to find a violation of the procedural right to life, that is to say the duty to investigate the violation of the right to life.[101] However, this solution is highly unsa-

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[98] Frowein, *supra* note 95, at 248.

[99] Labita v. Italy, App. No. 26772/95, Eur. Ct. H.R. at 45(Apr. 6, 2000) (Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupancic, dissenting).

[100] Erdal, *supra* note 26, at HR/79.

[101] *See* Kurt v. Turkey, App. No. 24276/94 Eur. Ct. H.R. Part II (1998) (finding that a violation of a procedural right is a failure by the State to investigate the violation of that right).

tisfactory since, as pointed out by the dissenting judges in *Labita,* "it could permit a State to limit its responsibility to a finding of a violation of the procedural obligation only, which is obviously less serious than a violation for ill-treatment."[102]

Another method developed by the Court in order to overcome the drawback of the formula was the increasing admission of inferences.[103] In the disappearance case *Tirmurtas v. Turkey,* the Court lowered the standard by dismissing the need for direct evidence previously required in *Kurt v. Turkey*, thus permitting the use of circumstantial evidence in order to establish a violation of the right to life.[104] However, as noted earlier, the admission of inferences is only permitted in relation to an alleged violation of the right to life. Moreover, where it uses inferences and presumptions, the Court always reiterates that the presumed death of the disappeared is established "beyond reasonable doubt."[105] In other words, on one hand, the Court is not willing to depart from the beyond reasonable doubt formula, but on the other hand, it is increasingly changing its substance in order to lessen its rigidity and to make it more adequate to the circumstances of particular cases. In support of this conclusion, the recent decision relating to a disappearance case in Turkey, *Osmanoglu v. Turkey,* seems to obviate such intentions.[106] Indeed, the Court clarified that the beyond reasonable doubt criterion had an autonomous meaning and that although the language is analogous to the national legal system standard, it has for the European Court a different scope. The Court thus stated that the level of persuasion necessary to reach a conclusion is "linked to the specificity of the

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[102] Labita v. Italy, App. No. 26772/95, Eur. Ct. H.R., at 45 (Apr. 6, 2000) (Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupancic, dissenting).

[103] *See* KAZAZI, *supra* note 97, at 259 (stating that "inference is a judicial instrument at the disposal of international tribunals which if applied correctly could facilitate their functioning.").

[104] *See* Gobind Singh Sethi, *The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances*, 8 No. 3 HUM. RTS. BRIEF 29, 30 (2001). This approach was confirmed in Cicik v. Turkey in 2001 in which the Court held that circumstantial evidence would suffice for finding a violation of right to life.

[105] Baysayeva v. Russia, App. No. 694481/01, Eur. Ct. H.R. ¶ 120 (2006).

[106] Osmanoglu v. Turkey, App. No. 48804/99, Eur. Ct. H.R. ¶ 45 (2008).

facts, the nature of the allegations made and the convention right at stake."[107]

Notwithstanding the efforts of the Court to modify its initial standard, it still falls short of being adequate in cases of disappearances. Indeed, unlike in cases of violations to the right to life, the Court systematically rejects the applicant's allegation of the violation of Article 3 (torture and ill-treatment) in relation to the victim.[108] The reasoning of the Court disregards the material impossibility of the parties to provide evidence of torture because the body disappeared, and further dismisses the allegation on the ground of lack of evidence.[109]

### *II. The Notion of Enforced Disappearance*

As a consequence of enforced disappearances being a rather recent phenomenon, both the 1969 Inter-American Convention and the 1950 European Convention fail to provide a legal definition of the notion. In the Inter-American system, this gap was overcome by the adoption of the Inter-American Convention on Forced Disappearances of Persons in 1994[110] and by the judicial interpretation of the notion of enforced disappearances by the Inter-American Court. The European jurisprudence on disappearances is still characterized by an absence of definition of the phenomenon of enforced disappearances.

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[107] Osmanoglu , App. No. 48804/99, Eur. Ct. H.R. ¶ 45.

[108] *See* discussion regarding the right to humane treatment in Part III. B. of this Article.

[109] *See, e.g.*, Bazorkina v. Russia, App. No. 69481/01, Eur. Ct. H.R. ¶ 133 (2006); *Baysayeva,* App. No. 74237/01, Eur. Ct. H.R. ¶ 137; Alikhadzhiyeva v. Russia, App. No. 68007/01, Eur. Ct. H.R. ¶ 79 (2007); Lyanova and Aliyeva v. Russia, App. Nos. 12731/02, 28440/03, Eur. Ct. H.R. ¶ 115 (2008).

[110] *See* Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, OAS/Ser. P AG/doc. 3114/94 rev.1 (entered into force Mar. 28, 1996) [hereinafter IACFD].

### *A. The Notion of Enforced Disappearance in the Inter-American System*

#### *1. The Inter-American Convention of Enforced Disappearances*

The Inter-American Convention on Forced Disappearances (IACFD) was the first treaty defining the notion of enforced disappearances.[111] In 1987, the Organization of American States (OAS) General Assembly mandated that the Inter-American Commission on Human Rights prepare a first draft of a convention related to enforced disappearances.[112] The IACFD was subsequently adopted in 1994 by the OAS General Assembly. Prior to this convention, the only international instrument that attempted to define the notion was the Declaration on Enforced Disappearances (DED), adopted by the United Nations General Assembly on December 20, 1978.[113] Notwithstanding the contention made by certain scholars that the DED expressed *opinio juris* since it was adopted unanimously,[114] the DED's definition of enforced disappearances was not *per se* binding.

In light of the plethora of disappearance cases the Inter-American Court was facing, the OAS undertook to tackle the problem by adopting IACFD where Article II defines enforced disappearances as follows:

> Forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[115]

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[111] *See* MARÍA FERNANDA PÉREZ SOLLA, ENFORCED DISAPPEARANCES IN INTERNATIONAL HUMAN RIGHTS 12 (2006).

[112] *See generally* Inter-American Commission on Human Rights, Annual Report of the Commission 1987, AG/Res. 890 (XVII-0/87), November 14, 1987.

[113] G.A. Res. 33/173, U.N. Doc. A/RES/33/173 (Dec. 20, 1978).

[114] PÉREZ SOLLA, *supra* note 111, at 10.

[115] IACFD, *supra* note 110, art II.

Albeit praised for being a significant step forward in international human rights law, as well as remaining until 2006, the only internationally agreed definition,[116] the IACFD reveals some "normative gaps."[117] In addition to leaving open the issues of prevention of enforced disappearances and judicial guarantees for the victims,[118] the definition in Article II contains a very controversial requirement: the lack of access to a remedy.[119] Indeed, Pérez Solla points out that such a requirement confuses "disappearances *per se* and of their possible consequences" because it means that if a family has access to judicial remedies there would be no disappearances.[120] Thus, she contends that the text is too restrictive since it only protects disappearances accompanied with "lack of access to domestic remedies."[121] Although this may be a valuable point, it is important to state that, in the majority of cases, the requirement of absence of remedies does not prevent the Inter-American Court from finding the existence of an enforced disappearance since enforced disappearances are almost systematically characterized by the absence of effective domestic remedies and a policy of impunity.[122]

*2. A Violation of Multiple Rights*

As early as in *Velásquez-Rodríguez,* the Inter-American Court stated, "the phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion."[123] Accordingly, the Court declared "the forced disappearance of human beings is a multiple and continuous violation of many rights under the Inter-American Convention on Human

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[116] International Convention, *supra* note 4.

[117] TULLIO SCOVAZZI & GABRIELLA CITRONI, THE STRUGGLE AGAINST ENFORCED DISAPPEARANCES AND THE 2007 UNITED NATIONS CONVENTION 253 (2007).

[118] *Id.* at 253- 54.

[119] PÉREZ SOLLA, *supra* note 111, at 10.

[120] *Id.* at 13.

[121] *Id.*

[122] *See* discussion regarding the right to humane treatment in Part III. B. of this Article.

[123] Velásquez Rodríguez, 1989 Inter-Am. Ct. H.R. (ser. C) No. 4 ¶ 155 (July 29, 1988).

Rights that the State parties are obligated to respect and guarantee."[124] The so-called multiple rights approach was reiterated in the Preamble of the IACFD.[125] In addition, Article III of the IACFD indicates, "this offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined."[126] The purpose of this approach is to enable the Court to deal with this human rights violation with a comprehensive approach, by paying attention to the nature and the different sides of an enforced disappearance case and by granting the monitoring organ a multiple-sided view of the problem, which allows the adoption of the necessary measures to grant full reparation to victims and their family.[127] By the same token, the Court contended in the 2008 decision *Heliodoro Portugal v. Pánama* that:

> [W]hen examining an alleged forced disappearance it should be taken into account that the deprivation of liberty of the individual must be understood merely as the beginning of the constitution of a complex violation that is prolonged over time until the fate and whereabouts of the alleged victim are established . . . Consequently, the examination of a possible forced disappearance should not be approached in an isolated, divided and fragmented manner, considering merely the detention, or the possible torture, or the risk of loss of life, but rather the focus should be on all the facts presented in the case being considered by the Court.[128]

In that vein, in the American system the recognition of a person's disappearance will *ipso facto* entail that several rights of the In-

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[124] Velásquez Rodríguez, 1989 Inter-Am. Ct. H.R. ¶ 155.

[125] IACFD, *supra* note 110, prmbl. ("[F]orced disappearance of persons of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights.").

[126] *Id.* art. III.

[127] PÉREZ SOLLA, *supra* note 111, at 39.

[128] Case of Heliodoro Portugal v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶ 112 (Aug. 12, 2008).

ter-American Convention on Human Rights were violated.[129] In most instances, the Court examines the violation of these rights as a whole in light of the evidence provided for proving the disappearance. An illustration of this approach may be found in the recent decision *Tiu Tojín v. Guatemala,* in which the Court held that provided a disappearance is a violation of multiple rights, the Guatemalan State automatically violated Articles 4, 5, 7, 8 and 25.[130] Consequently, the Court did not find it necessary to analyze each right separately.[131]

*3. An Autonomous Right*

Unlike the International Convention, the IACFD does not identify enforced disappearances as an autonomous right.[132] It is only in *Serrano Cruz Sister*[133] and *Goiburú*[134] that the Court asserted that forced disappearances are an autonomous and continuous human rights violation under international law developed in the 1970's. Prior to this decision, "[a]lthough the Court had characterized a forced disappearance as a multiple and continuous violation of several rights in other cases before," it was not apparent in the existing case law at what point this autonomous human rights violation became enforceable against States.[135] This approach was confirmed in *Heliodoro Portugal v. Pánama* where the Court held that it is "necessary to consider the offense of forced disappearance *in toto*, as an autonomous offense of a continuing or permanent nature with its

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[129] *See* American Convention on Human Rights (ACHR), arts. 5, 7, 8, 25, July 18, 1978, 1144 U.N.T.S. 123 [hereinafter ACHR]. Note the right to life (Article 5), right to humane treatment (Article 5), right to liberty (Article 7) and right to an effective remedy (Article 8 and 25).

[130] Tiu Tojín v. Guatemala, 2008 Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 54 (Nov. 26, 2008).

[131] *Id.*

[132] McCrory, *supra* note 7, at 549.

[133] *See generally* Serrano-Cruz Sisters v. El Salvador, 2005 Inter-Am. Ct. H.R. (ser. C) No. 131 (Sept. 9, 2005).

[134] Case of Goiburú v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006).

[135] Claudia Martin, *Catching up with the past: Recent decisions of the Inter-American Court of Human Rights addressing gross human rights violations perpetrated during the 1970s-1980s,* 7 HUM. RTS. L. REV. 774, 790 (2007).

multiple elements intricately interrelated."[136]

*4. A crime against humanity*

The Preamble of the IACFD makes it plain that "the systematic practice of the forced disappearance of persons constitutes a crime against humanity."[137] The jurisprudence of the Court is in line with this assertion.[138] By the same token, the Inter-American Court maintained the practice of forced disappearances as an aggravated international responsibility of the State and that "the prohibition of forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*."[139]

### *B. The Absence of Definition of Enforced Disappearances in the European System*

As of this writing, the European Court has not elaborated a definition of enforced disappearance. The only reference to a definition is found in *Kurt v. Turkey* in the submission of Amnesty International.[140] The absence of a definition for enforced disappearance has a remarkable influence in the methodology employed.[141] Indeed, the European Court did not endorse the Inter-American Court's multiple rights approach. In other words, while in the Inter-American Court system "every case constitutes a violation of rights," the European Court counts on a more conservative approach: "a case of enforced disappearance may constitute a violation of several provisions, but that is not strictly necessary."[142] It, therefore, considers the alleged violations of each right separately as if they resulted from different

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[136] Case of Heliodoro Portugal v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶112 (Aug. 12, 2008) (emphasis added).

[137] IACFD, *supra* note 110, prmbl.

[138] *See, e.g.*, Case of Goiburú v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 81-85 (Sept. 22, 2006).

[139] *Id.* ¶ 84.

[140] Kurt v. Turkey, 1998-III Eur. Ct. H.R. ¶ 66 (citing The Inter-American Convention on Forced Disappearance of Persons, art. 2, June 9, 1994, 33 I.L.M. 1529)

[141] PÉREZ SOLLA, *supra* note 111, at 13.

[142] *Id.* at 38.

situations.

Unfortunately, the lack of a comprehensive approach in the European system acts as an impediment to an effective protection and enforcement of human rights. Indeed, in many instances, the Court refuses to find a violation of important rights such as the right to be free of inhuman and degrading treatment. In that respect, the European Court should address the specificity of enforced disappearance by first making an effort to define the phenomenon within the ambit of the European system, and second, by triggering a debate among judges as to whether the phenomenon should entail the adoption of a specific method when reaching a conclusion. By refusing to enter into this discussion, the Court keeps denying the gravity of the phenomenon. A phenomenon that by its nature makes it very difficult to prove violations of multiple rights. Consequently, it necessarily calls for a method of reasoning that would be more flexible than for other types of violations. In this regard, the Inter-American Court's multiple rights approach has proved to be satisfactory in order to overcome the dilemma of proof and should act as an example for the European Court.

## *III. The Rights Violated*

### *A. The Right to Life*

#### *1. Enforced Disappearance and the Right to Life in the Inter-American Court (Article 4)*

Since the beginning of its jurisprudence on enforced disappearances, the Inter-American Court adopted the view that the nature of the offense entailed *ipso facto* a violation of Article 4 of the Convention (right to life). The Inter-American Court considered that "the practice of disappearances often involves secret execution without trial, followed by the concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life."[143] This

[143] Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 4 ¶ 157 (July 29, 1988).

also holds true "if there is a minimal margin of doubt in this respect."[144] Consequently in all instances, "it must be presumed that authorities that systematically executed detainees [did so] without trial and concealed their bodies."[145] In that regard, in cases where the body of a victim is not found, the amount of time that elapsed since the allegedly disappeared person was last seen would be relevant in order to determine whether a person may be presumed dead.[146]

In addition, the Inter-American Court found that a failure to investigate the disappearance constituted a violation of the obligation to protect the right to life (Article 1.1 of the Convention).[147] This duty to investigate "continues as long as there is uncertainty about the fate of the person who has disappeared."[148] The Court's reasoning was confirmed in subsequent cases.[149]

### 2. *Enforced Disappearances and the Right to Life in the European Court (Article 2)*

The complex interpretation of Article 2 of the Convention by the European Court has led to the spelling out of three distinct State obligations.[150] First, a State has the duty to refrain from unlawful killings. Second, the State bears the positive obligation to take steps to prevent avoidable loss of life. Third, the State has the duty to investigate suspicious deaths. The first two obligations refer to the "substantive right to life" while the last obligation concerns the "procedur-

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[144] *Id.* ¶ 188.

[145] *Id.*

[146] *See, e.g.*, Neira Alegria et al. Case, 1995 Inter-Am. Ct. H.R. (ser. C) No. 21 ¶ 71 (Jan. 19, 1995); Caballero-Delgado & Santana Case, 1995 Inter-Am. Ct. H.R. (ser. C) ¶¶ 63-64.

[147] Velásquez Rodríguez, 1989 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 188.

[148] *Id.* ¶ 181.

[149] Baldeón-García v. Perú, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 97 (Apr. 6, 2006) (holding "Any deficiency or fault in the investigation affecting the ability to determine the cause of death or to identify the actual perpetrators or masterminds of the crime will constitute failure to comply with the obligation to protect the right to life.") *See* Ticona Estrada et al. v. Bolivia, 2008 Inter-Am. Ct. H.R. (ser. C) No. 191 (Nov. 27, 2008).

[150] *See* CLARE OVEY & ROBIN WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 56 (2006).

al right to life."[151] In reality, it is important to emphasize that the Court developed this complex approach where it could not find a violation under an Article due to the lack of evidence or identity of the violators, and thus expanded the duties to impose the obligation on States to conduct post-incident inquiries.[152]

a. Violation of the Substantive Right to Life

i. Violation of the Duty to Refrain From Unlawful Killings

The European Court was "disappointingly timid in its treatment of the first case of disappearance"[153] especially in relation to its approach of the right to life. Indeed, in *Kurt v. Turkey* the Court found no violation of Article 2 in absence of concrete evidence that the authorities killed the young man.[154] Fortunately, the Court departed from this rigid reasoning in *Timurtas* in which it accepted that when the State has not provided a plausible explanation for the disappearance and there is "sufficient circumstantial evidence, the Court will make the finding that the individual died in State custody."[155] Since this decision, when the Court presumes the disappeared person dead[156] there is a violation of the substantive right to life.[157]

ii. Violation of the Positive Obligation to take Steps to Prevent Avoidable Loss of Life

The European Court developed the obligation to take steps to

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[151] OVEY & WHITE, *supra* note 150, at 59.

[152] Stuart E. Hendin Q.C., *The Evolution of the Right to life in the European Court of Human Rights*, 4 BALTIC Y.B. INT'L L. 75, 109 (2004).

[153] OVEY & WHITE, *supra* note 150, at 59.

[154] Kurt v. Turkey, 1998 III Eur. Ct. H.R. ¶¶ 107-108.

[155] Hendin Q.C., *supra* note 152, at 102-104 (citing to Tirmutas v. Turkey, App. No. 23531/94, Eur. Ct. H.R. (2008).

[156] *See* discussion regarding the admission of evidence in Part I. A. of this Article.

[157] *See, e.g.*, Alikhadzhiyeva v. Russia, App. No. 68007/01, Eur. Ct. H.R., ¶ 63 (2007); Baysayeva v. Russia, App. No. 74237/01, Eur. Ct. H.R., ¶ 120 (2007); Lyanova v. Russia, App. Nos. 12713/02, 28440/03, Eur. Ct. H.R., ¶ 98 (2008).

prevent avoidable loss of life for the first time in *Osman v. UK* holding that "[a]rticle 2 of the Convention may also imply in certain well defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."[158] In *Mahmut Kaya v. Turkey*, the Court gave directions as to what amounted to the extreme circumstances in which such an obligation arose.[159] Three elements must be present: first, there must be an "unknown perpetrator killing phenomenon;" second, the victim must be at risk; and third, the authorities must have been aware of the risk.[160] The Court has only used this interpretation of the substantive right to life in disappearance cases on a rare basis.[161] However, it proves very useful where the perpetrators, the authors of disappearances are unknown, and their acts are not attributable to the State. For instance, in *Koku v. Turkey* the Court confirmed that notwithstanding the fact that State agents were not responsible for the disappearance and subsequent death of the victim, it nonetheless made it clear that it did not necessarily exclude the responsibility of the government for the victim's death.[162] Relying on *Osman,* the Court reiterated that the right to life "extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk."[163] In light of the fact that Koku, as the chairman of a political branch of which members were kidnapped, injured and killed, the Court considered that he belonged to a category of persons who ran a particular risk of falling victim to disappearance.[164] The authorities were aware of this risk,[165] and the criminal

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[158] Osman v. United Kingdom, App. No. 23452/94,29 Eur. H.R. Rep. 245 (1998). *See* ALISTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS BY THE EUROPEAN CONVENTION OF HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 17 (2004) (contending that the Court was "seeking to make the convention guarantees of practical value.").

[159] Mahmut Kaya v. Turkey, App. No. 22535/93, Eur. Ct. H.R. ¶ 89 (2000).

[160] *Id.*

[161] *See, e.g.,* Case of Koku v. Turkey, App. No. 27305/95, Eur. Ct. H.R. ¶ 128 (2005); Osmanoğlu v. Turkey, App. No. 48804/99, Eur. Ct. H.R. ¶ 75 (2008).

[162] *Koku,* App. No. 27305/95, Eur. Ct. H.R. ¶ 125.

[163] *Id.* ¶ 126.

[164] *Koku,* App. No. 27305/95, Eur. Ct. H.R ¶ 131.

law provisions that were in place to deter the commission of offences against the persons at risk were defective.[166] Thus, there was a violation of the positive obligation to protect. It was the first time the Court applied the positive obligation to protect reasoning in a disappearance case. The extension of this obligation to disappearance cases was re-affirmed in *Osmanoglu v. Turkey* on April 24, 2008.[167]

b. Violation of the procedural right to life

The procedural right to life, which is the State's duty to investigate a suspicious death, was first developed by the European Court in *McCann and Others v. UK*.[168] As underscored by Alastair Mowbray, the underlying justification for the Court to develop this positive obligation was to ensure "the practical effectiveness at the domestic level of article 2" even though the language of the article did not expressly encompass such duty.[169]

In that respect, the European Court followed the lead of the Inter-American Court and directly linked a lack of effective investigation with a violation of Article 2.[170] The European Court, thus, emphasized that the right to life was only meaningful where the procedural protection was in place to ensure that the exercise of force was subject to independent and public scrutiny.[171] The obligation applies whether the killing was caused by State agents or not,[172] and ultimately "arises upon proof of an arguable claim that the individual was last seen in custody, subsequently disappeared in a context that may be considered life threatening."[173] In *Kelly and Others v. UK,* the European Court pronounced a twofold justification for the duty to

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[165] *Id.* ¶ 134.

[166] *Id.* ¶ 144.

[167] Osmanoğlu v. Turkey, App. No. 48804/99, Eur. Ct. H.R. ¶ 75 (2008).

[168] McCann and Others v. the United Kingdom, 324 Eur. Ct. H.R. (ser. A) ¶ 161(1996).

[169] MOWBRAY, *supra* note 158, at 29.

[170] Fionnuala Ni Aolain, *The evolving jurisprudence of the European Convention concerning the right to life,* 19 NETH. Q. HUM. RTS. 21, 33 (2001).

[171] *Id.* at 33.

[172] Ergi v. Turkey, App. No. 23818/94, Eur. Ct. H.R. ¶ 82 (1998).

[173] Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R. ¶ 132 (2001).

hold enquiries: "[t]he essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility."[174] This approach was endorsed in disappearance cases for the first time in *Tas v. Turkey.* The duty to hold enquiries is now well established in its disappearance jurisprudence as the Court almost systematically finds a violation of a procedural right.[175] Despite its resemblance with the Inter-American Court jurisprudence in its failure to investigate, it is not amiss to point out that the European Court's approach is very unique as it uses Article 2 (right to life) to address the procedural aspect of the right to life.[176] Conversely, the Inter-American Court applies the treaty's general obligation contained in Article 1.1 (obligation to respects rights) of the Inter-American Convention to impose an obligation to investigate.[177] Although the European Court may refer to the general obligation to respect human rights when finding a failure to investigate (Article 1),[178] it nonetheless makes it clear that the obligation also stems from Article 2 itself.

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[174] Kelly and Others v. United Kingdom, App. No. 30054/96, Eur. Ct. H.R. ¶ 94 (2001). *See also* Alastair Mowbray, *Duties of Investigation under the European Convention on Human Rights,* INT'L & COMP. L.Q. 438 (2002) (submitting that this explanation reflects the widening of the scope of investigation obligation to encompass killings by both private persons and State personnel).

[175] *See* Baysayeva v. Russia, App. No. 74237/01, Eur. Ct. H.R. ¶ 130 (2007); Varnava and Others v. Turkey, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, Eur. Ct. H.R. ¶ 133 (2008); Alikhadzhiyeva v. Russia, App. No. 68007/01, Eur. Ct. H.R. ¶ 109 (2008); Sangariyeva and Others v. Russia, App. No. 1839/04, Eur. Ct. H.R. ¶ 85 (2008); Lyanova and Aliyeva v. Russia, App. No. 12713/02, 28440/03 Eur. Ct. H.R. ¶ 73 (2008).

[176] PÉREZ SOLLA, *supra* note 111, at 55.

[177] *See* Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 4 ¶ 188 (July 29, 1988).

[178] Tas v. Turkey, App. No. 24396/94, Eur. Ct. H.R. ¶ 68 (2000).

### *B. The Right to Humane Treatment*

#### *1. The Right to Humane Treatment in the Inter-American Court System (Article 5)*

##### a. With Respect to the Victim

Considering that in most instances, disappearance entails an impossibility, in absence of a corpse, to determine whether a person was subjected to torture or other cruel and inhuman treatment, the key issue when finding a violation of Article 5 is to establish whether disappearance entails *ipso facto* torture or other prohibited ill-treatment.[179] The Inter-American Court responded to this issue in a very flexible manner holding that "the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person."[180] Thus, pursuant to the Inter-American jurisprudence, a violation of Article 5 may be presumed and prolonged isolation, and being held *incommunicado* is inherently part of a disappearance.[181] The Inter-American Court's reliance on the presumption of inhuman treatment stems from the idea that "a person who is unlawfully detained is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to be treated with dignity will be vi-

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[179] *See* NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 202 (Oxford University Press and the United Nations Educational, Scientific and Cultural Organization 1987) (1999) (mentioning that under the Article 2 (1) of the DED stating that the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment is violated by an act of enforced disappearances). In the same vein, the U.N. Working Group on Enforced or Involuntary Disappearances was of the opinion that disappearance constitutes *ipso facto* torture or other prohibited ill-treatment, U.N. Econ. & Soc. Council [ECOSOC], *Report of the Working Group on Enforced or Involuntary Disappearances*, ¶131, U.N. Doc. E/CN.4/1983/14 (Jan. 21, 1983) [hereinafter Working Group on Enforced Disappearances].

[180] Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) ¶ 187., Godínez & Cruz Case, 1989 Inter-Am. Ct. H.R. (ser. C) ¶ 197.

[181] Julie Lantrip, *Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, ILSA J. INT'L & COMP. L. 551, 556 (1999).

olated."[182] Nonetheless, the Court made it plain that it will not make such presumptions unless the detainee endured "prolonged detentions."[183] For instance, when the disappeared person was executed within a few hours after his capture the Court found that there was insufficient proof that the person was tortured.[184] The Inter-American Court system places strong emphasis on the link between disappearances and *incommunicado* detentions. Under the Inter-American Convention, *incommunicado* detention is not absolutely prohibited,[185] it may constitute cruel, inhuman or degrading treatment where it is arbitrary, prolonged or in violation of domestic law.[186] Indeed the Court held that "in international human rights law . . . incommunicado detention is considered to be an exceptional instrument and . . . its use during detention may constitute an act against human dignity."[187] Furthermore, the IACFD lays out measures, which must be taken to prevent enforced disappearances and *incommunicado* detention.[188]

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[182] *See, e.g.,* Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 150 (Nov. 25, 2000); Cantoral-Benavides v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 90 (Aug. 18, 2000).

[183] Caballero-Delgado & Santana Case, 1995 Inter-Am. Ct. H.R. (ser. C) ¶65. *See* RODLEY, *supra* note 179, at 260 (explaining that the criteria is "prolonged detention" and that there is no reason to believe that the Court would depart from this view when faced with the evidence that the detention was prolonged).

[184] Caballero-Delgado & Santana Case, 1995 Inter-Am. Ct. H.R. (ser. C) ¶65.

[185] TORTURE IN INTERNATIONAL LAW: A GUIDE TO JURISPRUDENCE 118 (Association for the Prevention of Torture & Center for Justice and International Law 2008) [hereinafter CEJIL and APT Guide].

[186] *Bámaca-Velásquez,* 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 87; *Cantoral-Benavides*, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 82. *See* Xavier A. Aguirre, *La prohibición de la tortura: un análisis sistemática de las interpretaciones jurisprudenciales de la Corte Interamericana de derechos humanos sobre las violaciones a artículo de la Convención Americana sobre derechos humanos*, 21 AM. U. INT'L L. REV. 43 (2005).

[187] *Bámaca-Velásquez,* 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 150; *Cantoral-Benavides*, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 82.

[188] IACFD, *supra* note 110, art. XI states "Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law. The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other

b. With Respect to the Victim's Relatives

In the past ten years, the Inter-American Court has shown an increasing willingness to consider the suffering of the victim's immediate relatives as coming within the scope of Article 5.[189] The Court first established that the victim's relatives' right to humane treatment had been violated in *Blake* in 1998.[190] The principle was subsequently confirmed in *Bámaca*.[191] In most instances, the Court seems to find a violation of Article 5 in relation to the relatives, especially when the State fails to adequately investigate the violation or refuses to supply the relatives with information.[192] It is, however, unclear as to how close the relationship must be for the Court to find the necessary "close ties to the victims."[193] If in the past parents were usually considered victims,[194] the Court indicated in *La Cantuta* that it may extend beyond immediate family members.[195] Hence, there was a violation in regard to family members with whom the victim had lived with prior to death, or who had taken an active role in the

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authorities."

[189] CEJIL and APT Guide, *supra* note 185, at 120 (explaining that this tendency is specific to cases involving enforced disappearances and extrajudicial killings); *See generally* CLAUDIA MARTIN & DIEGO RODRIGUEZ-PINZON, LA PROHIBICIÓN DE LA TORTURA Y LOS MALOS TRATOS EN EL SISTEMA INTERAMERICANO [The Prohibition of Torture and Ill-Treatment in the Inter-American Human Rights System] 115 (Boris Wijkström ed., 2006).

[190] Blake Case, 1998 Inter-Am. Ct. H. R. (ser. C) No. 36, ¶ 110 (Jan. 24, 1998) (the Court held that the forced disappearance had directly impaired their physical and mental integrity taking into account that they had to travel to Guatemala without the cooperation of the authorities. The brother suffered a serious case of depression, needing psychiatric treatment). *See* Lantrip, *supra* note 181, at 564 (arguing that the Court extended the interpretation of Article 5 in the Blake case because "the victim's disappearance could not be adjudicated because it occurred before the violating State became party to the jurisdiction of the Court.").

[191] Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 150 (Nov. 25, 2000).

[192] *See, e.g.,* La Cantuta Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162,¶ 69 (Nov. 29, 2006); Case of Goiburú v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 97 (Sept. 22, 2006).

[193] CEJIL and APT Guide, *supra* note 186, at 121.

[194] *Id.*

[195] *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 123.

searching for the victim.[196] However, in its recent decision of *Heliodoro Portugal v. Panamá* rendered in August 2008, the Court seems to demonstrate an intention to foreshorten the scope of the victim's relatives' rights under Article 5.[197] Indeed, the Court sets out a number of conditions to be taken into account in order to determine whether a victim's relative may be considered a victim under Article 5 such as: (1) the existence of a close family tie; (2) the particular circumstances of the relationship with the victim; (3) the extent to which the family member was involved in the search for justice; (4) the State's response to their efforts; and (5) the context of a "system that prevents free access to justice's as a result of not knowing the victim's whereabouts."[198]

The Inter-American Court's recant from its previous flexible jurisprudence appears to be inspired by the European Court's approach on that matter.[199] It is yet to be seen how the Inter-American Court will apply these conditions and whether it will significantly alter the recognition of relatives as victims of inhuman treatment.

### 2. *The Right to Humane Treatment in the European Court System (Article 3)*

#### a. With Respect to the Victim

Unlike the Inter-American Court, the European Court usually does not find that enforced disappearance constitutes a violation of Article 3 *per se*.[200] Instead, the European Court applies a higher standard of proof.[201] Accordingly, whether the detention amounts to a violation of Article 3 of the European Convention depends upon

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[196] *La Cantuta*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 125.

[197] Case of Heliodoro Portugal v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 186, ¶163 (Aug. 12, 2008).

[198] *Id.*

[199] *See* Ipek v. Turkey, App. No. 25760/94, Eur. Ct. H.R. ¶ 181 (2004).

[200] Kurt v. Turkey, 1998-III Eur. Ct. H.R. ¶ 116 (reasoning that the Court had not been presented with any specific evidence of ill treatment nor of "an officially tolerated practice of disappearance and associated ill-treatment."); *See* RODLEY, *supra* note 179, at 261 (contending that in this decision the Court "missed the point . . . [T]he suffering that the Inter-American Court found as being 'in itself' cruel and inhuman was not based on the existence of a systematic practice.").

[201] PÉREZ SOLLA, *supra* note 111, at 76.

the particular circumstances such as the provision of heating, ventilation, lighting, food and water, medical treatment, toilets, etc.[202] The Court will assess the cumulative effects of any such conditions in order to establish whether a detainee was subjected to ill-treatment.[203] The demonstration of such factors is particularly difficult in disappearance cases resulting in the Court's constantly dismissing the alleged violation of Article 3 on grounds of lack of evidence.[204]

In the same vein, as for the right to life, the Court developed a procedural right to humane treatment to overcome the rigidity of its standard.[205] Hence, the Court held in *Sevtap Veznedaroglu* that in cases where a person raises a reasonable claim that he has been seriously ill-treated by the police, Article 3 must be read in conjunction with the State's general duty under Article 1 to impose an obligation on States to conduct "an effective official investigation capable of leading to the identification and punishment of those responsible."[206]

Nevertheless, this approach was not confirmed in disappearance cases. The Court opined in *Bazorkina* that the failure to investigate a claim of inhuman treatment did not raise a separate issue since it examined deficiencies of investigation under procedural Article 2 and Article 13.[207] Therefore, the European Court seems very reluctant to relinquish its stringent criteria to accommodate the difficulties of proving an allegation of ill treatment in disappearance cases. Such an approach is at odds with the Court's increasing willingness to recognize a violation of the right to life.

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[202] ERDAL & BAKIRCI, *supra* note 92.

[203] LEACH, *supra* note 27, at 208.

[204] *See, e.g.*, Bazorkina v. Russia, App. No. 69481/01, Eur. Ct. H.R. ¶ 133 (2006); Baysayeva v. Russia, App. No. 74237/01, Eur. Ct. H.R. ¶ 137 (2007); Alikhadzhiyeva v. Russia, App. No. 68007/01, Eur. Ct. H.R. ¶ 79 (2007); Lyanova and Aliyeva v. Russia, App. Nos. 12731/02, 28440/03, Eur. Ct. H.R. ¶ 115 (2008).

[205] Sevtap Veznedaroğlu v. Turkey, App. No. 32357/96, Eur. Ct. H.R. ¶ 35 (2000). *See also* OVEY & WHITE, *supra* note 150, at 86; MOWBRAY, *supra* note 174, at 444.

[206] *Sevtap Veznedaroğlu*, App. No. 32357/96, Eur. Ct. H.R. ¶ 32.

[207] *Bazorkina*, App. No. 69481/01, Eur. Ct. H.R. ¶ 136.

b. With Respect to the Victim's Relatives

Albeit recalcitrant to hold that a disappeared person is subjected to torture or ill treatment in absence of evidence, the European Court has proved to be less stringent when the suffering of the victim's family is at stake. Indeed, in *Kurt*, the Court found that the mother of the victim had been "left with the anguish of knowing that her son has been detained and there was a complete absence of official information as to his subsequent fate. His [the detainee's] anguish has endured over a prolonged period of time."[208] Following this decision, the Court, nonetheless, avoided opening the floodgates by imposing a number of conditions. Accordingly, the Court indicated in *Ipek v. Turkey* that "whether a family member of a 'disappeared person' is a victim of treatment contrary to Article 3 will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation."[209] The relevant elements that must be taken into account include: 1) the proximity of family tie (in that respect the Court attaches a special weight to the parent-child bond); 2) the particular circumstances of the relationship; 3) the extent to which the family member witnessed the events in question; 4) the involvement of the family member in the attempts to obtain information about the disappeared person; and 5) the way in which the authorities responded to those inquiries.[210]

In light of the subjective nature of these criteria and the related difficulty to assess the closeness of family bonds without making an arbitrary judgment call, the Court emphasized that "the essence of such violation does not mainly lie in the fact of the *disappearance* of the family member, but rather concerns the authorities [sic] reactions and attitudes to the situation when it is brought to their attention."[211] Inasmuch as a more objective standard

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[208] Kurt v. Turkey, 1998-III Eur. Ct. H.R. ¶ 133.

[209] Ipek v. Turkey, App. No. 25760/94, Eur. Ct. H.R. ¶ 181 (2004).

[210] *Ipek,* App. No. 25760/94, Eur. Ct. H.R. ¶ 181; Osmanoglu v. Turkey, App. No. 48804/99, Eur. Ct. H.R. ¶ 96 (2008); Sangariyeva and Others v. Russia, App. No. 1839/04, Eur. Ct. H.R. ¶ 90 (2008).

[211] Orhan v. Turkey, App. No. 25656/94, Eur. Ct. H.R. ¶ 358 (2002) (empha-

was needed to facilitate the Court's assessment of a violation of Article 5 in relation to the victim's relatives, the Court has applied it in a very rigid and sometimes incoherent manner. For instance, in *Seker v. Turkey,* although the Court admitted that the inadequacy of the investigation into the disappearance of his son may have caused the father anguish and mental suffering, the Court considered that it lacked special factors because "there was nothing in the content of tone of the authorities' replies to the enquiries made by the applicant that could be described as inhuman or degrading treatment."[212] This application of the "attitude of the authorities" criteria is extremely conservative,[213] especially when it leads to disregarding the anguish of a parent who went through the process of inquiring for his son in vain.

### C. *The Right to Liberty and Security of the Person*

#### 1. *The Right to Liberty and Security under the Inter-American Convention (Article 7)*

The Inter-American Court endorsed the view that the right to liberty and security is the principal human right denied by the very fact of enforced disappearances,[214] and therefore, held in *Velásquez-Rodriguez* that "[t]he kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and the invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7."[215] In

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sis added); Imakayeva v. Russia, App. No. 7615/02, Eur. Ct. H.R. ¶ 164 (2006); *Sangariyeva and Others*, App. No. 1839/04 Eur. Ct. H.R.¶ 90.

[212] Şeker v. Turkey, App. No. 52390/99, Eur. Ct. H.R. at ¶ 83 (2006), *See* Koku v. Turkey, App. No. 27305/95, Eur. Ct. H.R. ¶ 171 (2005) (stating that "the applicant . . . was the brother of the disappeared person. He was not present when his brother was abducted, . . . [W]hile the applicant took a number of steps to bring his brother's case to the attention of international organizations, . . . he did not bear the brunt of the task . . . Consequently, the Court perceives no special features existing in this case which would justify a finding of a violation of Article 3 of the Convention in relation to the applicant himself.").

[213] PÉREZ SOLLA, *supra* note 111, at 77.

[214] *See* Working Group on Enforced Disappearances, *supra* note 179, ¶131.

[215] Velásquez Rodríguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 4 ¶ 155

that vein, the Court is generally of the opinion that all the provisions contained in Article 7 aiming at preserving individuals from arbitrary detentions are violated in cases of disappearances.[216] Thus, the detention of disappeared persons is considered a "clear instance of abuse of power" failing to be ordered by a competent authority.[217] The Court also draws emphasis on both protections granted by Article 7.5[218] (right to be brought promptly before a judge) and Article 7.6[219] (right to habeas corpus). With respect to Article 7.5, the Court indicated in *Bámaca* that "[a]n individual who has been deprived of his freedom without any type of judicial supervision should be liberated or immediately brought before a judge, because the essential purpose of Article 7 is to protect the liberty of the individual against interference by the State."[220] It is important to note that the wording of Article 7.5 only provides that a person should be brought before a judge "within a reasonable time" but the Court in cases of disappearances adopted a more stringent criterion since it requires that a person be brought "immediately." It seems that the Court recognized the particular vulnerability of detained persons in disappearance cases.

Similarly, the Inter-American Court clarified that the right to *habeas corpus* (Article 7.6) was of paramount importance in disappearance cases holding that its function was essential to respect the

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(July 29, 1988).

[216] Cantoral-Benavides v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 77 (Aug. 18, 2000).

[217] La Cantuta v. Peru, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 109 (Nov. 29, 2006).

[218] ACHR, *supra* note 129, art. 7.5 states "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings."

[219] ACHR, *supra* note 129, art. 7.6 states "[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the Court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful."

[220] Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 140 (Nov. 25, 2000). *See also* Hermanos Gómez Paquiyauri Case, 2004 Inter-Am. Ct. H.R., (ser. C) No. 110, ¶ 95 (July 8, 2004).

right to personal integrity and to prevent disappearances.[221] This view was reiterated in *La Cantuta* in 2006 where the Court indicated that *habeas corpus* was the most suitable means to ensure freedom.[222] The Court stressed that it is not sufficient that the domestic apparatus allows access to *habeas corpus* recourse; it must also be effective.[223] Nevertheless, although it appears that the Court finds it appropriate to relate Article 7.6 with Article 25 (right to an effective remedy),[224] this does not systematically hold true as in some instances the Court will only consider the protection of *habeas corpus* within the ambit of Article 7.[225] Such lack of consistency does not, however, seem to put in question the strong emphasis placed upon the protection of *habeas corpus* in disappearance cases by the Inter-American Court.

### 2. *The Right to Liberty and Security under the European Convention (Article 5)*

Serving a similar function as Article 7 of the Inter-American Convention, Article 5 aims at preventing persons from arbitrary detention.[226] The Court, therefore, decided in its first decision rendered on disappearance that arbitrary detention amounted to a particularly

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[221] *See* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, arts. 7.6, 27.2, 25.1, Advisory Opinion OC-8/87, Jan. 30 1987, Ser. A, No. 8, ¶ 35.

[222] La Cantuta Case, 2006 Inter-Am Ct. H.R., ¶ 111 (Nov. 29, 2006).

[223] Neira Alegría et. al, 1995 Inter-Am. Ct. H.R. (ser. C) No. 21, ¶ 71 (Jan. 19, 1995).

[224] *See, e.g.,* Suárez-Rosero v. Ecuador, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, ¶ 66 (Nov. 12, 1997); Cantoral-Benavides v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 169 (Aug. 18, 2000).

[225] La Cantuta Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162,¶ 111 (Nov. 29, 2006).

[226] LEACH, *supra* note 27, at 221; *See also* Rhonda Louise Powell, *The Right to Security of Person in European Court of Human Rights Jurisprudence,* 12 EUR. HUM. RTS. L. REV. 649, 651 (2007) (explaining that from an examination of the debates surrounding the drafting of the ECHR the intention of the drafters was to protect people from arbitrary detention. The right to liberty of person and the right to security of person were described as two aspects of the same right, physical liberty being the substantive aspect and security the means of protection or the procedural aspect).

grave violation of Article 5.[227] This view is now well established in the Court's jurisprudence related to disappearance cases.[228] The European Court's approach, nevertheless, differs significantly from the Inter-American Court's on that matter. Indeed, while the Inter-American Court considers the whole of the protection granted by Article 7, the European Court only focuses on two specific positive obligations on the States,[229] namely the obligation to account for detainees and to take effective measures to safeguard against the risk of their disappearance whilst in custody, and the duty to investigate allegations that persons in custody have disappeared.[230] However, the Court mentions neither the duty to bring detainees promptly before a judge (Article 5.3) nor the duty to bring a detainee before a court to determine the lawfulness of his detention (Article 5.4).[231] It remains unclear why the Court disregards such protection in disappearance cases since no justification is provided for such an omission in its jurisprudence.[232] Instead, the Court focuses on the violation of the obligation to account for detainees and to take effective measures to safeguard against the risk of their disappearance whilst in custody.[233] This generally comprises the failure to record a detention in official

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[227] Kurt v. Turkey, 1998-III Eur. Ct. H.R. ¶129.

[228] *See* Bazorkina v. Russia, App. No. 69481/01 Eur. Ct. H.R. at ¶ 146 (2006) ("[A]ny deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the purpose of Article 5, namely to protect the individual from arbitrary detention . . . . Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty be amenable to independent judicial scrutiny and secures the accountability of the authorities for the measure. The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5.").

[229] MOWBRAY, *supra* note 158, at 68.

[230] *See, e.g.,* Baysayeva v. Russia, App. No. 74237/01, Eur. Ct. H.R., ¶ 147 (2007).

[231] MOWBRAY, *supra* note 158, at 75.

[232] *Id.*

[233] *See, e.g.*, Kurt v. Turkey, 1998-III Eur. Ct. H.R. ¶¶ 122-125; Akdeniz and Others v. Turkey, App. No. 23954/94, Eur. Ct. H.R. ¶ 106 (2001); Orhan v. Turkey, App. No. 25656/94, Eur. Ct. H.R. ¶ 367 (2002); *Bazkorkina,* App. No. 69481/01, Eur. Ct. H.R. ¶146; Utsayeva and Others v. Russia, App. No. 29133/03, Eur. Ct. H.R. ¶ 195 (2008).

custody records which has been found to be a serious omission.[234] More specifically, the Court considers that the absence of records noting "date, time, location of detention, the name of the detainees, as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5."[235] Regarding the obligation to investigate, the Court held the Article 5 requires the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken to custody and has not been seen since.[236] In sum, while the European Court focuses on the importance of State obligations to prevent and investigate disappearances, the Inter-American Court primarily emphasizes the right to access a judge and *habeas corpus*.

### *D. The Right to an Effective Remedy*

#### *1. The Interpretation of the Right to an Effective Remedy by the Inter-American Court (Article 25)*

Article 25 of the Inter-American Convention provides that "everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal."[237] This provision is arguably very extensive since it requires an effective remedy for violations of "rights recognized by the constitution or laws of the state concerned *or* by this Convention."[238] In other words, Article 25 may be invoked not solely for Convention rights, but for any rights existing under domestic law. The Inter-American Court usually

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[234] Kurt v. Turkey, 1998-III Eur. Ct. H.R. ¶125 (holding that the accurate and reliable holding data provides an indispensable safeguard against arbitrary detention, the absence of which enables these responsible for the act of deprivation of liberty to escape accountability for the fate of the detainee.)

[235] *Orhan*, App. No. 25656/94, Eur. Ct. H.R. ¶ 371; *Baysayeva*, App. No. 74237/01, Eur. Ct. H.R. ¶146; *Utsayeva and Others*, App. No. 29133/0370, Eur. Ct. H.R. ¶ 195.

[236] *Kurt*, 1998-III Eur. Ct. H.R. ¶¶122-25.; *Akdeniz and Others*, App. No. 23954/94, Eur. Ct. H.R. ¶106; *Orhan,* App. No. 25656/94, Eur. Ct. H.R. ¶¶ 367-69; *Bazorkina,* App. No. 69481/01, Eur. Ct. H.R. ¶ 146.

[237] ACHR, *supra* note 129, art. 25.

[238] *Id.*

combines the right of access to justice with the guarantees of due process of law (Article 8).[239] The Court took the view that Article 8.1 must be broadly interpreted in line with Article 1.2 of the DED.[240] In disappearance cases, the compliance with Article 25 is considered in light of two different issues:[241] first, the Court examines whether there was an adequate and effective remedy through *habeas corpus*; and, second, it analyzes the State's obligation to investigate the alleged disappearance.[242] With respect to the former, the Court considers *habeas corpus* to be the adequate and effective remedy in disappearances cases.[243] Indeed, in *Bámaca,* the Court reiterated this view by submitting that "[a]mong essential guarantees, *habeas corpus* represents the ideal means of guaranteeing, controlling respect for the life and integrity of a person, and preventing his disappearance or the indetermination of his place of detention, and also to protect the individual from torture or other cruel, inhumane and degrading treatment."[244] In that vein, the Inter-American Court declares violations of Article 25 in cases of enforced disappearances when the remedy of *habeas corpus* did not exist or when it was inefficient or ineffective.[245] Concerning the State's obligation to investigate, the Court examines whether the State used due diligence in conducting investigations[246] and that it ensured, within a reasonable

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[239] ACHR, *supra* note 129, art. 8. *See* Goiburú v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 110 (Sept. 22, 2006) ("the States Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25), remedies that must be implemented according to the rules of due process of law (Article 8).")

[240] Blake Case, 1998 Inter-Am. Ct. H. R. (ser. C) No. 36, ¶ 96 (Jan. 24, 1998).

[241] PÉREZ SOLLA, *supra* note 111, at 124.

[242] *See, e.g.,* Ticona Estrada et al. v. Bolivia, 2008 Inter-Am. Ct. H.R. (ser. C) No. 191, ¶ 80 (Nov. 27, 2008).

[243] Castillo Páez Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 79 (Nov. 27, 1998); Blake Case, 1998 Inter-Am. Ct. H. R. (ser. C) No. 36, ¶ 102 (Jan. 24, 1998).

[244] Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 192 (Nov. 25, 2000).

[245] PÉREZ SOLLA, *supra* note 111, at 124 (2006) (citing to Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 192 (Nov. 25, 2000)).

[246] *See, e.g.,* Gómez-Palomino, 2005 Inter-Am. Ct. H.R. (ser. C) No. 136, ¶85.

time, access to justice,[247] the truth of the facts and the reparations to the next of kin.[248] In that regard, the Court made it plain that the integral reparation of the violation of a right protected by the Inter-American "Convention cannot be reduced to the payment of compensation to the victim's next of kin."[249] In addition, "[t]he obligation to repair damage is a legal obligation of the State that should not depend exclusively on the procedural activities of the victims."[250]

### 2. *The Interpretation of the Right to an Effective Remedy by the European Court (Article 13)*

The twin provision of Article 25 in the European Convention was drafted very differently. Indeed, Article 13 provides "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[251] Two differences must be noted. First, the European Court refers to a "national authority" and not solely a "court or tribunal" which gives it a wider reach. On the other hand, unlike the Inter-American provision, the wording of Article 13 is ambiguous since it raises the question of whether Article 13 only applies "after the Conventions' organs had determined that there had been a breach of the Convention's rights."[252] Notwithstanding the fact that this question was answered in *Klass* in 1978 which ruled that Article 13 is an independent provision which can be

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[247] Ticona Estrada et al. v. Bolivia, 2008 Inter-Am. Ct. H.R. (ser. C) No. 191, ¶ 79 (Nov. 27, 2008). Court stated that a reasonable time must be appreciated in light of the total duration of the proceedings until the final decision. [...] the absence of response from the State is a determinative element when assessing whether there was a violation of Article 8 and 25).

[248] Goiburú v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 110(a) (Sept. 22, 2006).

[249] *Id.* ¶ 121.

[250] *Goiburú*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 122.

[251] European Convention, *supra* note 25, art.13.

[252] OVEY & WHITE, *supra* note 150, at 460 (arguing that the proper view is that Article 13 is about guaranteeing a process within the national legal order by which a remedy for a violation can be provided).

violated even if there is no violation of another Convention right,[253] in its more recent judgments the European Court is increasingly taking issues of violations of Article 13 in conjunction with other provisions.[254] This also holds true in disappearance cases.[255] The Court's recant from *Klass* considerably limits the scope of Article 13.

When assessing whether there was a breach of Article 13, the Court proceeds in examining two questions. First, the Court analyzes whether the applicants had an "arguable claim,"[256] which simply means that they must have an arguable case[257] in light of the Convention rights protected.[258] In other words, "Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention right in whatever form they might happen to be ensured in the domestic legal order."[259] Second, the Court considers whether the domestic remedy was effective. In that regard, the Court "offers a measure of respect for national procedural autonomy since

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[253] Klass v. Germany, 28 Eur. Ct. H.R. (ser. A) ¶ 64 (1978).

[254] *See, e.g.*, Peck v. United Kingdom, 2003-I Eur. Ct. H.R., ¶114; Conka v. Belgium, 2002-I Eur. Ct. H.R., ¶75; OVEY & WHITE, *supra* note 150, at 460.

[255] Lyanova v. Russia, App. Nos. 12713/02, 28440/03, Eur. Ct. H.R., ¶ 139 (2008); Betayev v. Russia, App. No. 37315/03, Eur. Ct. H.R., ¶ 118 (2008); Isayeva v. Russia, App. No. 57950/00, Eur. Ct. H.R., ¶ 159 (2007).

[256] *Klass*, 28 Eur. Ct. H.R. (ser. A), ¶ 64 (holding Article 13 requires that where individuals consider themselves to have been prejudiced by a measure allegedly in breach of the Convention, they should have a remedy before national authority).

[257] *Id. See* OVEY & WHITE, *supra* note 150, at 462 (explaining in determining whether a case is arguable, the test is rather one of seeing whether there are the makings of a prima facie case).

[258] *See generally* Francoise J. Hampson, *The Concept of an "arguable claim" under Article 13 of the European Convention of Human Rights*, 39 INT'L & COMP. L. Q. 891, 894 (1991) (arguing that Article 13 cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the Convention).

[259] *See, e.g.*, Timurtas v. Turkey, App. No. 23531/94, Eur. Ct. H.R. ¶111 (2000) (holding Article 13 thus requires the provision of domestic remedy to deal with the substance of an arguable claim under the Convention "and to grant appropriate relief, although the contracting parties are afforded some discretion as to the manner in which they conform to their Convention obligations under the provision.").

this refers to the ability of each contracting State to determine the form of remedies offered to meet its obligations under the Article."[260] Nevertheless, although these remedies need not be judicial, they must be effective.[261] In disappearance cases, the Court seems to have adopted a slightly stricter approach in terms of effectiveness. The Court emphasized that "where irreversible harm might ensue, it will not be sufficient that the remedies are merely as effective as can be; they must provide much more than certain guarantees of effectiveness."[262] Consequently, in addition to the payment of compensation where appropriate, a thorough and effective investigation will initiate and become capable of leading to the identification and punishment of those responsible, including effective access for the relatives to the investigatory procedures.[263] Therefore, as rightly pointed out by Maria Pérez Solla, the European Court emphasizes the failure of the State to conduct an investigation whereas the Inter-American Court's primary concern is the right to *habeas corpus*.[264] Yet, unlike in its reasoning of Article 5, in the ambit of Article 13 the European Court provides some explanation as to why it dismisses the right to *habeas corpus*. The European Court generally expresses the view that because Article 5.4 and 5.5 are *lex specialis* in relation to Article 13, they absorb its requirement in a finding of Article 5 and, therefore, there is no separate issue.[265] Such reasoning is extremely

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[260] OVEY & WHITE, *supra* note 150, at 463.

[261] *Klass*, 28 Eur. Ct. H.R. (ser. A), ¶ 64.

[262] *See, e.g.,* Chahal v. United Kingdom, App. No. 22414/93, Eur. Ct. H.R. ¶¶ 150-52 (1996); Conka v. Belgium, App. No. 51564/99, Eur. Ct. H.R. ¶ 75 (2002) ("the scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be 'effective' in practice as well as in law. The 'effectiveness' of a 'remedy' within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.").

[263] Yasa v. Turkey, App. No. 63/1997/847/1054, Eur. Ct. H.R. ¶114 (1998); *Timurtas*, App. No. 23531/94, Eur. Ct. H.R. ¶ 111; Suheyla Aydin v. Turkey, App. No. 25660/94, Eur. Ct. H.R. ¶ 208 (2005); Sangariyeva and Others v. Russia, App. No. 1839/04, Eur. Ct. H.R. ¶ 106 (2008).

[264] PÉREZ SOLLA, *supra* note 111, at 124.

[265] *See Sangariyeva and Others*, App. No. 1839/04, Eur. Ct. H.R. ¶ 110; Ibra-

troubling since, as mentioned above, the Court disregards both Article 5.4 and 5.5 when it examines whether there was a violation of Article 5.[266] Consequently, the protection of prompt access to a judge and *habeas corpus* are neither considered under Article 5 nor within the ambit of Article 13.

### *E. The Right to Legal Personality*

Unlike the European Convention, the Inter-American Convention enshrines the right to recognition as a person before the law (Article 3).[267] Such provision mirrors Article 6 of the Universal Declaration on Human Rights as well as Article 16 of the International Covenant on Civil and Political Rights. The question of whether an enforced disappearance amounts to a violation of Article 3 is controversial within the Inter-American system. Indeed, the Inter-American Commission adopted the view that enforced disappearance constitutes a violation of the right to judicial personality.[268] In support of this approach, the Commission states that:

> [T]he connection between forced disappearance and violation of the right to juridical personality has to do with the fact that the precise object of forced disappearance is to remove the individual from his due protection; the aim of those who carry it out is to operate outside the law, conceal any evidence of the crime, and escape punishment, in addition to the clear and deliberate intention of eliminating any possibility of the person bringing any legal action to assert his or her rights.[269]

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gimov and Others v. Russia, App. No. 34561/03, Eur. Ct. H.R. ¶ 137 (2008); Betayev and Betayeva v. Russia, App. No. 37315/03, Eur. Ct. H.R. ¶ 130 (2008).

[266] *See Sangariyeva and Others*, App. No. 1839/04, Eur. Ct. H.R. ¶ 101; *Ibragimov and Others*, App. No. 34561/03, Eur. Ct. H.R. ¶117.

[267] ACHR, *supra* note 129, art. 3.

[268] *See, e.g.*, Cruz Sosa v. Guatemala, Case 10.897, Inter-Am. C.H.R., Report No. 30/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 43 (1997). Cruz Gómez v. Guatemala, Case 10.606, Inter-Am. C.H.R., Report No. 11/98, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 66 (1998).

[269] Castro v. Peru, Case Application 11.385, Inter-Am. C.H.R., ¶ 169 (July 11, 2008).

Therefore, according to the Commission, the recognition of the violation of juridical personality in cases of disappearances is predicated on the idea that "the right to juridical personality has several dimensions: the right to exercise and enjoy rights; the capacity to take on obligations; and standing"[270] and that the characteristics of disappearance necessarily entails a infringement of the right to exercise and enjoy rights.

The Inter-American Court used a different approach from the Commission for many years but finally decided to accept that enforced disappearances constituted a violation of the right to legal personality. The Court's unwillingness to endorse the Commission's position had been explained in *Bámaca.* First, the Court heeded the fact that the IACFD does not refer expressly to the juridical personality among the elements that typify the complex crime of forced disappearance.[271] Second, the Court explained that since the deprivation of life suppresses the human being, it is not relevant to invoke the violation of juridical personality.[272] Third, the Court submitted that the right to the recognition of juridical personality established in Article 3 has its own juridical content,[273] namely the right of every person to be recognized everywhere as a person of rights and obligations.[274] The right to juridical personality was therefore defined by the Court in a very restrictive manner and could only be violated in cases of "absolute disavowal of the possibility of being a holder of such rights and obligation."[275] The Court's restrictive approach was re-affirmed in subsequent disappearance cases.[276] Such analysis was nevertheless at odds with the development of international protection against enforced disappearances[277] and was inconsistent with its own

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[270] *Id.* ¶ 168.

[271] Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 180 (Nov. 25, 2000).

[272] *Id.*

[273] Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. ¶ 180.

[274] Ticona Estrada et al. v. Bolivia, 2008 Inter-Am. Ct. H.R. (ser. C) No. 191, ¶ 69 (Nov. 27, 2008).

[275] *Bámaca,* 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶179.

[276] *See, e.g., Ticona Estrada,* 2008 Inter-Am. Ct. H.R. (ser. C) No. 191, ¶ 69.

[277] *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on H.R., *Civil and Political Rights, Including Questions of: Disappearances and Summary Execu-*

finding that disappearance is a complex violation of multiple rights.[278] For that reason, the Court finally agreed that the multiple and complex nature of enforced disappearances has led to the conclusion that the Court's previous position should be reversed, thus it admitted that enforced disappearance also violated the right to legal personality.[279]

### *F. The Right to Truth*

The right to truth is arguably one of the most problematic issues in disappearance cases.[280] In reality, neither the Inter-American nor the European Convention expressly refers to a right to truth. Nevertheless, the advancement of truth has been and remains a critical issue within the realm of the Inter-American Court system. Indeed, "the recognition of this right has been encouraged as a reaction against amnesty and, in general, impunity legislation in some Latin American countries for the lack of determination of the whereabouts and fate of the victims of enforced disappearances."[281] The right to truth was first developed in relation with other rights and obligations of the State with respect to persons under their jurisdiction.[282] The recognition within the international community of the impor-

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*tions*, ¶ 70, U.N. Doc. E/CN.4/2002/71 (Jan. 8, 2002) (*prepared by* Manfred Nowak), *See also* Declaration on the Protection of all Persons from Enforced Disappearance, G.A. Res. 47/133, art. 1, U.N. Doc. A/RES/47/133 (Dec. 18, 1992) ("Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.").

[278] *See* discussion regarding enforced disappearance a being a violation of multiple rights at Part II. A. of this article.

[279] Anzualdo-Castro v. Perú, 2009 Inter-Am. Ct. H. R. (ser C) No. 202, ¶ 90 (Sept. 22, 2009).

[280] PÉREZ SOLLA, *supra* note 111, at 91.

[281] *Id.*

[282] Carlos Miguel Reaño Balarezo, *Algunos alcances sobre el derecho a le verdad* [Some Scope on the Right to Truth], JUSTICIA VIVA, INSTITUTO DE DEFENSA LEGAL 11 (Peru), www.justiciaviva.org.pe/informes/col_ derechoalaverdad.doc.

tance of uncovering the truth of massive human rights violations, including enforced disappearances, has led certain commentators to contend that the right to truth was an emerging principle of international law.[283] However, notwithstanding the wide international impetus toward the recognition of some sort of right to truth, the uncertainty of its content warrants the conclusion that it has not yet reached the shape of a real legal norm.[284] The view of the Inter-American Court with respect to the recognition of an autonomous right to truth mirrors the commentators' concerns for the difficulty of giving a clear normative content. On the one hand, the Court recognized the existence of a right to truth. On the other hand, it held that in light of circumstances of the case, the right to truth is "subsumed" in the right of the victim or the next to kin to obtain clarification of the facts through the investigation and prosecution imposed through Articles 8 and 25 of the Convention.[285]

In other words, the Court's interpretation of the right to truth is limited to the right to obtain an investigation of the facts and to confront the perpetrators prosecuted.

Proponents of the recognition of an autonomous right to truth contend that it encompasses more than a mere obligation to investigate and prosecute on the part of the State. Therefore, the question arising is one of defining the scope of right to truth and whether it may truly be wider than an obligation to investigate and prosecute.

The normative content of the right to truth may be defined as two-fold: it is both a collective right and an individual right. As underscored by Diane Orentlicher, "[e]very people has the inalienable right to know the truth about past events concerning the perpetration

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[283] Juan E. Méndez, *Derecho a la Verdad Frente a las Graves Violaciones a los Derechos Humanos*, *in* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES, (M. Abregú y C. Courtis eds., 1997), *available at* http://www.aprodeh.org.pe/sem_verdad/documentos/Juan_E_ Mendez.doc.

[284] *See generally* Yasmin Naqvi, *El derecho a la verdad en el derecho internacional: ¿realidad o ficción?* 862 INT'L REV. RED CROSS 1 (2006), *available at* http://www.icrc.org/Web/spa/sitespa0.nsf/html/review-862-p245.

[285] Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 201 (Nov. 25, 2000).

of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes."[286] Therefore, the collective dimension of the right to truth may take the form of the establishment of truth commissions or other truth finding mechanisms. This dimension of the right to truth was expressly recognized by the General Assembly of the Organization of American States (OAS).[287] The recognition of a collective right to truth imposes the corollary duty on the State to put in place an appropriate truth finding mechanism. However, the collective right to truth is not confined to the mere establishment of a political truth finding mechanism. Indeed, the Inter-American Court made it plain that the "historical truth" contained in the Report of the Truth Commission in Peru cannot be a substitute for establishing the truth through judicial processes.[288] In a similar vein, the Inter-American Commission emphasizes that:

> [The] satisfaction of the collective dimension of the right to the truth demands procedural elucidation of the most comprehensive historical truth possible, which includes judicial determination of patterns of joint behavior and of the individual behavior of all the persons who in different ways were involved in such violations, as well as their respective liability.[289]

The Commission further considers that "[s]uch an investigation should be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victims or their family or their offer of proof."[290] Conversely, the in-

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[286] U.N. Econ. & Soc. Council [ECOSOC], Comm'n on H.R., *Promotion and Protection of Human Rights, Report of the Independent expert to update the Set of principles to combat impunity,* Principle 2, U.N. Doc., E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (*prepared by* Diane Orentlicher) [hereinafter Combat Impunity Report].

[287] *See* OAS Doc. AG/RES. 2267 (XXXVII-O-07) (June 5, 2007).

[288] La Cantuta Case, 2007 Inter-Am. Ct. H.R. (ser. C) No. 162,¶ 224 (Nov. 29, 2006).

[289] Castro v. Peru, Case 11.385, Inter-Am. C.H.R, ¶159 (2008).

[290] *Id.*

dividual dimension of the right to truth will be defined as the access to both truth commissions and judicial processes. As pointed out by the Office of the High Commissioner for Human Rights, the individual right to truth may be characterized by the right to know, to be informed, and to have access to information.[291] The right to truth is the right of the victim's family to know the truth with regard to the pattern of disappearance and its *modus operandi* but also to know whether the disappeared person was tortured and the location of his or her whereabouts.[292] The scope of the right to truth has therefore been significantly defined. The crucial issue of whether the recognition of an autonomous right to truth would actually work as an asset in terms of protection and enforcement of human rights beyond a mere obligation of investigation is nevertheless still pending. The Inter-American Court adopted the view that it does not. However, the recognition of the right to truth may be useful in several regards. First, it may reinforce the obligation of States to shed light on obscure practices at the reparation stage.[293] It may also enhance the

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[291] U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Human Rights, *Report to the Economic and Social Council on the Sixty-First Session of the Commission,* ¶ 52, U.N. Doc. E/CN.4/2005/L.10/Add.17 (April 22, 2005); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Human Rights, *Promotion and Protection of Human Rights: Right to Truth,* U.N. Doc. E/CN.4/2005/L.84 (Apr. 15, 2005).

[292] U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Human Rights, *Study on the Right to Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, ¶ 38, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) [hereinafter Study on the Right to Truth] (submitting that "as international law on the right to the truth has evolved to apply in all situations of serious violations of human rights, the material scope of the right to the truth has also expanded to include other elements. These may be summarized as the entitlement to seek and obtain information on: the causes leading to the person's victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators.").

[293] Currently the Inter-American Court pays due attention to the importance of obtaining the truth about what happened to the victim of a disappearance at the reparation stages where the Court tends to order the State to reopen investigations and to identify the body of the victim. This approach seems motivated by a con-

concept of truth beyond the language of remedies and set it as a goal in itself. The impulse given by certain advocates to the recognition of the right to truth may have a beneficial "spill over" effect on situations falling outside the scope of enforced disappearances and enhance the concept that every human right violation should be clarified and every victim should know the truth about the circumstances of the violation. Finally, it will be in line with the growing acceptance by the international community of an autonomous right to obtain the truth.[294]

It is important to stress that the recognition of the right to truth's implication goes beyond what may admittedly appear to be merely symbolic. On the contrary, the insertion of a concept of truth in the proceedings of justice sends a more powerful message; it shows the path toward what justice should aspire to achieve. Indeed, the concept of a right to truth clearly encompasses the centrality of the role of victims in criminal proceedings in order to restore the social order that was broken because of the crime. Such approach to justice lays at the basis of Truth and Reconciliation Commissions, which have been used in many instances after traumatic national events and correspond to the "collective right to truth."[295] As such the recognition of a right to truth would be valuable since it would allow restorative justice objectives and values to reach the status of a human right.

### *Conclusion*

Enforced disappearances pose serious challenges in terms of evidence in both the Inter-American and the European Court systems. Although both systems adopted a "free-evaluation" of evidence allowing them great leeway in deciding which type of evidence may be admitted, the Inter-American appears to be more inclined to admit indirect evidence. A significant difference between

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cern for the victims' relatives' need to know what happened. *See, e.g.*, Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000).

[294] *See* Study on the Right to Truth, *supra* note 292, ¶ 43 (explaining that despite the fact that the right to truth is closely related to other rights it remains an autonomous right with its own legal basis).

[295] Combat Impunity Report, *supra* note 286.

the Inter-American approach from the European lies in the issue of the shift of burden of proof. The Inter-American Court focuses on the existence of a pattern of disappearances and requires solely a link between the disappearances with that pattern to shift the burden of proof onto the State. Conversely, the European Court albeit making timid references to the phenomenon of disappearance in certain countries - continues to disregard patterns in its reasoning. It, nevertheless, admits that the burden of proof may shift once the applicant has made a *prima facie* demonstration that a person must be presumed dead. Fortunately, the European jurisprudence shows that the Court is flexible in finding *prima facie* death of the disappeared person. In addition, while both courts demonstrated that a State's lack of cooperation may in certain circumstance shift the burden of proof onto the State, this jurisprudence must be confirmed and clarified. With respect to the standard of proof, the European Court appears to be struggling with its unnecessarily high "beyond reasonable" standard and leans toward a reshaping of its content in line with the Inter-American Court's flexible standard.

The process of defining the notion of enforced disappearances has played a paramount role in the Inter-American system for purposes of setting up an adequate method when examining the type of violations that occur in disappearance cases. Thus, the endorsement by the Inter-American of the multiple rights approach along with the acceptance of an autonomous right not to be subjected to enforced disappearance, successfully embrace the complexity of the phenomenon of enforced disappearances. As a result, the Court automatically finds violation of a right to life, right to humane treatment, right to liberty and security, and the right to an effective remedy. It is, nevertheless, reluctant to recognize violations of the right to legal personality and disregards the existence of the right to truth as an autonomous right.

On the other side, the European Court jurisprudence is devoid of any specific definition and method to tackle the complexity of the enforced disappearances. It, therefore, proceeds by analyzing violations of each individual right on its own. In many instances, the stringent interpretation of these rights prevents the Court from finding violations. In order to overcome these limitations, the Court chose to develop the positive obligation related to each right. Thus,

the Court will be more inclined to find a violation of the obligation to conduct an investigation, rather than the substantive right itself. Such an approach is, nevertheless, disappointingly timid. As a result, the Court ultimately eschews its obligation to lower its strict standards to match the challenges of the phenomenon of enforced disappearances.

The European Court of Human Rights should therefore favor a humble gaze at the work of the Inter-American Court of Human Rights, which after years of experience, has managed to develop a valuable jurisprudence that pays due regard to the gravity and difficulty of the phenomenon of enforced disappearances.

Specifically the European Court should adopt a violation of multiple rights approach, which will lower the high threshold of proving certain violations. In that respect, the European Court may also adopt methods such as the recognition of patterns of enforced disappearances in order to create presumptions of death and torture.

Finally, both the Inter-American and European Court of Human Rights should enter into a profound dialogue with respect to the assets of recognizing the right to truth, and by the same token, integrate restorative justice within the human rights discourse.