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Judicial Review of State Action by International Courts

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Dinah L. Shelton

Abstract

This Article examines judicial review of state action by international courts, in particular inter-American institutions.

ARTICLES

JUDICIAL REVIEW OF STATE ACTION BY INTERNATIONAL COURTS

*Dinah L. Shelton**

INTRODUCTION

On July 29, 1988, the Inter-American Court of Human Rights (the "Court") pronounced its first judgment in a contentious proceeding.¹ The case of Angel Manfredo Velásquez Rodríguez ("Velásquez Rodríguez") was submitted to the Court by the Inter-American Commission on Human Rights (the "Commission"), based on a 1981 petition filed against the government of Honduras. The Court's judgment unanimously found that Honduras had violated the rights of personal liberty, humane treatment, and life, guaranteed by the American Convention of Human Rights (the "Convention" or the

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1. See Velásquez Rodríguez Case, ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS [INTER-AM. CT. H.R.] 35, OAS/ser. L./V./III.19, doc. 13 (1988). In an earlier case submitted by Costa Rica, the Court declined to proceed because the Inter-American Commission had not first considered the matter. See Matter of Viviana Gallardo, No. G. 101/81, INTER-AM. CT. H.R. (Decision of Nov. 13, 1981). In addition to these two cases, the Court has issued nine advisory opinions. See Judicial Guarantees in States of Emergency, Advisory Opinion No. OC-9/87, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 9 (1987); Habeas Corpus in Emergency Situations, Advisory Opinion No. OC-8/87, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 8 (1987); Enforceability of the Right to Reply or Correction, Advisory Opinion No. OC-7/86, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 7 (1986); The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion No. OC-6/86, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 6 (1986); Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion No. OC-5/85, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 5 (1985); Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion No. OC-4/84, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 4 (1984); Restrictions to the Death Penalty, Advisory Opinion No. OC-3/83, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 3 (1983); The Effect of Reservations on the Entry into Force of the American Convention, Advisory Opinion No. OC-2/82, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 2 (1982), reprinted in 22 I.L.M. 37 (1983); "Other Treaties" Subject to the Advisory Jurisdiction of the Court, Advisory Opinion No. OC-1/82, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 1 (1982), reprinted in 22 I.L.M. 51 (1983).

“American Convention”),² and decided that Honduras must pay fair compensation to the victim’s next-of-kin.³

The Court’s judgment is significant both in its articulation of the law of state responsibility for human rights violations and for the process by which the Court arrived at its conclusions. During the proceedings, the Court determined, *inter alia*, the scope and standard of its review, issues concerning the admissibility and weight of evidence, and the burden and degree of proof. This article will discuss the procedural aspects of the case, comparing the Inter-American Court’s treatment of judicial review and evidentiary matters with that of other permanent international tribunals: the International Court of Justice (the “ICJ”),⁴ the European Court of Human Rights (the “ECHR”),⁵ and the European Court of Justice (the “ECJ”).⁶ It

2. American Convention on Human Rights, OEA/ser. K/XVI/1.1, doc. 65, rev. 1, corr. 2 (1970), *reprinted in* 9 I.L.M. 673 (1970) [hereinafter American Convention]. Nineteen states members of the Organization of American States have ratified the Convention: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. *See* ORG. OF AM. STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/ser.L./V./II.65, doc. 6 (1985) [hereinafter HANDBOOK]. The United States is a signatory, but not a state party. *See* President’s Message to the Senate Transmitting Human Rights Treaties, PUB. PAPERS, Feb. 23, 1978, at 395.

3. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 76, ¶ 194. The Court did not fix the amount of damages because the parties submitted no evidence on the issue. *Id.* Instead, it decided that Honduras and the Commission should agree on the amount of damages and present their agreement to the Court for approval. *Id.* The parties were unable to reach agreement and the matter is pending before the Court. Telephone interview with Professor Claudio Grossman, American University, Washington College of Law, Washington, D.C., Adviser for the Inter-American Commission on Human Rights (May 8, 1989).

4. The ICJ is the judicial organ of the United Nations. Its jurisdiction comprises all cases referred to it by states parties or pursuant to treaty or through acceptance in advance of the jurisdiction of the Court. *See* Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055, 1060, T.S. No. 993, at 30 [hereinafter ICJ Statute].

5. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1955) [hereinafter European Convention], established both the European Court of Human Rights and the European Commission on Human Rights. The commission’s functions are to receive applications concerning victims, review them for admissibility, and attempt a “friendly settlement” if the petition is found to be admissible. The commission undertakes fact-finding and, if necessary, investigations of the petition’s allegations. *Id.* art. 28, 213 U.N.T.S. at 238-40. If a friendly settlement is not reached, the commission draws up a report on the facts and its opinion as to whether a violation of the Convention has been established. *Id.* art. 31, 213 U.N.T.S. at 240. Either the commission or a state party that

will point out where the Inter-American Court has developed or refined international rules of evidence to meet the particular concerns of human rights litigation. It concludes by affirming the need, implicitly recognized in this case, to balance the traditional principle of flexibility in international evidentiary

has accepted the court's jurisdiction may submit the matter to the court after commission proceedings have been completed. *Id.* art. 44, 213 U.N.T.S. at 246. As of January 1988, 144 cases had been submitted to the court. See COUNCIL OF EUROPE, EUROPEAN COMMISSION OF HUMAN RIGHTS: STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 94-98 (Supp. 1987) [hereinafter STOCK-TAKING]. The commission and the court each contain a number of members equal to the number of states parties to the convention, currently twenty-one. Those states are Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. On the European Convention in general, see F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1974); S. ERCMAN, GUIDE TO CASE LAW (1981); F. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975); Z. NEDJATI, HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION (1978); A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE (2d ed. 1977); see also COUNCIL OF EUROPE, BIBLIOGRAPHY RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1978). Concerning procedures under the European Convention, see O'Boyle, *Practice and Procedure Under the European Convention on Human Rights*, 20 SANTA CLARA L. REV. 697 (1980). For an overview of the European Court, see Bos-suyt & Vanden Bosch, *Judges and Judgments: 25 Years of Judicial Activity of the Court of Strasbourg, 1984-1985* REVUE BELGE DE DROIT INTERNATIONAL 695.

6. The European Court of Justice (the "ECJ") is the tribunal of the European Coal and Steel Community (the "ECSC"), the European Economic Community (the "EEC"), and the European Atomic Energy Community ("Euratom"). See Protocol on the Statute of the Court of Justice of the European Economic Community, Apr. 17, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) at 141 (official English version), 298 U.N.T.S. 147 (unofficial English trans.); Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) at 1 (official English version), 298 U.N.T.S. 11 (unofficial English trans.) [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) at 162 (official English version), 298 U.N.T.S. 167 (unofficial English trans.) [hereinafter Euratom Treaty]; Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189) at 1 (official English version), 261 U.N.T.S. 140 (unofficial English trans.) [hereinafter ECSC Treaty]. The Court's powers include direct review of Community action pursuant to article 173 of the EEC Treaty and indirect control through cases referred for review by national courts under article 177 of the same treaty. The Court's jurisdiction is not defined exclusively by the treaties, but also by provisions in other agreements, conventions, and protocols. See K.P.E. LASOK, THE EUROPEAN COURT OF JUSTICE 3 (1984). The Single European Act, O.J. L 169/1 (1987), authorizes creation of a court of first instance to hear and determine certain claims, actions, or proceedings brought by natural or legal persons. There will be a right of appeal to the European Court of Justice on points of law only. See EEC Treaty, *supra*, art. 168a, added by Single European Act, *supra*, art. 11, at 6; Euratom Treaty, *supra*, art. 140, 1973 Gr. Brit. T.S. No. 1, at 202, 298 U.N.T.S. at 213; ECSC Treaty, *supra*, art. 32d, added by Single European Act, *supra*, art. 4, at 4.

matters with some degree of predictability of international tribunals as investigatory, as well as adjudicatory, bodies.

I. INTER-AMERICAN INSTITUTIONS

Since 1948, the Inter-American system of the Organization of American States (the "OAS") has developed ambitious and effective mechanisms for the promotion and protection of human rights. The legal documents of the system⁷ recognize civil, political, economic, social, and cultural rights.⁸ They establish the Inter-American Commission on Human Rights⁹ and the Inter-American Court of Human Rights.¹⁰ The Commis-

7. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2416, T.I.A.S. No. 2361, 119 U.N.T.S. 3, amended Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 326 [hereinafter OAS Charter]. The Inter-American system has two legal sources, one of which is the OAS Charter. *Id.* The other is the American Convention. See *supra* note 2. In addition, certain subsidiary documents are legally binding. See Regulations of the Inter-American Commission on Human Rights (1980, modified 1985) [hereinafter Inter-Am. Commission Regulations], reprinted in HANDBOOK, *supra* note 2, at 115-42; Rules of Procedure of the Inter-American Court of Human Rights (1980) [hereinafter Inter-Am. Court Rules], reprinted in HANDBOOK, *supra* note 2, at 155-74; Statute of the Inter-American Court of Human Rights (1979) [hereinafter Inter-Am. Court Statute], reprinted in HANDBOOK, *supra* note 2, at 143-54; Statute of the Inter-American Commission on Human Rights (1979) [hereinafter Inter-Am. Commission Statute], reprinted in HANDBOOK, *supra* note 2, at 103-13; American Declaration of the Rights and Duties of Man (1948) [hereinafter American Declaration], reprinted in HANDBOOK, *supra* note 2, at 17-25. On the legal status of the American Declaration, see Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828, 833-36 (1975).

8. See American Convention, *supra* note 2, arts. 3-26, at 2-9, reprinted in 9 I.L.M. at 676-83; American Declaration, *supra* note 7, arts. I-XXVIII, reprinted in HANDBOOK, *supra* note 2, at 20-25.

9. See OAS Charter, *supra* note 7, arts. 51(e), 112, 150, 21 U.S.T. at 674, 691, 701, T.I.A.S. No. 6847, at 68, 85, 95, 721 U.N.T.S. at 342, 364-66, 376; American Convention, *supra* note 2, arts. 33-34, at 11, reprinted in 9 I.L.M. at 685. The OAS General Assembly elects the seven members of the Commission in an individual capacity to a term of four years. OAS Charter, *supra* note 7, art. 51(e), 21 U.S.T. at 674, T.I.A.S. No. 6847, at 68, 721 U.N.T.S. at 342; American Convention, *supra* note 2, art. 37, at 11, reprinted in 9 I.L.M. at 685. The Commission represents all member states of the OAS as both an organ of the OAS and of the Convention. OAS Charter, *supra* note 7, art. 112, 21 U.S.T. at 691, T.I.A.S. No. 6847, at 85, 721 U.N.T.S. at 364-66. The Commission functions to promote the observance and protection of human rights. It also serves as a consultative organ of the organization in human rights matters. See *id.*; see also American Convention, *supra* note 2, art. 41, at 12, reprinted in 9 I.L.M. at 686; Shelton, *Implementation Procedures of the American Convention on Human Rights*, 26 GERM. Y.B. INT'L L. 238 (1983).

10. See American Convention, *supra* note 2, art. 33, at 11, reprinted in 9 I.L.M. at 685. The Court consists of seven judges nominated from among nationals of the member states of the OAS. *Id.* art. 52, at 16, reprinted in 9 I.L.M. at 690. Judges are

sion may review complaints from individuals and groups or itself initiate proceedings concerning human rights violations by any OAS member state.¹¹ The Commission may also undertake country-wide studies of human rights practices and make on-site investigations.¹²

The Court may hear cases between states parties to the Convention or against a state at the request of the Commission if the state involved has accepted the Court's jurisdiction.¹³ The Court may award damages and take provisional measures when necessary.¹⁴

elected to the Court in an "individual capacity" by a vote of the states parties to the Convention. *Id.* The Judges of the Court are to be "of the highest moral authority," "of recognized competence in the field of human rights," and must "possess the qualifications required for the exercise of the highest judicial functions" in the state of nationality or of the state that nominates them. *Id.* The judges are elected for a term of six years and "may be reelected only once." *Id.* art. 54, at 16, reprinted in 9 I.L.M. at 690; see Inter-Am. Court Statute, *supra* note 7, arts. 18-20, reprinted in HANDBOOK, *supra* note 2, at 150-51; Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231 (1982).

11. See American Convention, *supra* note 2, arts. 44-45, at 13, reprinted in 9 I.L.M. at 687. The Inter-American system is unique in making the right of individual petition automatic and inter-state proceedings optional. *Id.*; see Inter-Am. Commission Regulations, *supra* note 7, art. 26, reprinted in HANDBOOK, *supra* note 2, at 125; Inter-Am. Commission Statute, *supra* note 7, arts. 18-20, reprinted in HANDBOOK, *supra* note 2, at 109-11; Norris, *The Individual Petition Procedure of the Inter-American System for the Protection of Human Rights*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 117 (H. Hannum ed. 1986); Norris, *Bringing Human Rights Petitions Before the Inter-American Commission*, 20 SANTA CLARA L. REV. 733 (1980).

12. See Inter-Am. Commission Regulations, *supra* note 7, art. 62, reprinted in HANDBOOK, *supra* note 2, at 137-38; Inter-Am. Commission Statute, *supra* note 7, arts. 18(c), (g), reprinted in HANDBOOK, *supra* note 2, at 109-10. To date, the Commission has published country reports concerning Cuba (1962, 1963, 1967, 1970, 1977, 1979, 1983); the Dominican Republic (1965, 1966); Haiti (1969, 1979); Honduras (1970); Chile (1974, 1976, 1977, 1985); Panama (1978); Nicaragua (1978, 1981, 1984); Paraguay (1978); Uruguay (1978); El Salvador (1970, 1978); Argentina (1980); Colombia (1981); Guatemala (1981, 1983, 1985); Bolivia (1981); and Suriname (1983, 1985). See HANDBOOK, *supra* note 2, at 192-94. For a discussion of the effectiveness of on-site investigations, see Norris, *Observations In Loco: Practice and Procedure of the Inter-American Commission on Human Rights, 1979-1983*, 19 TEX. INT'L L.J. 285 (1984); Norris, *Observations In Loco: Practice and Procedure of the Inter-American Commission on Human Rights*, 15 TEX. INT'L L.J. 46 (1980); Shelton, *Utilization of Fact-Finding Missions to Promote and Protect Human Rights: The Chile Case*, 2 HUM. RTS. L.J. 1 (1981).

13. See American Convention, *supra* note 2, arts. 61(1), 62(3), at 17-18, reprinted in 9 I.L.M. at 691-92. The Court also has the most extensive advisory jurisdiction of any international tribunal. See Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985).

14. See American Convention, *supra* note 2, art. 63(1)-(2), at 18, reprinted in 9 I.L.M. at 692.

II. THE VELÁSQUEZ RODRIGUEZ CASE

According to the 1981 petition filed with the Commission and supplementary information received later, Velásquez Rodríguez was a student at the National Autonomous University of Honduras when he disappeared.¹⁵ He was allegedly kidnapped and detained without a warrant for his arrest by members of the National Office of Investigations (the "DNI") and G-2 of the Armed Forces of Honduras.¹⁶ During his detention he was taken to various locations where he was interrogated and tortured.¹⁷

The Commission considered the Velásquez Rodríguez case over a five-year period. It sought to obtain information from the government to determine the truth of the facts alleged.¹⁸ The Commission concluded its proceedings on April 18, 1986, finding the evidence showed Velásquez Rodríguez to be missing and that Honduras "has not offered convincing proof that would allow the Commission to determine that the allegations are not true."¹⁹

On April 24, 1986, the Commission submitted the case to the Court.²⁰ The government responded by entering preliminary objections to the Court's jurisdiction.²¹ The Court heard

15. Velásquez Rodríguez Case, INTER-AM. CT. H.R. 35, 36, ¶ 3. OAS/ser. L./V./III.19, doc. 13 (1988).

16. *Id.*

17. *Id.*

18. The Commission received the petition on October 7, 1981, and communicated the relevant parts to the government for response. *Id.* ¶ 4. The Commission tried on several occasions to obtain information, but the government failed to reply. *Id.* After nearly two years, the Commission applied article 42 of its regulations and presumed the truth of the uncontested allegations. *Id.* at 35-36, ¶¶ 1-4; see also *infra* note 58. One month later, on November 18, 1983, the government asked for reconsideration on the grounds that domestic remedies had not been exhausted. *Id.* ¶ 5. The Commission reopened the proceedings and sought further information from the government. *Id.* at 36-37, ¶ 6. The government filed responses in October 1985 and April 1986. *Id.* at 37, ¶¶ 8-9. The Commission, by Resolution 22/86 of April 18, 1986, deemed the responses inadequate and, in a final decision, "reaffirmed" the 1983 resolution presuming the truth of the facts alleged. *Id.* ¶ 10.

19. *Id.* The government's evidence consisted of the results of an investigatory commission set up to study the matter as well as a decision of the First Criminal Court, which dismissed the complaints filed against persons allegedly responsible for the disappearance of Velásquez Rodríguez. *Id.* ¶¶ 7-9.

20. *Id.* ¶ 12.

21. *Id.* at 38, ¶ 16; see also Inter-Am. Court Rules, *supra* note 7, art. 27, reprinted in HANDBOOK, *supra* note 2, at 165 (procedure for filing preliminary objections).

argument on the objections on June 15, 1987,²² and unanimously rejected them, except for those relating to the issue of exhaustion of domestic legal remedies, which were joined to the merits of the case.²³ In that same order, the Court set a schedule for the filing of memorials and offers of proof, "with an indication of the facts that each item of evidence is intended to prove."²⁴ The government and Commission were also ordered to indicate "how, when and under what circumstances" each wished to present its evidence.²⁵ The Court subsequently admitted all testimonial and documentary evidence offered by both the Commission and the government.²⁶

Hearings on the merits of the case took place between September 30 and October 7, 1987. The Court heard arguments by agents for the Commission and the government. In addition, the Commission called a series of witnesses for three purposes. The first group testified about the general situation in Honduras between 1981 and 1984 regarding disappearances and the government's complicity in them.²⁷ The second group testified as to the existence of effective domestic remedies.²⁸ Finally, two witnesses testified on the specific facts relating to Velásquez Rodríguez.²⁹

After hearing all the witnesses, the Court ordered the submission of additional documentary and testimonial evidence, including testimony by two members of the Honduran army. It also ordered Honduras to locate a missing witness.³⁰ The government responded by requesting that the ordered testi-

22. Prior to the hearing, on March 20, 1987, the Commission filed a "motion" together with its observations, asking that the date set for oral argument on the preliminary objections be rescinded. The Court denied the motion without a statement of reasons. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 39, ¶¶ 20-22. This procedure is noteworthy because none of the Court's basic texts refer to the existence or filing of motions, nor is the term used in any of the prior opinions of the Court. It is similarly absent from the texts of other international tribunals.

23. *Velásquez Rodríguez Case*, INTER-AM. CT. H.R. 35, 55, ¶ 96, OEA/ser. L./V./III.17, doc. 13 (1987) (preliminary objections) [hereinafter Preliminary Objections].

24. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 39, ¶ 24.

25. *Id.*

26. *Id.* at 40, ¶ 27.

27. *Id.* at 41, ¶ 28(c).

28. *Id.* ¶ 28(d).

29. *Id.* ¶ 28(e).

30. *Id.* at 42, ¶ 29(c)(1).

mony be heard in a closed hearing, for national security reasons. The Court acceded to the government's request over the objections of the Commission and, in a closed session attended by both parties, heard the two army officers as well as the head of the Honduran intelligence services.³¹

Subsequent to the hearing, while the case remained pending, the Court was obligated to issue two interim protective measures requested by the Commission as a result of threats made against certain witnesses and the murders of others.³²

The Court issued its judgment on the merits on July 29, 1988.³³ It concluded that existing remedies in Honduras during the period in question were ineffective,

because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities.³⁴

On the merits, the Court found that from 1981 to 1984 between 100 and 150 persons disappeared in Honduras under similar circumstances.³⁵ In regard to the kidnappings, "[i]t was public and notorious knowledge in Honduras that the

31. *Id.* ¶¶ 32-34.

32. The January 15 order, referring to attacks on witnesses as "savage, primitive, inhuman and reprehensible," demanded that the Honduran government adopt, without delay, such measures as are necessary to prevent further infringements on the basic rights of those who have appeared or have been summoned to do so before this Court . . . in strict compliance with the obligation of respect for and observance of human rights, under the terms of Article 1(1) of the Convention.

Velásquez Rodríguez Case, INTER-AM. CT. H.R. 25, 26, OAS/ser. L./V./III.19, doc. 13 (1988) (Interim Protection Order of Jan. 15). The same order required the government to investigate and punish the threats against and murders of witnesses. *Id.* On January 18, 1988, following a public hearing, the Court decided on further measures, requiring the Honduran government report to the Court the specific steps taken to protect witnesses and investigate crimes against them. The Court included a demand for medical and forensic reports on those witnesses who had been killed. Velásquez Rodríguez Case, INTER-AM. CT. H.R. 27, 28, OAS/ser. L./V./III.19, doc. 13 (1988) (Interim Protection Order of Jan. 19). The government submitted autopsy and forensic reports to the Court within two weeks. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 45-46, ¶ 46. Further documentation, including autopsy and ballistic reports, was submitted by the government the following month. *Id.*

33. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 35.

34. *Id.* at 52, ¶ 80.

35. *Id.* at 63-66, ¶ 147.

kidnappings were carried out by military personnel or the police, or persons acting under their orders"³⁶

The Court further found that Velásquez Rodríguez was kidnapped under circumstances falling within the systematic practice of disappearances, that persons connected with the armed forces or under its direction carried out the kidnapping,³⁷ and that there was no evidence that Velásquez Rodríguez disappeared "to join subversive groups."³⁸ Therefore, the Court concluded, Honduran officials either carried out or acquiesced in the kidnapping, resulting in a failure by the government "to guarantee the human rights affected by" disappearances.³⁹

The Court held that it is a principle of international law that the state is responsible for the acts and omissions of its agents undertaken in their official capacity, even if they are acting outside the scope of their authority or in violation of internal law.⁴⁰ Intent or motivation is irrelevant.⁴¹

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.⁴²

Where human rights violations are committed by private parties and not seriously investigated, those parties "are aided in a sense by the government, thereby making the State responsible on the international plane."⁴³ In conclusion:

The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article

36. *Id.* at 64, ¶ 147(c).

37. *Id.* at 65, ¶ 147(f).

38. *Id.* at 65-66, ¶ 147(h).

39. *Id.* at 66, ¶ 148.

40. *Id.* at 70, ¶ 170.

41. *Id.* at 71, ¶ 173.

42. *Id.* ¶ 174.

43. *Id.* at 72, ¶ 177.

1(1) of the Convention, which obligated it it [sic] to ensure Manfredo Velásquez the free and full exercise of his human rights.⁴⁴

III. *EVIDENTIARY AND PROCEDURAL ISSUES*

A. *Standard and Scope of Review*

Like other international tribunals, the Inter-American Court may investigate as well as judge cases submitted to it.⁴⁵ However, unlike other international tribunals, except the ECHR, the Court entertains cases only upon the conclusion of proceedings before a commission.⁴⁶ In both the Inter-American and European systems, the commission normally makes findings of fact, gives opinions on issues of law, and concludes whether or not the respondent state has violated one or more protected human rights.⁴⁷ In this situation, the courts necessarily review not only state action, but their respective commis-

44. *Id.* at 73, ¶ 182.

45. See Inter-Am. Court Rules, *supra* note 7, arts. 34-35, reprinted in HANDBOOK, *supra* note 2, at 167; ICJ Statute, *supra* note 4, arts. 49-50, 59 Stat. at 1062, T.S. No. 993, at 32; European Court of Human Rights, Revised Rules of Court, Rule 40 (1982) [hereinafter Eur. Ct. H.R. Revised Rules]; European Court of Justice, Rules of Procedure, arts. 45-52, O.J. C 39/1, at 13-15 (1982) [hereinafter ECJ Rules of Procedure]. The two functions represent a combination of common law and civil law traditions. For a comparison of procedural aspects of common law and civil law tribunals, see Deák, *The Place of the "Case" in the Common and the Civil Law*, 8 TUL. L. REV. 337 (1933-34). For a brief discussion of the civil law impact on the European Court of Justice, see K.P.E. LASOK, *supra* note 6, at 255.

46. See *supra* notes 5, 9-14, and accompanying text. Although it has not yet happened, in certain cases the International Court of Justice (the "ICJ") might review findings and determinations by international commissions or committees. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, art. 22, 660 U.N.T.S. 195, 236-38 [hereinafter Racial Convention] (providing that "[a]ny dispute between two or more States Parties with respect to the interpretation or application of [the] Convention, which is not settled by negotiation or by the procedures expressly provided for in [the] Convention" may be referred to the ICJ). The Racial Convention's procedures involve a supervisory body, the Committee on the Elimination of Racial Discrimination. *Id.* arts. 8-14, 660 U.N.T.S. at 224-32. Similarly, the European Court of Justice may review the decisions and recommendations of Community institutions as well as hear disputes between states parties submitted by special agreement. See EEC Treaty, *supra* note 6, arts. 173, 182, 1973 Gr. Brit. T.S. No. 1, at 57, 59, 298 U.N.T.S. at 75-76, 78; Euratom Treaty, *supra* note 6, art. 154, 1973 Gr. Brit. T.S. No. 1, at 204, 298 U.N.T.S. at 216; ECSC Treaty, *supra* note 6, arts. 33, 89, 1973 Gr. Brit. T.S. No. 2, at 31, 85, 261 U.N.T.S. at 167, 223; G. BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 125-39 (1981).

47. See *supra* notes 5, 11.

sions' findings and conclusions as well.⁴⁸ The courts, thus, have aspects in common with both trial and appellate tribunals. To the extent that their judicial review has a partly appellate character, they face issues of scope and standard of review uncommon in tribunals that hear cases at first instance. Specifically, the Inter-American and European courts must decide what deference, if any, is due their commissions' determinations.

In *Velásquez Rodríguez*, the Inter-American Court reviewed de novo all question of fact and law.⁴⁹ The Commission argued against this, claiming that Commission decisions on admissibility of petitions should be given conclusive effect.⁵⁰ The Court held that the Convention gives the Court full jurisdiction over all issues relevant to a case and that it is not bound by what the Commission previously may have decided.⁵¹ The Court stressed that it is institutionally separate, the sole judicial organ in the system, and does not act as a court of appeal in relation to the Commission.⁵²

The Court's de novo consideration of issues of law is clearly correct, because the Commission is, essentially, not a judicial body. Although both the Commission and the Court supervise implementation of human rights obligations by states parties, it is the Court whose stated purpose is the appli-

48. *Id.*

49. Preliminary Objections, *supra* note 23, at 41, ¶ 28. De novo review means trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered. *See, e.g.*, *Exner v. FBI*, 612 F.2d 1202, 1209 (9th Cir. 1980).

50. Preliminary Objections, *supra* note 23, at 41, ¶ 28. Similar arguments were made to the European Court of Human Rights and were similarly rejected. *See, e.g.*, *Case of Klass*, 28 Eur. Ct. H.R. (ser. A) at 17, ¶ 32 (1978); *Ringeisen Case*, 13 Eur. Ct. H.R. (ser. A) at 35-36, ¶ 82 (1971); *DeWilde, Ooms and Versyp Cases* ("Vagrancy" Cases), 12 Eur. Ct. H.R. (ser. A) at 28, ¶ 44 (1970). The European Court's assumption of jurisdiction is justified as "simply ascertaining whether the conditions allowing it to deal with the merits of the case are satisfied." *Airey Case*, 32 Eur. Ct. H.R. (ser. A) at 10, ¶ 17 (1979).

51. Preliminary Objections, *supra* note 23, at 41, ¶ 29. Similarly, in the *Klass* and *Vagrancy* cases, the European Court of Human Rights confirmed that once a case is referred to it, "the Court is endowed with full jurisdiction and may take cognisance of all questions of fact or of law arising in the course of the proceedings, including questions which may have been raised before the Commission under the head of admissibility." *Klass*, 28 Eur. Ct. H.R. at 17, ¶ 32; *see Vagrancy*, 12 Eur. Ct. H.R. at 29, ¶¶ 49-50.

52. Preliminary Objections, *supra* note 23, at 41, ¶ 29.

cation and interpretation of the American Convention.⁵³ In contrast, the main function of the Commission is "to promote respect for and defense of human rights."⁵⁴ The Commission's work in investigating and considering petitions is one of many significant and varied tasks accorded it.⁵⁵ The difference in the roles of the Court and Commission is further reflected in the composition of the two bodies: Members of the Court must be jurists who possess the qualifications required to exercise the highest judicial functions under national law, while members of the Commission are required to "be persons of high moral character and recognized competence in the field of human rights."⁵⁶ The Commission itself recognized the Court's duty to develop and apply the law of the system, as reflected in Commission requests to the Court for advisory opinions interpreting provisions of the Convention.⁵⁷

Whether the Court should consider *de novo* the Commission's findings of fact is less certain. *De novo* review was necessary in *Velásquez Rodríguez* because there were no Commission findings. The Commission's conclusions were based on the presumed truth of the petition's allegations, because the government did not adequately respond to requests for informa-

53. See American Convention, *supra* note 2, art. 62(3), at 18, *reprinted in* 9 I.L.M. at 692. The European Court of Human Rights notes in its similar system that a case assumes a judicial character when it is referred to the court. See *Lawless Case*, 1 Eur. Ct. H.R. (ser. A) at 13 (1960).

54. See American Convention, *supra* note 2, art. 41, at 12, *reprinted in* 9 I.L.M. at 686.

55. See *supra* notes 11-12 and accompanying text; see also Inter-Am. Commission Statute, *supra* note 7, arts. 18-20, *reprinted in* HANDBOOK, *supra* note 2, at 109-11; American Convention, *supra* note 2, *reprinted in* 9 I.L.M. at 673.

56. American Convention, *supra* note 2, arts. 34, 52, at 11, 16, *reprinted in* 9 I.L.M. at 685, 690. For critiques of the Commission's legal analysis, see Shelton, *Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights*, 3 AM. U.J. INT'L L. & POL'Y 323, 332-34 (1988); Shelton, *Abortion and the Right to Life in the Inter-American System: The Case of "Baby Boy,"* 2 HUM. RTS. L.J. 309 (1981); Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 AM. U.J. INT'L L. & POL'Y 339 (1988).

57. The Commission requested three of the Court's nine advisory opinions. See *Habeas Corpus in Emergency Situations*, Advisory Opinion No. OC-8/87, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 8 (1987); *Restrictions to the Death Penalty*, Advisory Opinion No. OC-3/83, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 3 (1983); *The Effect of Reservations on the Entry into Force of the American Convention*, Advisory Opinion No. OC-2/82, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 2 (1982).

tion.⁵⁸ Although the Court could have deferred to the Commission, adopting its conclusions and estopping Honduras from contesting the presumed facts, it based its judgment as much as possible on proof rather than presumption,⁵⁹ consistent with the practice of other tribunals.⁶⁰

The Court did not decide the standard of review it would apply if facts remain contested in a proceeding where there is a detailed Commission report. The practice of other tribunals varies. The judgments of the ECHR reveal only three cases in which facts remained disputed following the commission's proceedings.⁶¹ In all three cases the court reviewed the facts, without explicitly discussing its standard of review.⁶² In practice, the court appears to give substantial weight to the com-

58. See *supra* notes 18-19 and accompanying text. The Court did not decide the validity of Inter-American Commission Regulation, *supra* note 7, art. 42. Velásquez Rodríguez Case, INTER-AM. CT. H.R. 35, 36, ¶ 4, OAS/ser. L./V./III.19, doc. 13 (1988). Some states have questioned the legality of the presumption of truth, which arguably goes beyond a procedural rule and may not be adopted without clear authority in the Convention, however useful it might be as a sanction for non-cooperation. The Court Rules leave open the question of how the Court should proceed in the event of a party's default. Compare Inter-Am. Court Rules, *supra* note 7, art. 24, reprinted in HANDBOOK, *supra* note 2, at 164, with ICJ Statute, *supra* note 4, art. 53, 59 Stat. at 1062, T.S. No. 993, at 32 and Eur. Ct. H.R. Revised Rules, *supra* note 45, R. 51.

59. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 61, ¶ 138. The Court may have felt that a decision based upon unsubstantiated allegations would be less authoritative and credible than one where the allegations had been fully tested through the production and evaluation of evidence.

60. In *Free Zones of Upper Savoy and the District of Gex*, the Permanent Court of International Justice (the "PCIJ") denied an objection to the admissibility of certain evidence, stating that "the decision of an international dispute of the present order should not mainly depend on a point of procedure . . ." *Free Zones of Upper Savoy and the District of Gex* (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 96, 155-56 (June 7).

61. The first was an interstate proceeding, *Ireland v. U.K.*, 25 Eur. Ct. H.R. (ser. A) (1978). The other two were individual petitions referred to the court, one by the commission, *Artico Case*, 37 Eur. Ct. H.R. (ser. A) (1980), and the other by the commission and the government, *Pakelli Case*, 64 Eur. Ct. H.R. (ser. A) (1983).

62. In *Northern Ireland*, the court considered objections to the commission's fact-finding procedures and evidence taken. *Ireland v. U.K.*, 25 Eur. Ct. H.R. at 7-8, ¶ 8. In a February 11, 1977 order, the court held that it could not rule on the correctness of the commission's procedures, but that "it is empowered to assess the relevance and probative value of the evidence so obtained." *Id.*; see *Pakelli*, 64 Eur. Ct. H.R. at 15-16, ¶¶ 32-34; *Artico*, 37 Eur. Ct. H.R. at 14-15, ¶¶ 29-30. But see Eur. Ct. H.R. Revised Rules, *supra* note 45, R. 29(2).

mission's findings.⁶³ Such deference may explain, in part, the absence of disputed facts before the court; a government is unlikely to contest commission findings if there is a strong presumption in their favor.⁶⁴

The ECJ hears actions under several different treaty provisions.⁶⁵ One of these restricts review to the formal validity of the decision and to the interpretation of the provisions of the Euratom Treaty, thus apparently precluding factual review.⁶⁶ In contrast, article 173 of the EEC Treaty authorizes the ECJ to review an evaluation of the situation, resulting from economic facts or circumstances.⁶⁷ Similarly, under article 37 of the ECSC Treaty, the court may determine whether certain of its commission's decisions are "well-founded."⁶⁸ In the latter case, the court is authorized to review *de novo* and may substitute its own judgment in the matter.⁶⁹ The court may also review certain commission actions for abuse of discretion.⁷⁰ Generally, the question of the standard of review depends on whether or not the defendant acted pursuant to a provision granting it sole discretion; as may be expected, the greater the scope of discretion, the narrower the standard of review.⁷¹

63. See, e.g., *Ireland v. U.K.*, 25 Eur. Ct. H.R. at 7-8, ¶ 8; see also O'Boyle, *supra* note 5, at 726.

64. Of course, even at the commission, most cases concern the compatibility of national legislation with the European Convention's human rights protections. As a result, issues of fact are infrequently presented.

65. See, e.g., EEC Treaty, *supra* note 6, arts. 172-73, 1973 Gr. Brit. T.S. No. 1, at 57, 298 U.N.T.S. at 75-76; Euratom Treaty, *supra* note 6, art. 18, 1973 Gr. Brit. T.S. No. 1, at 171, 298 U.N.T.S. at 179; ECSC Treaty, *supra* note 6, arts. 33, 36-37, 1973 Gr. Brit. T.S. No. 2, at 31-33, 261 U.N.T.S. at 167-69.

66. See Euratom Treaty, *supra* note 6, art. 18, 1973 Gr. Brit. T.S. No. 1, at 171, 298 U.N.T.S. at 179.

67. EEC Treaty, *supra* note 6, art. 173, 1973 Gr. Brit. T.S. No. 1, at 57-58, 298 U.N.T.S. at 75-76.

68. ECSC Treaty, *supra* note 6, art. 37, 1973 Gr. Brit. T.S. No. 2, at 33, 261 U.N.T.S. at 169. These decisions concern the commission's recognition or refusal to recognize "the existence of a situation which is of such a nature as to provide fundamental and persistent disturbances in the economy of a member state." *Id.*

69. See, e.g., *Niederrheinische Bergwerks AG v. High Authority*, Joined Cases 2 and 3/60, 1961 E.C.R. 133, 146. *Contra* *Italy v. Commission*, Case 13/63, 1963 E.C.R. 165, 182-83, Common Mkt. Rep. (CCH) ¶ 8014, at 7294 (declining, on the basis of article 173 of the EEC Treaty, to review an assessment made by the commission because it was not clearly erroneous).

70. See, e.g., *Germany v. Commission*, Case 24/62, 1963 E.C.R. 63, 68, Common Mkt. Rep. (CCH) ¶ 8012, at 7254.

71. See G. BEBR, *supra* note 46, at 125-39; K.P.E. LASOK, *supra* note 6, at 198-255.

The basic texts of the Inter-American system do not explicitly refer to the Court's reviewing the Commission's factual findings.⁷² Thus, when presented with this question in a future case, the Court may choose a standard of review that could range from giving conclusive effect to the Commission's factual findings to de novo examination of the facts.

There are several arguments in favor of a broad standard of review. First, the Commission, the initial fact-finder, becomes party to the dispute before the Court and, as a litigant, is in a position to demonstrate the basis for its conclusions.⁷³ Second, if the factual findings of the Commission are given conclusive effect, the scope of judicial review effectively would be limited to issues of law. Such a result would be contrary to the Convention, which grants the Court jurisdiction over "all cases concerning the interpretation and application of the provisions of this Convention."⁷⁴ "Cases" include both questions of law and fact.⁷⁵ In addition, limiting the Court to decisions on law only would be inconsistent with the practice of other international tribunals.⁷⁶ Third, the Commission's conclusions

72. Contrast the European Court of Human Rights, whose rules provide that "[t]he Court shall, whether a case is referred to it by a Contracting Party or by the Commission, take into consideration the report of the latter." Eur. Ct. H.R. Revised Rules, *supra* note 45, R. 29(2). Although this does not establish a standard of review, it gives some deference to the findings of the commission. This deference clearly does not amount to giving the commission's findings conclusive effect. In addition to requiring only that the court "take into consideration" the report of the commission, the rules envisage a fact-finding role for the court. Rule 31 requires government assistance "when the Court desires to make or arrange for the making of an investigation on the spot in order to establish the facts or to procure evidence . . ." *Id.* R. 31; *see also id.* R. 40 (on the taking of evidence by the court).

73. *See* Inter-Am. Court Statute, *supra* note 7, art. 28, *reprinted in* HANDBOOK, *supra* note 2, at 153. Note, in contrast, that the European system does not recognize its commission as a party to court proceedings. *See* Eur. Ct. H.R. Revised Rules, *supra* note 45, R. 1(h). The role of a commission in assisting a court has sometimes been compared to that of the Advocate General in the European Court of Justice. *See* O'Boyle, *supra* note 5, at 726.

74. American Convention, *supra* note 2, art. 62(3), at 18, *reprinted in* 9 I.L.M. at 692.

75. In *Velásquez Rodríguez*, the Court cited the "broad terms" of the Convention in support of its jurisdiction over all issues relevant to a case. Preliminary Objections, *supra* note 23, at 41, ¶ 29.

76. However, the new court of first instance in the European Communities will conclusively determine issues of fact. *See supra* note 6. Establishment of the court of first instance undoubtedly reflects the heavy caseload of the European Court of Justice. In 1982 the ECJ delivered 185 judgments. *See* Everling, *The European Court of Justice as a Decisionmaking Authority*, 82 MICH. L. REV. 1294, 1296 (1984). The same

on disputed facts should be subject to appeal and review by the Court as a matter of procedural fairness. Lack of review could undermine the system, which, to be effective, requires decisions based upon authoritative and credible findings. Review provides an opportunity for a government accused of human rights violations to challenge initial findings before an independent judicial body that can review all the evidence in the case and make a final determination as to the truth of the allegations.⁷⁷

A highly deferential review of the Commission's factual findings, based on a standard of substantial evidence or abuse of discretion, would place the state at a disadvantage by effectively placing the burden of proof on it to overcome the Commission's findings. Although it is normal appellate practice to presume the correctness of findings and conclusions below, this result may be inconsistent with the Court's decision in *Velásquez Rodríguez*, which sees the Commission as representing the petitioner and obliged to prove alleged violations.⁷⁸ A highly deferential review could also raise issues of "procedural equilibrium and equality of the parties," about which the Court expresses concern in its opinion.⁷⁹

year the European Court of Human Rights had 16 cases submitted to it. See *STOCK-TAKING*, *supra* note 5, at 96. One advisory opinion was requested of the Inter-American Court of Human Rights in 1983. See *Restrictions to the Death Penalty*, Advisory Opinion No. OC-3/83, INTER-AM. CT. H.R. JUDGMENTS AND OPINIONS (ser. A) No. 3 (1983). As the caseloads of human rights tribunals increase, there may be increasing reliance on their commissions' fact-finding.

77. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). One U.S. federal appellate judge notes that litigants will accept what they may view as a wrong ruling so long as they feel they have been heard. See Letter from Judge Edward Leavy, Ninth Circuit, to Dinah L. Shelton (Mar. 1, 1989) (available at the *Fordham International Law Journal* office). A further argument for factual review may be based on the American Convention's guarantees regarding fair trial for individuals. Article 8 of the American Convention establishes minimum standards in this regard. These include the right to appeal a judgment to a higher court, at least insofar as criminal cases are concerned. American Convention, *supra* note 2, art. 8(h), at 4, reprinted in 9 I.L.M. at 678. While proceedings before the Inter-American Court are not criminal in nature, and the Court in *Velásquez Rodríguez* expressly rejected the application of certain concepts found in domestic criminal law, there seems no reason not to afford states a full and fair hearing before the Court on matters of fact as well as law. Affording such review may encourage more states to accept the jurisdiction of the Court.

78. See *supra* note 51 and accompanying text.

79. See *Velásquez Rodríguez Case*, INTER-AM. CT. H.R. 35, 43, ¶ 37, OAS/ser. L./V./III.19, doc. 13 (1988).

Nonetheless, the Commission seems well placed and better suited in many cases to undertake investigations and fact-finding.⁸⁰ For example, it may obtain evidence and testimony relevant to a particular case during an on-site country investigation. The evidence later may be unavailable or less reliable due to the passage of time or changed events. In such situations, the findings of the Commission should be entitled to deference even when challenged by the state. Thus, while it would be incorrect to give conclusive effect to the Commission's findings, it would be problematic to require the Commission to recreate or reestablish all evidence under de novo review. A standard that gives some weight or deference to the Commission's findings, but that recognizes the Court's duty to judge the merits of each case, seems appropriate.⁸¹

Whatever the standard of review adopted, the scope of inquiry by human rights tribunals is wide, because the nature of human rights cases requires investigating a government's treatment of alleged victims within its territory or jurisdiction. In this regard, the Inter-American Court appears prepared to go further than the ECHR. In order to arrive at its judgment in *Velásquez Rodríguez*, the Inter-American Court reviewed local laws and practices, including the effectiveness of internal legal remedies, the role of the police and military, and the acts and omissions of the government.⁸² It ordered the government to

80. The Commission's most notable achievements in promoting and protecting human rights have occurred during or as the result of fact-finding and on-site investigation. See T. BUERGENTHAL, R. NORRIS & D. SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS* ch. IV (2d ed. 1986).

81. In this context, it is important to distinguish between establishment of the facts and weighing the inferences and conclusions to be drawn from them. The latter is an inherent part of the judicial function. See D.V. SANDIFER, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 14-22 (rev. ed. 1975). In situations where the parties agree on the facts, courts normally do not reopen factual issues. See K.P.E. LASOK, *supra* note 6, at 199. However, at least one court rejected being bound by concessions made by the parties, viewing the nature of the proceedings before it as neither wholly accusatorial nor entirely inquisitorial. *Id.*; see also André, *Evidence Before the European Court of Justice, with Special Reference to the Grundig/Consten Decision*, 5 *COMMON MKT. L. REV.* 35, 38 (1967-68).

82. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 49-52, ¶¶ 64-81. The Court examined procedures of habeas corpus, appeal, cassation, extraordinary writ of amparo, and declaration of presumptive death, as well as criminal procedures. It looked not only at the laws, but at the practices in regard to each, including how many cases of habeas had been granted and denied and on what grounds. *Id.* International tribunals do abstain on issues of interpreting local law. See, e.g., Ringeisen

provide an organizational chart showing the structure of an army battalion and its position within the Honduran armed forces,⁸³ rejecting the notion that national security reasons should limit the scope of its review.⁸⁴

In comparison, the ECHR has articulated, and frequently applies, a more limited scope of review. It grants states a "margin of appreciation," in some cases a "wide margin of appreciation," to determine local practice on such matters as election laws, obscenity, states of emergency, and military matters, even where alleged human rights violations are in question.⁸⁵ While the margin doctrine may be seen as affecting the standard of review, more properly it should be seen as affecting the scope of review, because it limits judicial inquiry into matters deemed governed by local law.

The greater amount of review in the Inter-American system may result from several factors. First, human rights violations are more widespread and serious in the Western hemisphere than they are in Western Europe.⁸⁶ Less judicial scrutiny in the Inter-American system, thus, could have more severe consequences than in Europe. Second, the Inter-Amer-

Case, 13 Eur. Ct. H.R. (ser. A) at 40, ¶ 97 (1971) ("It is not the function of the European Court to pronounce itself on the interpretation of Austrian law . . .").

83. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 42, ¶¶ 29-30.

84. *Id.* at 67, ¶ 154.

85. *See, e.g.*, *Sporrong and Lönnroth*, 52 Eur. Ct. H.R. (ser. A) (1982) (economic policy); *Case of Klass*, 28 Eur. Ct. H.R. (ser. A) (1978) (national security); *Ireland v. U.K.*, 25 Eur. Ct. H.R. (ser. A) (1978) (state of emergency); *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) (1976) (obscenity and protection of minors); *Case of Engel and Others*, 22 Eur. Ct. H.R. (ser. A) (1976) (military matters); *De Wilde, Ooms & Versyp Cases* ("Vagrancy" Cases), 12 Eur. Ct. H.R. (ser. A) (1970) (privacy). No reference to margin of appreciation appears in the "travaux préparatoires" (the legislative history) of the European Convention. The term first appeared in cases dealing with a state's right to derogate from its obligations under article 15 of the European Convention. *See Lawless Case*, 1 Eur. Ct. H.R. (ser. A) (1960); *Cases of Torture or Maltreatment Amounting to Torture Alleged to Have Occurred in Cyprus*, 18 Eur. Comm'n H.R. 3 (1959); European Convention, *supra* note 5, art. 15, 213 U.N.T.S. at 232 (permitting state right to derogate during existence of a public danger threatening life of the nation, provided measures taken are strictly required by exigencies of the situation). For an analysis of the Court's application, see Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 CONN. J. INT'L L. 111 (1987).

86. *See Buergethal*, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U.L. REV. 155, 156 (1980) (noting that existence of non-democratic regimes and widespread poverty make human rights implementation more difficult in Western Hemisphere than in Europe). For an overview of the human rights situation, see INTER-AM. C.H.R., OEA/ser.L./V./II., doc. 19 (1987-88).

ican Court came into being nearly three decades after the European Court and benefited from the history and experience of the earlier tribunal.⁸⁷ The Inter-American Court is not as cautious and hesitant in its review as the first court seemingly felt it had to be. Third, the basic texts of the Inter-American system are more ambitious than those of the European system, containing longer and more detailed listings of human rights. States have thus accepted more obligations subject to judicial scrutiny. Whatever the mix and weight of these factors in *Velásquez Rodríguez*, the Inter-American Court announced its active role in determining compliance by states parties with their human rights obligations under the American Convention.

B. *Burden of Proof*

The allocation of burden of proof can have important consequences affecting the equality of arms of litigants and the outcome of cases.⁸⁸ Yet, the concept of burden of proof has had mixed reception in international tribunals. Many courts apply the maxim *ei incumbit probatio, qui dicit, non qui negat*: It is for the party who asserts a proposition or a fact to prove it, regardless of whether the party is nominally applicant or respondent.⁸⁹ Thus, in *Diversion of Water from the Meuse*,⁹⁰ the Permanent Court of International Justice (the "PCIJ") stated that the Belgian government should have produced evidence regarding the facts it alleged.⁹¹ Later, in *Temple of Preah Vihear*,⁹² the ICJ held that because both Cambodia and Thailand based their claims to the temple on a series of facts and contentions they asserted, "[t]he burden of proof in respect of these will of

87. The European Convention on Human Rights came into force on September 3, 1953. See European Convention, *supra* note 5, 213 U.N.T.S. at 222 n.1. The court heard its first case in 1960. See *Lawless Case*, 1 Eur. Ct. H.R. (ser. A) (1960). The American Convention on Human Rights came into force July 18, 1978, and the first matter reached the Court in 1981. See HANDBOOK, *supra* note 2. For a discussion of the impact on the Inter-American system of the Convention's entry into force, see T. BUERGENTHAL, R. NORRIS & D. SHELTON, *supra* note 80, at 16-26.

88. See *Trindade, Burden of Proof with Regard to Exhaustion of Local Remedies in International Law*, 9 HUM. RTS. J. 81 (1976).

89. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 25, ¶ 30 (Judgment of June 27) ("[I]t is of course for the party appearing to prove the allegations it makes . . .").

90. (*Neth. v. Belg.*), 1937 P.C.I.J. (ser. A/B) No. 70 (June 28).

91. *Id.* at 30.

92. (*Cambodia v. Thailand*), 1962 I.C.J. 6 (Judgment of June 15).

course lie on the Party asserting or putting them forward."⁹³ In other specific instances, the PCIJ held that an allegation that the rule of exhaustion of remedies does not apply must be proved.⁹⁴ Similarly, where it is claimed that a term is used in a special sense, rather than in its ordinary meaning, the burden is on the party claiming the special meaning to prove it.⁹⁵

The judgments and opinions of the ECJ reveal that in direct actions, both the applicant and the defendant have a duty to adduce evidence upon which they rely to prove an assertion of fact.⁹⁶ In addition, the court has the power to call for the production of evidence. However, the risk of non-persuasion rests with the applicant, unless the evidence is in the hands of a party who fails to produce it.⁹⁷

In contrast to other tribunals, the ECHR states that it rejects the concept of burden of proof, although in practice it requires the applicant's allegations to be proved.⁹⁸ In *Artico*,⁹⁹

93. *Id.* at 15-16.

94. *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 19 (Feb. 28).

95. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 49 (Apr. 5). "If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention." *Id.*

96. *See, e.g., Ruckdeschel v. Hauptzollamt Hamburg-St. Annen*, Joined Cases 117/76 and 16/77, 1977 E.C.R. 1753, 1784, Common Mkt. Rep. (CCH) ¶ 8457, at 8246. In *Duraffour v. Council*, Case 18/70, 1971 E.C.R. 515, the court held that the applicant had the burden of proof that her husband had not committed suicide, in order to justify a widow's insurance claim; however, the defendant also was bound, "as the appointing authority, to cooperate . . . in order to discover the truth." *Id.* at 525, ¶ 31.

97. *See, e.g., Commission v. Italy*, Case 45/64, 1965 E.C.R. 857, 867, Common Mkt. Rep. (CCH) ¶ 8038, at 7542 (ECJ shifted burden onto defendant government after commission challenged certain Italian taxing procedures as violation of article 96 of EEC Treaty). The government asserted the burden was on the commission to prove that the tax refunds it was making were greater than those authorized by the Treaty. *Id.* at 874, Common Mkt. Rep. (CCH) ¶ 8038, at 7548 (opinion of Advocate-General Gand). However, the information necessary to decide this issue was in the possession of the Italian government. *Id.* The court held that the government must provide the evidence to prove compliance. *See also Miller v. Commission*, Case 19/77, 1978 E.C.R. 131, 152-53, ¶¶ 20-22, Common Mkt. Rep. (CCH) ¶ 8439, at 7926 (dismissing application where applicant failed to produce accounts to support its claim that fine imposed by commission was unduly burdensome).

98. *Ireland v. U.K.*, 25 Eur. Ct. H.R. (ser. A) at 64, ¶¶ 160-161 (1978). In *North-ern Ireland*, the court held that it would not rely on the concept that the burden of proof is borne by one or the other of the two governments concerned. "In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material

the applicant provided prima facie evidence. The government did not expressly contest the truth of the evidence and did not introduce opposing evidence, arguing that the applicant bore the burden of proof.¹⁰⁰ The court took the facts as established, again rejecting the notion of burden of proof, "since neither the individual applicant nor the Commission has the status of a party before the Court."¹⁰¹

In *Velásquez Rodríguez*, the Inter-American Court, in several instances, explicitly allocated the burden of proof on the parties, discussing the subject in more detail than have other tribunals. The Court first assigned the burden of proof in considering the government's preliminary objection on exhaustion of domestic remedies.¹⁰² The Court held that the "State

proprio motu." *Id.* ¶ 160. Judge Zekia's separate opinion disagrees with the court that there is no burden of proof. He said, "surely there is a burden of proof to be discharged in some way or other" in order to determine allegations of human rights violations. *Id.* at 100 (separate opinion of Judge Zekia). What is important is by whom and how such onus should be discharged. *Id.* Judge Zekia relied on the presumption of innocence to indicate that there is a burden of proof "required to substantiate an allegation of contravention of the Convention by the respondent State" *Id.* at 101. However, "[w]ithholding of evidence and a non-cooperative attitude by a respondent State no doubt might cause the Commission to draw adverse inferences." *Id.* at 100. On exhaustion of local remedies, the commission's rules of procedure originally required the applicant to provide evidence to show that all domestic remedies were exhausted. Eur. Comm'n H.R. Rule 41(2) (1955), reprinted in 1955/1957 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 74. After much criticism that the rule imposed too heavy a burden, it was amended to require only prima facie evidence of exhaustion of remedies. 1960 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 24 ("[T]he applicant shall provide information enabling it to be shown that the conditions laid down in Article 26 of the Convention have been satisfied."). For a discussion of burden of proof on the question of exhaustion of local remedies, see A.A.C. TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW: ITS RATIONALE IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 134-72 (1983).

99. *Artico Case*, 37 Eur. Ct. H.R. (ser. A) (1980).

100. *Id.* at 14, ¶ 29.

101. *Id.* ¶ 30 (citations omitted). The court seems to assume that if the state is the only party before it, there can be no burden of proof, there being no adversary.

102. Article 46 of the American Convention provides that in order for a petition or communication lodged with the Commission to be admissible, remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. This requirement does not apply when the state does not afford due process of law, the victim is denied access to domestic remedies or prevented from exhausting them, or there is unwarranted delay in rendering a final judgment. American Convention, *supra* note 2, art. 46, at 13, reprinted in 9 I.L.M. at 687. As the Court notes, the rule of exhaustion permits a state to correct any deficiencies in its performance and avoid an international proceeding. *Velásquez*

claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective."¹⁰³ However, once the state—which is in the best position to indicate available remedies—demonstrates the existence of specific domestic remedies that should have been utilized, it is up to the other side to prove exhaustion or that one of the exceptions to the requirement applies.¹⁰⁴

The Court will not presume that there are no effective domestic remedies, because the lack of remedies would place the state in violation of specific guarantees of the Convention.¹⁰⁵ Instead, the Court examines the remedies indicated by the government, both in law and as applied, to determine whether they are adequate—suitable to address an infringement of a legal right—and effective—capable of producing the result for which they were designed.¹⁰⁶

On the merits, the Court stated that in principle the bur-

Rodriguez Case, INTER-AM. CT. H.R. 35, 48, ¶ 61, OAS/ser. L./V./III.19, doc. 13 (1988).

103. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 48, ¶ 59 (quoting Preliminary Objections, *supra* note 23, at 53, ¶ 88). A similar burden of proof exists in proceedings before the Commission. The Commission's regulations provide that when the petitioner is unable to prove exhaustion, it is up to the government to demonstrate that remedies under domestic law have not previously been exhausted. See Inter-Am. Commission Regulations, *supra* note 7, art. 37(3), reprinted in HANDBOOK, *supra* note 2, at 129. Similarly, in the European system, the commission held that the government claiming non-exhaustion must prove the existence of non-exhausted remedies. See Cyprus Case, 1958-59 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 186, 190-92; see also *Alam & Khan v. United Kingdom*, 24 Eur. Comm'n H.R. 116, 133 (1967); *Austria v. Italy*, 1961 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 116.

104. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 48, ¶ 60. In the European system, exhaustion is required "unless the applicant can show that, in these particular circumstances, this remedy was unlikely to be effective and adequate in regard to the grievance in question." *Austria v. Italy*, 1961 Y.B. EUR. CONV. ON HUM. RTS. at 168. Allegations of non-effectiveness must be accompanied by some evidence or proof. See *X v. United Kingdom*, 33 Eur. Comm'n H.R. 34, 34-43 (1970).

105. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 48, ¶ 60.

106. See *id.* at 49-50, ¶¶ 64-73. The *Velásquez Rodríguez* Court reviewed the record concerning the lack of effective remedies in Honduras during the period in question. It found that the evidence showed there were more than 100 persons illegally detained and, in general, the legal remedies that the government claimed were available to the victims were ineffective. *Id.* at 51, ¶ 76. The evidence also showed that reappearances were not due to legal remedies and that lawyers who filed writs of habeas corpus were intimidated. *Id.* at 52, ¶¶ 77-78. The Court noted that the government failed to call witnesses to refute the evidence presented by the Commission. The government contested some points in oral argument, but the court did not find that the attorneys presented "convincing evidence to support their arguments." *Id.* ¶

den of proof should be on the Commission to establish the facts supporting its allegations.¹⁰⁷ The Court's decision not only reflects the general practice of international tribunals, but is correct in principle. The fundamental norm *pacta sunt servanda* should carry with it a presumption that states not only should, but do, carry out their obligations in good faith. This implies a presumption of innocence when violations of international law are alleged, regardless of the organization or region.¹⁰⁸

As to how the burden of proof could be discharged, the Commission argued, and both the government and the Court agreed, that the burden could be discharged in this case by indirect or circumstantial evidence including inferences and presumptions.¹⁰⁹ The Court held that proof of an official practice of disappearances carried out or tolerated by the government, plus evidence linking the disappearance of an individual to that practice, would be sufficient to prove the violation, provided the proof had sufficient weight to meet the standard established by the Court.¹¹⁰

Although the Court placed the initial burden on the Commission, it recognized the difficulties of applying this principle when the necessary evidence is in the control of the defending government and cannot be obtained without the government's cooperation.¹¹¹ The Court's solution to this problem is to shift to the government the burden of producing evidence to refute the petitioner's allegations.¹¹² Failure to come forward may cause the Court to presume from the government's silence that the allegations are true.¹¹³

79. The Court thus concluded that Honduran remedies were ineffective during the period in question.

107. *Id.* at 59, ¶ 123.

108. *See* Ireland v. U.K., 25 Eur. Ct. H.R. (ser. A) at 100 (1978) (separate opinion of Judge Zekia).

109. *Velasquez Rodriguez*, INTER-AM. CT. H.R. at 60, ¶¶ 124-126.

110. *Id.* ¶ 126.

111. *Id.* at 61, ¶¶ 136-137.

112. *See id.* ¶ 138.

113. *See id.* Compare the ICJ decision in *Corfu Channel* where the court held that the mere fact of control over territory where an alleged violation of international law has occurred is not sufficient to shift the burden of proof, which remains on the state alleging an international law violation. However, a mere denial or statement of ignorance is an insufficient response and if direct proof is unavailable due to lack of cooperation by the defendant state, the court may place greater reliance on inferences of

This shifting of the burden represents one of the major developments in the case. While the burden in a few cases may be heavy,¹¹⁴ in most cases it reflects the reality of human-rights litigation. Individual petitioners and the Commission are not on equal footing with the government, lacking both the resources and the power of the defendant state. In addition, state sovereignty precludes the Commission and the Court from on-site investigation or acquisition of evidence without the state's consent.¹¹⁵ Thus, it seems appropriate for the Court to require the state to produce evidence in its exclusive control.¹¹⁶

C. Degree of Proof

The Inter-American Court notes that none of its documents establish a standard of proof and that in practice, international tribunals have avoided a rigid rule regarding the amount of proof necessary to support a judgment.¹¹⁷ Most international courts do not explicitly discuss the degree of proof required to sustain a judgment; where they do, the decisions

fact and circumstantial evidence. *Corfu Channel* (U.K. v. Albania), 1949 I.C.J. 1, 18 (Judgment of Apr. 9). Also, in *Minquiers and Ecrehos*, the court held that "each party has to prove its alleged title and the facts upon which it relies." *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47, 52 (Judgment of Nov. 17). When the government of Britain did not produce documents on which its title was based, the court said, "[a]s these documents are not produced, it cannot be seen on what ground the Judgment was based. It is therefore not possible to draw from this Judgment any conclusion supporting the British claim to the Minquiers." *Id.* at 68.

114. If the state can only escape responsibility by itself proving the circumstances in which the alleged violation occurred, it may place serious demands on governments whose degree of control over the territory is uncertain. Without the strict proof requirements the Court imposes, before an inference of state responsibility will be created, the burden could be very difficult to discharge, and could limit the willingness of states to accept the Court's jurisdiction.

115. See, e.g., Inter-Am. Commission Statute, *supra* note 7, art. 18(g), reprinted in HANDBOOK, *supra* note 2, at 110.

116. Similar results are obtained in cases where only one party is present before the court and evidence to prove the applicant's claims remain in the hands of the absent party. In *Iranian Hostages*, the ICJ noted the position of the United States, which claimed it had been unable to have access to its diplomatic and consular representatives, premises, and archives in Iran "and that in consequence it has been unable to furnish detailed factual evidence on some matters." *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 9, ¶ 11 (Judgment of May 24). The court accepted proof based upon press reports, statements by Iranian and U.S. officials, and verified pleadings.

117. See *Velásquez Rodríguez Case*, INTER-AM. CT. H.R. 35, 60, ¶ 127, OAS/ser. L./V./III 19, doc. 13 (1988); see K.P.E. LASOK, *supra* note 6, at 262.

are inconsistent. For example, the ICJ is guided, in unopposed cases, by article 53, which obliges the court to find that the applicant's claims are "well-founded in fact and in law."¹¹⁸ In considering Nicaragua's claim against the United States, the court clarified that the degree of proof required in unopposed cases is the same as that of contested proceedings, i.e., that the claim is "sound in law" and "that the facts on which it is based are supported by convincing evidence."¹¹⁹

In the ECJ, reference has been made to "full proof";¹²⁰ to "sufficiently weighty, clear and uncontradictory circumstantial evidence [that] is not contradicted by contrary circumstantial evidence";¹²¹ and to a "reasonable degree of certainty."¹²² In other words, the standard of proof is not settled.

The ECHR, in *Northern Ireland*, applied a standard of "beyond a reasonable doubt" in finding human rights violations, noting that this was the standard of proof the commission adopted when evaluating the material it obtained.¹²³ The Irish government argued that the standard was too rigid, particularly where the responding state has failed to be fully cooperative with the commission and court.¹²⁴ The court followed the commission's approach, but added that such proof may follow from the coexistence of sufficiently strong, clear, and concordant inferences 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."¹²⁵

Neither the European commission nor the court gave an explanation for adopting the highest standard of proof. However, the *Northern Ireland* holding was based upon an earlier commission decision involving an interstate complaint alleging an administrative practice of torture and ill-treatment in

118. ICJ Statute, *supra* note 4, art. 53, 59 Stat. at 1062, T.S. No. 993, at 32.

119. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 24, ¶ 29 (Judgment of June 27).

120. *Netherlands v. High Authority*, Case 6/54, 1954-1956 E.C.R. 103, 115.

121. *Duraffour v. Council*, Case 18/70, 1971 E.C.R. 515, 525, ¶ 30.

122. *Acciaierie e Ferrieré Pugliesi v. High Authority*, Case 8/65, 1966 E.C.R. 1, 12.

123. *Ireland v. U.K.*, 25 Eur. Ct. H.R. (ser. A) at 64-65, ¶ 161 (1978).

124. *Id.*

125. *Id.*

Greece.¹²⁶ The commission stated that for the purposes of that case, it must maintain a certain standard of proof, which was proof beyond a reasonable doubt.¹²⁷

Northern Ireland also involved an interstate complaint alleging widespread ill-treatment. The fact that both of these complaints concerned systematic violations of non-derogable rights may have influenced the commission and the court. Moreover, there are always suspicions of political motivation when interstate complaints are filed. Under these circumstances, the supervisory bodies may have felt the need to impose the highest standard of proof, which might not apply in other situations. Notably, in at least one individual petition, the court has decided in favor of an applicant on the basis of proof that the court recognized did not meet the standard of proof beyond a reasonable doubt.¹²⁸

In *Velásquez Rodríguez*, the Inter-American Court noted that international proceedings are less formal than domestic litigation. However, it appeared to adopt a domestic law principle that the degree of proof should depend on the nature, character, and seriousness of the case. Given the "special seriousness" of the allegations in *Velásquez Rodríguez*, which involved a policy of toleration of disappearances, the Court required that the proof be "capable of establishing the truth of the allegations in a convincing manner."¹²⁹ The Court's opinion left open the possibility that other degrees of proof may be required in other types of cases.

The "clear and convincing" standard seems appropriate where systematic and serious violations of human rights are alleged in individual petitions. Where the allegations are less serious, the Court could accept a showing by a preponderance of the evidence, although the *Velásquez Rodríguez* opinion does not clearly state this. A standard of beyond a reasonable doubt is generally not appropriate because, as the Court notes, these

126. See Greek Case, 1969 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 1, 196.

127. *Id.*

128. See Pakelli Case, 64 Eur. Ct. H.R. (ser. A) at 16 (1983). Similarly, in the Winterwerp Case, 33 Eur. Ct. H.R. (ser. A) (1981), the court held that a person should not be deprived of liberty unless "he has been reliably shown to be of unsound mind." *Id.* at 18, ¶ 39.

129. *Velásquez Rodríguez* Case, INTER-AM. CT. H.R. 35, 60, ¶ 129, OAS/ser. L./V./III.19, doc. 13 (1988).

are not criminal proceedings. "The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."¹³⁰ Furthermore, a criminal standard would be unduly burdensome for most individual applicants. Possibly, the Court might consider it in an interstate case, as has the European Court,¹³¹ where concerns of political motivation need to be alleviated. However, even in such circumstances, the implication of criminality probably should be avoided.

D. *Admissibility and Weighing of Evidence*

The rule that international tribunals are not bound to adhere to strict judicial rules of evidence finds more frequent statement in the cases than any other rule of evidence.¹³² Rules of evidence are drawn from the basic texts of each tribunal—the treaty, statute, and rules of court—as well as from customary law and general principles of law, including the practice of municipal and international tribunals.

The practice at the ICJ has been to admit all evidence, but to establish principles for excluding certain matters from consideration after being admitted, giving lowered value to some evidence, and giving stronger consideration to other proofs. "The International Court of Justice has construed the absence of restrictive rules in its Statute to mean that a party may generally produce any evidence as a matter of right, so long as it is produced within the time limits fixed by the Court."¹³³ As did its predecessor, the court rejects technical rules, believing that the decision of an international dispute "should not mainly depend on a point of procedure."¹³⁴

The court has stated that, in principle, it is not bound to confine its consideration "to the material formally submitted to it by the parties."¹³⁵ Thus, although international courts ap-

130. *Id.* at 61, ¶ 134.

131. *See* Ireland v. U.K., 25 Eur. Ct. H.R. (ser. A) (1978).

132. *See* D.V. SANDIFER, *supra* note 81, at 9.

133. *Id.* at 184.

134. *See* Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 96, 155-56 (June 7).

135. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v.

ply the concept of burden of proof and rely upon the litigants to substantiate their claims, the tribunals also actively seek evidence in appropriate cases. In this way, international courts may be seen to combine the common law adversarial system with the civil law practice of judicial inquiry.¹³⁶ For example, the ECJ may order a measure of inquiry, although the burden lies on the parties in the first instance to indicate the steps necessary to investigate an issue of fact by setting up their own cases and producing their own evidence.¹³⁷ A contention must be supported by sufficient evidence or indications to make out a prima facie case, before the ECJ will order additional inquiry to be made.¹³⁸ If a party refrains from producing evidence in its possession or at its disposal, the court may conclude that the contention is not supported by sufficient evidence to justify a measure of inquiry.¹³⁹

The ICJ accepts that in addition to evidence actually submitted, it may take note of statements of representatives of the parties or of other states in international organizations, as well as resolutions adopted or discussed by such organizations, in-

U.S.), 1986 I.C.J. 4, 25, ¶ 30 (Judgment of June 27) (citing *Payment in Gold of the Brazilian Federal Loans Issued in France* (Fr. v. Switz.), 1929 P.C.I.J. (ser. A) Nos. 20-21, at 124 (July 12); *Nuclear Test* (Austl. v. Fr.), 1974 I.C.J. 253, 263-64, ¶¶ 31-32 (Judgment of Dec. 20)); see also ICJ Statute, *supra* note 4, art. 50, 59 Stat. at 1062, T.S. No. at 993, at 32. The European Court of Human Rights has a provision identical to that of the ICJ.

136. See D.V. SANDIFER, *supra* note 81, at 176-79; *supra* note 45 and accompanying text.

137. See, e.g., *SNUPAT v. High Authority*, Joined Cases 42 and 49/59, 1961 E.C.R. 53, where an intervener based argument on the wording of a contract that it did not produce because it was confidential. The court held that since the intervenor was relying on a document in its own possession, it should have introduced proof of its allegations by disclosing it. *Id.* at 84-85. "It is not acceptable to rely on the Court to take the initiative in obtaining for itself by measures of inquiry information intended to prove the cogency of the argument relied upon by the intervener, which itself possesses that information." *Id.* at 84. Similarly, in *Gualco v. Commission*, Case 14/64, 1965 E.C.R. 51, the court rejected as unfounded a series of arguments made by an applicant who did not produce any documents to support the assertions alleged. *Id.* at 59-60. Having not made a prima facie case, the court held there was no need to order the measures of inquiry suggested by the applicant. *Id.* All the evidence had in fact been in her possession or at her disposal. *Id.* See K.P.E. LASOK, *supra* note 6, at 216.

138. See *Prakash v. Commission*, Joined Cases 19 and 65/63, 1965 E.C.R. 533, 554.

139. See, e.g., *ILFO v. High Authority*, Case 51/65, 1966 E.C.R. 87, 96 (applicant's failure to offer evidence to justify request for measure of inquiry resulted in rejection of such request).

sofar as factually relevant, whether or not such material has been drawn to its attention by a party.¹⁴⁰

Although freely admitting evidence, equality of the parties remains the basic principle of the court. In *Nicaragua*, the court noted the need to balance its receipt of communications by an absent party, whose views it is valuable to know in whatever form those views may have been expressed, with this principle. Thus, although the court will admit for consideration informal communications by an absent party, "[t]he treatment to be given by the Court . . . must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule."¹⁴¹

The Rules of the ECHR provide that the court may "obtain any evidence which it considers capable of providing clarification on the facts of the case."¹⁴² It may do this on its own motion, at the request of a party, the commission, the applicant, or a third party invited or granted leave to submit written comments.¹⁴³ The court may also "decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task."¹⁴⁴ The court may also delegate one or more of its members to conduct an inquiry, carry out an investigation on the

140. See *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 4, 44, ¶ 72 (Judgment of June 27). Declarations of states may be regarded as evidence of the truth of facts, as evidence that such facts are attributable to the states making the declarations, and, to a lesser degree, as evidence for the legal qualification of these facts. *Id.*

141. *Id.* at 26, ¶ 31.

142. Eur. Ct. H.R. Revised Rules, *supra* note 45, R. 40(1).

143. See *id.*

144. *Id.* Compare the procedures of the ECJ. Its rules provide that at the close of pleadings the court "shall prescribe the measures of enquiry that it considers appropriate by means of an order setting out the issues of fact to be determined" after hearing the views of the advocate-general. ECJ Rules of Procedure, *supra* note 45, art. 45, § 1, at 13. The court may require the parties, their representatives or agents, or the governments of member states to produce all documents and supply all information that it considers desirable. *Id.* § 2 (stating that such requirements are without prejudice to articles 24 and 25 of the ECSC Statute, articles 21 and 22 of the EEC Statute, or articles 22 and 23 of the Euratom Statute). In addition the court may entrust "any individual, body, authority, committee or other organisation it chooses" with the task of giving an expert opinion or holding an enquiry. Protocol on the Code of the Court of Justice, Apr. 18, 1951, art. 25, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189) —, 115 (official English version), 261 U.N.T.S. 247, 259 (unofficial English trans.).

spot, or take evidence in some other manner.¹⁴⁵ Although the rules provide for the possibility of objection to a witness or expert, they state that the court "may hear for the purpose of information a person who cannot be heard as a witness."¹⁴⁶

In practice, the ECHR has expressed a rule of liberality consistent with the practice of the ICJ. In *Northern Ireland*, the court stated that it

is not bound, under the Convention or under the general principles applicable to international tribunals, by strict rules of evidence. In order to satisfy itself, the Court 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.¹⁴⁷

In *Velásquez Rodríguez*, the Inter-American Commission presented twelve witnesses; five more were listed but did not appear.¹⁴⁸ The Court on its own ordered the production of further documentary and testimonial evidence. In ruling on the government's preliminary objection on failure to exhaust domestic remedies, the Court stated that it was using "all the evidence before it, including that presented during the proceedings on the merits."¹⁴⁹

Documentary evidence was accepted as valid, "particularly because the parties did not oppose or object to those documents nor did they question their authenticity or veracity."¹⁵⁰ In addition to testimony, the Court accepted press clippings as a means of corroborating the testimony and documentary evidence.¹⁵¹ The Court viewed some items as a manifestation of

145. Eur. Ct. H.R. Revised Rules, *supra* note 45, R. 40(4).

146. *Id.* R. 43. The rules do not indicate the grounds on which objection (recusation) may be made. None of the court's decisions refer to an objection being made.

147. *Ireland v. U.K.*, 25 Eur. Ct. H.R. (ser. A) at 79, ¶ 209 (1978).

148. *Velásquez Rodríguez Case*, INTER-AM. CT. H.R. 35, 40-41, ¶ 28(a)-(f), OAS/ser. L./V./III.19, doc. 13 (1988). One of the five was murdered after being summoned to testify while another witness was killed after giving his testimony. *Id.* at 43-44, ¶¶ 40-41.

149. *Id.* at 47, ¶ 51.

150. *Id.* at 62, ¶ 140.

151. *Id.* at 56, 59, 63, ¶¶ 106, 119, 146. Compare *Iranian Hostages*, where the ICJ stated that the essential facts of the case were "matters of public knowledge" that had received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 9, ¶ 12 (Judgment of May 24). The court accepted

“public and well-known facts which, as such, do not require proof.”¹⁵² Others had evidentiary value in themselves insofar as they textually reproduced public statements of government officials.¹⁵³ Others were viewed as corroborating witness testimony.¹⁵⁴ In this regard, the Court noted the practice of both international and domestic courts of accepting direct evidence, both testimonial and documentary, and indirect evidence—circumstantial evidence, indicia, and presumptions. The Court noted that in cases of repression characterized by attempts to suppress information, circumstantial or presumptive evidence becomes especially important.¹⁵⁵

Press clippings and extracts from books received less favorable treatment in *Nicaragua* where the ICJ treated such material, whether submitted by Nicaragua or by the United States, “with great caution.”¹⁵⁶ Even where the court saw the material as meeting high standards of objectivity, the court stated it “regards press reports not as evidence capable of proving facts, but considers that they can nevertheless contribute, in some circumstances, to corroborating the existence of a particular fact,”¹⁵⁷ as illustrative material additional to other sources of evidence. Additionally, the court took the view that press information could establish public knowledge “and the Court can attach a certain amount of weight to such public knowledge.”¹⁵⁸ However, the court indicated that it will show particular caution because reports may all turn out to be based on a single source.¹⁵⁹

press reports, noting that the United States Memorial contained a “statement of Verification” from a high-ranking U.S. official that “to the best of his knowledge and belief the facts there stated are true.” *Id.* at 10, ¶ 12. These included U.S. translations into English of Iranian news reports. The court noted that it necessarily had to rely on these sources because of the lack of participation by Iran. It also noted that all the information had been communicated to the Iranian government “without having evoked from that Government any denial or questioning of the facts alleged before the Court by the United States.” *Id.* ¶ 13.

152. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 63, ¶ 146.

153. *Id.*

154. *Id.*

155. *Id.* at 60-61, ¶ 131.

156. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 4, 40, ¶ 62 (Judgment of June 27).

157. *Id.* at 79, ¶ 143.

158. *Id.* at 40, ¶ 63.

159. *Id.*

While all international courts freely admit evidence, they use a variety of principles to evaluate the evidence submitted. For example, in *Nicaragua*, the ICJ gave considerable significance to the declarations made by the authorities of the states concerned.¹⁶⁰ The court followed what it calls the general practice of courts in giving "superior credibility" to two kinds of evidence: first, that of disinterested witnesses—those who are not parties to the proceedings and stand to gain or lose nothing from its outcome—and "so much of the evidence of a party as is against its own interest."¹⁶¹ Where the case involves armed conflict, testimony by a member of the government of a state party to the litigation will be utilized when it may be regarded as contrary to the interests or contentions of the state to which the witness owes allegiance or as relating to matters not controverted.¹⁶²

The ECHR similarly evaluates the probative quality of evidence. The court weighs the relevance and value of each item, noting where the absence of cross-examination of interested witnesses may affect that value. In *Northern Ireland*, the court held that it would assess the relevance and probative value of evidence obtained by the commission, placing particular weight on objective medical testimony and less on the views of interested witnesses.¹⁶³

On questions of admissibility, international practice shows that when evidence is challenged, the burden is upon the party challenging it to show that the evidence should be excluded on the basis of a specific ground requiring such action.¹⁶⁴ In *Nicaragua*, Nicaragua attempted to exclude from consideration a

160. *Id.* at 41, ¶ 64.

161. *Id.* at 42-43, ¶ 69.

162. *Id.* at 43, ¶ 70.

For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve. The Court believes this approach to be the more justified in view of the need to respect the equality of the parties in a case where one of them is no longer appearing; but this should not be taken to mean that the non-appearing party enjoys *a priori* a presumption in its favour.

Id.

163. *Ireland v. U.K.*, 25 Eur. Ct. H.R. (ser. A) at 79-80, ¶¶ 209-210 (1978).

164. In *Velásquez Rodríguez*, the Court stated that a party challenging a witness has the burden of refuting the witness' testimony. *Velásquez Rodríguez Case*, INTER-AM. CT. H.R. 35, 62, ¶ 141, OAS/ser. L./V./III.19, doc. 13 (1988).

U.S. State Department document that was published to justify U.S. Central American policy.¹⁶⁵ The publication was not submitted to the court in any formal manner contemplated by the statute and rules of the court.¹⁶⁶ However, it was sent to an official of the registry to be made available to the court.¹⁶⁷ Nicaragua did not attempt to counter the publication, claiming that it could not be considered evidence because it was not properly before the court.¹⁶⁸ However, the court considered that "in view of the special circumstances of this case, it may, within limits, make use of information in such a publication."¹⁶⁹

Hearsay testimony is generally admitted, but is given little, if any, weight. In *Corfu Channel*, the ICJ rejected consideration of the testimony of one witness, stating that "the facts stated by the witness from his personal knowledge are not sufficient to prove what the United Kingdom Government considered them to prove."¹⁷⁰ Since the witness was relying on third-party hearsay, the court would treat it as no more than an allegation. "A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here."¹⁷¹

In *Velásquez Rodríguez*, the government objected on several occasions to the admissibility of testimony, based on article 37 of the Court's rules.¹⁷² One objection asserted that a witness had deserted the Armed Forces and had violated his military oath.¹⁷³ Another witness was challenged because, as the sister of the victim, she was a party interested in the outcome.¹⁷⁴ In both these cases, the Court unanimously rejected the objec-

165. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 44, ¶ 73 (Judgment of June 27).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 1, 16 (Judgment of Apr. 9).

171. *Id.* at 17.

172. *Velásquez Rodríguez Case*, INTER-AM. CT. H.R. 35, 56-57, ¶¶ 101, 110, OAS/ser. L./V./III.19, doc. 13 (1988). Article 37 of the Inter-American Court Rules allows the Court to "decide any dispute arising from an objection to a witness or expert." Inter-Am. Court Rules, *supra* note 7, art. 37, reprinted in HANDBOOK, *supra* note 2, at 168.

173. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 56, ¶ 101.

174. *Id.* at 57, ¶ 110.

tions.¹⁷⁵ The Court noted that the government had attacked the impartiality and honesty of some witnesses and had asserted that a criminal record made others incompetent to testify.¹⁷⁶ "They even insinuated that testifying against the State in these proceedings was disloyal to the nation."¹⁷⁷ However, the government presented no concrete evidence to rebut the witnesses' testimony, which the Court held it had the burden to do.¹⁷⁸ Therefore, the testimony could not be ignored. The Court further specifically rejected the government's allegations that a criminal record or pending charges or an interest in the case is sufficient to deny competence to testify.¹⁷⁹ Finally, the Court found the allegations of disloyalty for testifying "unacceptable," because "human rights are higher values" that are not derived from nationality.¹⁸⁰

In addition to objecting to the admissibility of testimony because of bias or untruthfulness, the government challenged other evidence as hearsay and attacked the credibility of witnesses. The Court treated these objections as going to the weight and not the admissibility of the evidence presented.¹⁸¹

Witness testimony was also evaluated by the ICJ in *Nicaragua*.¹⁸² The court noted that the failure of the United States to participate created two particular disadvantages.¹⁸³ First, there was no cross-examination, even though the judges extensively questioned those appearing.¹⁸⁴ Second, there were no defense witnesses.¹⁸⁵ The court specifically excluded consideration of opinion testimony.¹⁸⁶ It considered only statements of fact.¹⁸⁷ "An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with

175. *See id.* at 56-57, ¶¶ 101, 111.

176. *Id.* at 53-54, 56-58, ¶¶ 86, 88, 90, 92, 101, 110, 116.

177. *Id.* at 62, ¶ 142.

178. *Id.* at 63, ¶ 143.

179. *Id.* ¶¶ 142-143.

180. *Id.* ¶ 144.

181. *Id.* at 52-59, ¶¶ 82-118.

182. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 4, 41-42, ¶ 66 (Judgment of June 27).

183. *Id.* at 42, ¶ 67.

184. *Id.*

185. *Id.*

186. *Id.* ¶ 68.

187. *Id.*

other material, assist the Court in determining a question of fact, but is not proof in itself."¹⁸⁸

In general, then, the Inter-American Court follows the practice of other international tribunals in seeking to obtain the maximum relevant evidence upon which to base a decision. It specifically rejects exclusionary rules, while enforcing its own rules of procedure. It strongly upholds the rights of individuals to bring petitions and to testify against their own government concerning human rights abuses. Such practice is consistent with the dual functions of the Court to investigate allegations of human rights violations and to interpret and apply the Convention.

E. *Presumptions and Judicial Notice*

In deciding *Velásquez Rodríguez*, the Inter-American Court, like other international courts, applied certain presumptions and took judicial notice of facts commonly accepted. Judicial notice is often taken in matters of international law. In *Nicaragua*, the ICJ held that "the Court is not solely dependent on the argument of the parties before it with respect to the applicable law."¹⁸⁹ In another decision, the ICJ stated that it, "as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required . . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute."¹⁹⁰ However, the court noted that the views of parties to a case as to the law applicable to their dispute are very material, particularly where the views are in agreement.¹⁹¹

As for presumptions, the Inter-American Court found that presumptive or circumstantial evidence is especially important where there are allegations of disappearances.¹⁹² The most

188. *Id.*

189. *Id.* at 24, ¶ 29 (citation omitted).

190. Fisheries Jurisdiction (U.K. v. Ice., Fed. Rep. of Germany v. Ice.), 1974 I.C.J. 3, 9, ¶ 17. *But see* Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276-78 (Judgment of Nov. 20) (requiring proof of regional custom). In the ECJ, community law may be proved by reference to the official texts of the instruments or by reference to the Official Journal. *See* K.P.E. LASOK, *supra* note 6, at 198.

191. *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. at 25, ¶ 29.

192. *Velásquez Rodríguez Case*, INTER-AM. CT. H.R. 35, 60-61, ¶ 131, OAS/ser. L./V./III.19, doc. 13 (1988).

important presumption articulated in this case is the presumption of truth of unrefuted allegations.¹⁹³ As the Court noted, international proceedings are not criminal cases and international tribunals are not required to apply criminal procedures.¹⁹⁴ The objective of a human rights proceeding is to protect victims and compensate for the damages resulting from wrongful state action.¹⁹⁵ Therefore, the burden of proof on the applicant will be balanced by recognition that the duty to present evidence cannot be applied where that evidence is within the control of the state. If the state controls the means to verify acts, its silence or evasiveness may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or not compelled as a matter of law.

Cases in which one side fails to participate are generally not as authoritative as ones in which all the facts and allegations on both sides have been fully presented to the court for determination. Mindful of this, the Inter-American Court took steps to avoid having a decision based upon liability derived from silence.¹⁹⁶ The Court noted that part of the reason it ad-

193. In *Iranian Hostages*, the ICJ noted the lack of denial by Iran and its silence in finding the allegations by the United States well-founded, based on article 53 of the ICJ Statute. See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 9-10, ¶¶ 11-13 (Judgment of May 24). The European Court of Human Rights has no equivalent of article 53, nor do its rules apply a presumption of truth. The court must simply render a decision in case of default by a party. See *Eur. Ct. H.R. Revised Rules*, *supra* note 45, R. 51.

194. See *Velasquez Rodriguez*, INTER-AM. CT. H.R. at 61, ¶ 134. This is said to be especially true of human rights proceedings. *Id.* ¶¶ 134-135.

195. *Id.* ¶ 134.

196. *Id.* ¶ 138. In *Nicaragua*, the ICJ also made an effort to avoid a decision based solely on silence. The court expressed concern to maintain the equality of the parties and the sound administration of justice especially when one of the parties is absent. *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 4, 39-40, ¶ 59 (Judgment of June 27). In this regard, it has freedom in estimating the value of the various elements of evidence, though "general principles of judicial procedure necessarily govern the determination of what can be regarded as proved." *Id.* at 40, ¶ 60. The court applied the principle of admissions against interest, finding that statements by high-ranking official political figures "are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission." *Id.* at 41, ¶ 64. The ICJ does indicate caution on this: It notes where the statements appear, whether the citation is in the original language or in translation, and how it came to the attention of the court. *Id.* ¶ 65. Nicaragua attempted to use the U.S. argument, but found that certainly the U.S. position could be seen as a recognition of the "imputability of some of the activities complained of." *Id.* at 45, ¶ 74.

mitted all the evidence and ordered more was to compensate for the lack of evidence presented by Honduras and to avoid a decision based solely on a presumption of truth from silence. The Court referred to its discretion to apply the presumption from silence as well as its "duty to evaluate the evidence as a whole."¹⁹⁷ Its decision reflects both principles.¹⁹⁸

EVALUATION AND CONCLUSIONS

The function of evidence is "to enable the tribunal to discover the truth concerning the conflicting claims of the parties before it."¹⁹⁹ In human rights litigation the situation is somewhat different. The primary purpose is less to resolve disputes than to ensure that states comply with their obligations to respect and ensure the rights protected in the conventions they have ratified. While in domestic law the court is a neutral referee between contesting parties, each of whom is responsible for the conduct of the case, in the international arena, tribunals also draw upon the civil law model of courts of inquiry or investigation.

The main factor involved in most international litigation is that it involves sovereign states whose cooperation is essential for the functioning of the system. These states may have exclusive control over the territory where the evidence is to be found and over the individuals bringing the claims. This requires imposing a burden on the state to produce evidence in question.

Evidentiary and procedural rules in international litigation have been characterized by their flexibility, if not by their non-existence. Certain characteristics flow from this and from the

197. *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 61, ¶ 138.

198. In a recent order issued in a companion case to *Velásquez Rodríguez*, the Court reiterated its concern that the state cooperate in producing evidence and stressed the consequences of a failure to do so. *Fairén Garbi and Solís Corrales Case*, INTER-AM. CT. H.R. (Order of Jan. 20, 1989). The Court notes that states parties to the Convention have pledged to cooperate and to investigate situations involving possible violations of rights protected by the Convention. On this basis it ordered Honduras to exhume and identify within thirty days a body found in a particular location in the country. The Court observed that "the lack of cooperation of the parties to a case in providing proof that is under their control constitutes a failure of their legal duty in achieving the object and purpose of the Convention, capable of creating a presumption against the party in question." *Id.*

199. *D.V. SANDIFER*, *supra* note 81, at 1.

demands of hearing disputes involving sovereign states. Human rights cases do not, in reality, involve equality of arms. There is a need to ensure that the tribunals are able to obtain the necessary evidence to make a determination on the merits. This cannot be done without the cooperation of the state in question. For this reason human rights tribunals may more readily apply a presumption of truth from a state's failure to cooperate.

Evidentiary flexibility, which is valued for its assistance in fact-finding, must still be balanced by sufficient predictability to guarantee fair procedures. Clearly articulated standards must be established for the production of evidence and standards of proof that will assist individuals, commissions, and governments in preparing meritorious cases, and that will also ensure credible, authoritative decisions that no state can ignore.

Thus, while the need for flexibility remains, predictability and fairness are of equal concern. Procedures should not change from case to case. Both states and individuals whose rights are at stake should have clear guidance on procedures, as well as on substance of human rights obligations. In this respect, the guidelines given by the Inter-American Court will be useful in future cases. The guidelines clearly indicate to those claiming violations the degree and kind of proof necessary to challenge state action in cases similar to this. The guidelines are sufficiently deferential to states to avoid unnecessary intervention, but they put a sufficient burden on the state, such that it cannot hide behind evidence in its control. Further refinements of these principles and development of others can be sought in future decisions of the Inter-American Court of Human Rights and other international tribunals.